

**WORLD TRADE  
ORGANIZATION**

**WT/DS282/AB/R**  
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**UNITED STATES – ANTI-DUMPING MEASURES ON OIL  
COUNTRY TUBULAR GOODS (OCTG) FROM MEXICO**

**AB-2005-7**

*Report of the Appellate Body*



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| <i>US – DRAMS</i>  | Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521              |
| <i>US – Gambling</i>   | Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005   |
| <i>US – Non-Rubber Footwear</i>                                | GATT Panel Report, <i>United States – Countervailing Duties on Non-Rubber Footwear from Brazil</i> , adopted 13 June 1995, BISD 42S/208.   |
| <i>US – Oil Country Tubular Goods Sunset Reviews</i>           | Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004  |

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| <i>US – Wheat Gluten</i>     | Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717   |

TABLE OF ABBREVIATIONS USED IN THIS REPORT

| <b>Abbreviation</b>           | <b>Description</b>   |
|-------------------------------|--|
| <i>Anti-Dumping Agreement</i> | <i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>  |
| DSB                           | Dispute Settlement Body  |
| DSU                           | <i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>  |
| GATT 1994                     | <i>General Agreement on Tariffs and Trade 1994</i>   |
| Hylsa                         | <i>Hylsa, S.A. de C.V.</i>   |
| OCTG                          | oil country tubular goods  |
| Panel Report                  | Panel Report, <i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282/R, 20 June 2005  |
| SAA                           | Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCCAN 4040 (Exhibit MEX-26 submitted by Mexico to the Panel)  |
| <i>SCM Agreement</i>          | <i>Agreement on Subsidies and Countervailing Measures</i>  |
| SPB; Sunset Policy Bulletin   | "Sunset Policy Bulletin", Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, <i>United States Federal Register</i> , Vol. 63, No. 73 (16 April 1998), p. 18871 (Exhibit MEX-32 submitted by Mexico to the Panel) |
| TAMSA                         | <i>Tubos de Acero de Mexico, S.A.</i>  |
| Tariff Act                    | Tariff Act of 1930   |
| USDOC                         | United States Department of Commerce   |
| USITC                         | United States International Trade Commission   |
| USITC's Sunset Determination  | Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico—Investigation Nos. 701-TA-364, 731-TA-711, and 713-616 (Review): Determination and Views of the Commission, USITC Publication 3434 (June 2001) (Exhibit MEX-20 submitted by Mexico to the Panel)                   |
| <i>Working Procedures</i>     | <i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005  |
| WTO                           | World Trade Organization   |
| <i>WTO Agreement</i>          | <i>Marrakesh Agreement Establishing the World Trade Organization</i>   |



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Anti-Dumping Measures on  
Oil Country Tubular Goods (OCTG) from  
Mexico**

Mexico – *Appellant/Appellee*  
United States – *Appellant/Appellee*

Argentina – *Third Participant*  
Canada – *Third Participant*  
China – *Third Participant*  
European Communities – *Third Participant*  
Japan – *Third Participant*  
Separate Customs Territory of Taiwan, Penghu,  
Kinmen, and Matsu – *Third Participant*

AB-2005-7

Present:

Ganesan, Presiding Member  
Lockhart, Member  
Taniguchi, Member

**I. Introduction**

1. Mexico and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report: *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by Mexico against the United States regarding, *inter alia*, the continuation of anti-dumping duties on oil country tubular goods ("OCTG") from Mexico following the conduct of a five-year or "sunset" review of those duties, as well as certain United States laws and procedures relating to such reviews.<sup>2</sup>

2. On 11 August 1995, the United States Department of Commerce (the "USDOC") issued an anti-dumping duty order on OCTG from Mexico, based on a dumping margin of 23.79 per cent for *Tubos de Acero de Mexico, S.A.* ("TAMSA") and for "all other" Mexican producers, including *Hylsa, S.A. de C.V.* ("Hylsa").<sup>3</sup> The USDOC subsequently reduced this margin to 21.70 per cent.<sup>4</sup> On 3 July

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<sup>1</sup>WT/DS282/R, 20 June 2005.

<sup>2</sup>Panel Report, para. 2.1.

<sup>3</sup>*Ibid.*, para. 2.3.

<sup>4</sup>*Ibid.*, footnote 6 to para. 2.3 and para. 2.6; Oil Country Tubular Goods From Mexico: Notice of Panel Decision, Amended Order and Final Determination of Antidumping Duty Investigation in Accordance With Decision Upon Remand, *United States Federal Register*, Vol. 62, No. 25 (6 February 1997), p. 5612 (Exhibit MEX-2 submitted by Mexico to the Panel), at p. 5613.

2000, the USDOC initiated a sunset review of the order.<sup>5</sup> In its determination of the likelihood of continuation or recurrence of dumping<sup>6</sup>, the USDOC determined that revocation of the order would be likely to lead to continuation or recurrence of dumping at the rate of 21.70 per cent for TAMSA, Hylsa, and "all other" Mexican producers.<sup>7</sup> In its determination of the likelihood of continuation or recurrence of injury, the United States International Trade Commission (the "USITC") determined that revocation of the anti-dumping duty orders on OCTG (other than drill pipe) from Mexico and certain other countries would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.<sup>8</sup> As a result of these determinations by the USDOC and the USITC, the USDOC did not revoke the order on OCTG (other than drill pipe) from Mexico.<sup>9</sup>

3. Before the Panel, Mexico challenged, under the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"), *inter alia*:

- (a) Sections 752(a)(1), 752(a)(5), and 752(c)(1) of the Tariff Act of 1930 (the "Tariff Act")<sup>10</sup>; pages 889 to 890 of the Statement of Administrative Action<sup>11</sup> (the "SAA"); Section II.A.3 of the Sunset Policy Bulletin (the "SPB")<sup>12</sup>; the "practice" of the

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<sup>5</sup>Panel Report, para. 2.6.

<sup>6</sup>In our discussion, we refer at times to the USDOC's determination of the likelihood of continuation or recurrence of dumping as the "likelihood-of-dumping determination" and to the USITC's determination of the likelihood of continuation or recurrence of injury as the "likelihood-of-injury determination".

<sup>7</sup>Panel Report, para. 2.6; Oil Country Tubular goods ("OCTG") From Mexico; Final Results of Sunset Review of Antidumping Duty Order, *United States Federal Register*, Vol. 66, No. 47 (9 March 2001), p. 14131 and Memorandum from Jeffrey May to Bernard Carreau, "Issues and Decision Memorandum for the Full Sunset Review of the Antidumping Duty Order on Oil Country Tubular Goods (OCTG) from Mexico; Final Results" (26 February 2001) (Exhibit MEX-19 submitted by Mexico to the Panel).

<sup>8</sup>Panel Report, para. 2.7; Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico: Determinations, *United States Federal Register*, Vol. 66, No. 132 (10 July 2001), p. 35997 and Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico—Investigation Nos. 701-TA-364, 731-TA-711, and 713-616 (Review): Determination and Views of the Commission, USITC Publication 3434 (June 2001) (Exhibit MEX-20 submitted by Mexico to the Panel).

<sup>9</sup>Panel Report, para. 2.8; 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, *United States Federal Register*, Vol. 66, No. 143 (25 July 2001), p. 38630 (Exhibit MEX-22 submitted by Mexico to the Panel), at p. 38631.

<sup>10</sup>These provisions are codified in Sections 1675a(a)(1), 1675a(a)(5), and 1675a(c)(1) of Title 19 of the *United States Code*, respectively (Exhibit MEX-24 submitted by Mexico to the Panel).

<sup>11</sup>Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCCAN 4040 (Exhibit MEX-26 submitted by Mexico to the Panel).

<sup>12</sup>Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, *United States Federal Register*, Vol. 63, No. 73 (16 April 1998), p. 18871 (Exhibit MEX-32 submitted by Mexico to the Panel).

USDOC in such reviews; and the "standard" applied by the USITC in such reviews;  
and

- (b) various aspects of the USDOC's likelihood-of-dumping determination and the USITC's likelihood-of-injury determination in the sunset review of anti-dumping duties on OCTG from Mexico.<sup>13</sup>

4. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 20 June 2005, the Panel made the following findings:

(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.

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<sup>13</sup>For further details of Mexico's claims, see Panel Report, para. 3.1.

- 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.

...

- (d) Other claims
- 8.13 We make no findings concerning alleged inconsistency with ... 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.

5. On 4 August 2005, Mexico notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal<sup>14</sup> pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").<sup>15</sup> On 11 August 2005, Mexico filed an appellant's submission.<sup>16</sup> On 16 August 2005, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and

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<sup>14</sup>WT/DS282/6 (attached as Annex I to this Report).

<sup>15</sup>WT/AB/WP/5, 4 January 2005.

<sup>16</sup>Pursuant to Rule 21(1) of the *Working Procedures*.

filed a Notice of Other Appeal<sup>17</sup> pursuant to Rule 23(1) of the *Working Procedures*. On 19 August 2005, the United States filed an other appellant's submission.<sup>18</sup> On 29 August 2005, the United States and Mexico each filed an appellee's submission.<sup>19</sup> On the same day, Argentina, China, the European Communities, and Japan each filed a third participant's submission<sup>20</sup>, and Canada and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.<sup>21</sup>

6. The oral hearing in this appeal was held on 19 September 2005. The participants and third participants presented oral arguments (with the exception of Canada and the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu) and responded to questions posed by the Members of the Division hearing the appeal.

## II. Arguments of the Participants and Third Participants

### A. *Claims of Error by Mexico – Appellant*

#### 1. Requirement to Establish a Causal Link in Sunset Reviews

7. Mexico argues that the Panel erred in failing to find that Article 11.3 of the *Anti-Dumping Agreement* requires investigating authorities to demonstrate the existence of a causal link between likely dumping and likely injury, even assuming, *arguendo*, that Article 3.5 of the *Anti-Dumping Agreement* does not apply to sunset reviews.

8. Relying on Article VI:1 of the GATT 1994, Mexico argues that "'dumping' must be the cause of the 'injury' before it can be 'condemned' through the use of anti-dumping measures."<sup>22</sup> In addition, Mexico contends that Article VI:6(a) of the GATT 1994 suggests that "[t]he causality requirement of Article VI:6(a) continues throughout the life of the anti-dumping measure."<sup>23</sup> Citing the report of the GATT panel in *US – Non-Rubber Footwear*, Mexico argues that "the requirement under Article VI:6(a) to determine a causal link between the dumping and injury is not a time-bound obligation that expires upon imposition of the order" and that "further implementation of [the

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<sup>17</sup>WT/DS282/7 (attached as Annex II to this Report).

<sup>18</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>19</sup>Pursuant to Rules 22(1) and 23(4) of the *Working Procedures*, respectively.

<sup>20</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>21</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

<sup>22</sup>Mexico's appellant's submission, para. 22.

<sup>23</sup>*Ibid.*, para. 24.

order]—including its continuation through—a sunset review has to be done consistently with Article VI:6(a), which includes the requirement to establish a causal link."<sup>24</sup>

9. According to Mexico, the reference in Article 11.1 of the *Anti-Dumping Agreement* to "dumping which is 'causing' injury" indicates "that a causal link is a precondition to an order being considered as 'necessary' under Article 11.1."<sup>25</sup> In other words, "[u]nless the dumping is 'causing injury,' then the order is not 'necessary,' and cannot 'remain in force.'"<sup>26</sup> Mexico argues, in this respect, that the Appellate Body Report in *US – Carbon Steel* suggests that, "in order for an anti-dumping duty to be considered as 'necessary' under Article 11.1, its purpose must be to 'counteract dumping which is causing injury.'"<sup>27</sup>

10. Mexico further submits that "[t]he Panel's finding that the [USDOC's] likelihood of dumping determination with respect to Mexican OCTG imports was WTO-inconsistent necessarily meant that the [USITC's] likelihood of injury determination was also WTO-inconsistent."<sup>28</sup> According to Mexico, "a WTO-consistent determination of likely dumping is a legal predicate to a WTO-consistent determination of likely injury."<sup>29</sup> Mexico argues that the panel report in *US – DRAMS* supports "the notion that a finding of likely dumping is a necessary predicate to a finding of likely injury".<sup>30</sup> Mexico adds that "[t]he DSB rulings in *US – Oil Country Tubular Goods Sunset Reviews*, combined with the Panel's finding in [the present case], establish that there was no WTO-consistent basis for a finding of likely dumping for *any* Member that was included in the USITC's cumulative analysis."<sup>31</sup>

11. Finally, Mexico argues that the Panel acted inconsistently with Article 11 of the DSU by failing to address Mexico's argument regarding "the fundamental causation principles of Article VI of the GATT and the Anti-Dumping Agreement"<sup>32</sup>, which, Mexico contends, apply in the context of sunset reviews under Article 11.3, regardless of the applicability of Article 3.5 of the *Anti-Dumping Agreement* to such reviews. Mexico submits, in this regard, that the Panel erred in finding that "Mexico did not explain or elaborate on' its causation claim".<sup>33</sup> According to Mexico, "[t]he Panel

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<sup>24</sup>Mexico's appellant's submission, para. 25 (quoting GATT Panel Report, *US – Non-Rubber Footwear*, para. 4.5). (footnote omitted)

<sup>25</sup>*Ibid.*, para. 32.

<sup>26</sup>*Ibid.*

<sup>27</sup>*Ibid.*, paras. 33-34 (referring to Appellate Body Report, *US – Carbon Steel*, para. 70).

<sup>28</sup>*Ibid.*, para. 52.

<sup>29</sup>*Ibid.*, para. 54.

<sup>30</sup>*Ibid.*, para. 30 (referring to Panel Report, *US – DRAMS*, para. 6.28).

<sup>31</sup>*Ibid.*, para. 57. (original emphasis)

<sup>32</sup>*Ibid.*, para. 66.

<sup>33</sup>*Ibid.*, para. 45 (quoting Panel Report, para. 6.12).

record shows that, despite Mexico's repeated explanation and elaboration, the Panel simply ignored [Mexico's] argument and failed to make any assessment of it."<sup>34</sup> Mexico maintains that Article 11 of the DSU "does not allow Panels to ignore arguments in this manner, and then claim that an insufficient explanation or elaboration justifies a decision not to assess the argument."<sup>35</sup>

12. For these reasons, Mexico requests the Appellate Body to rule that the Panel erred in its interpretation and application of Articles 1, 11.1, 11.3, and 18.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994, and acted inconsistently with Article 11 of the DSU by failing to find that Article 11.3 of the *Anti-Dumping Agreement* requires investigating authorities to demonstrate the existence of a causal link between likely dumping and likely injury.

## 2. Cumulation in Sunset Reviews

13. Mexico argues that the Panel acted inconsistently with Article 11 of the DSU by not making findings with respect to Mexico's argument that, regardless of the applicability of Article 3.3 of the *Anti-Dumping Agreement* to sunset reviews, the USITC's likelihood-of-injury determination "failed to satisfy the requirements applicable to the conduct of any cumulative injury assessment."<sup>36</sup> Mexico submits that it "fully explained the legal and factual basis to support its position"<sup>37</sup> and refers, in this respect, to several explanations it provided to the Panel, arguing that the Panel disregarded these explanations. Mexico requests the Appellate Body "to address, complete the analysis, and rule in favor of Mexico's claims, on which the Panel declined to rule."<sup>38</sup>

14. According to Mexico, the Panel "simply assumed" that, because Article 3.3 of the *Anti-Dumping Agreement* "does not apply to sunset reviews, the USITC's cumulative injury determination could not be inconsistent with Article 11.3".<sup>39</sup> Mexico submits that the Panel erred because it "wrongly assumed that its findings regarding two of Mexico's cumulation arguments were sufficient to address Mexico's separate and wholly independent argument that was not linked to Article 3.3".<sup>40</sup>

15. According to Mexico, the USITC was under an obligation to "ensure that cumulation was appropriate in light of the conditions of competition".<sup>41</sup> To do so, the USITC was "required" to make

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<sup>34</sup>Mexico's appellant's submission, para. 67.

<sup>35</sup>*Ibid.*

<sup>36</sup>*Ibid.*, para. 73.

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*, para. 75.

<sup>39</sup>*Ibid.*, para. 77.

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*, p. 23, heading II.B.2.c.i.

"a threshold finding that the subject imports would be simultaneously present in the U.S. market".<sup>42</sup> Mexico asks: "[i]f 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?"<sup>43</sup> Mexico contends that "nowhere in [the USITC's] analysis is there positive evidence demonstrating that imports from Mexico, Argentina, Italy, Korea, and Japan would be present in the United States market at the same time ... if the order were revoked."<sup>44</sup>

16. Mexico further argues that the USITC "did not apply the legal standard required by Article 11.3 in connection with its assessment of likelihood of simultaneity"<sup>45</sup>, because the USITC "requir[ed] a demonstration that the imports 'would not' be simultaneously in the market".<sup>46</sup> Mexico emphasizes that "the mere absence of contradictory information is not positive evidence of what is likely to happen."<sup>47</sup>

17. Mexico also argues that the USITC's likelihood-of-injury determination is inconsistent with Article 11.3 "because [the USITC] failed to identify a time-frame within which subject imports would be simultaneously present in the U.S. market and the corresponding likely injury would take place".<sup>48</sup>

18. Moreover, Mexico contends that, having "decided to cumulate Mexican imports with imports from the other four countries that were cumulated in the original investigation", the USITC "was required to do so consistently with the requirements of Article 3.3"<sup>49</sup>, regardless of whether that provision applies directly to sunset reviews. Mexico finds support for its position in the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body stated that, "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."<sup>50</sup>

19. Accordingly, Mexico requests the Appellate Body to find that the Panel erred in its interpretation and application of the *Anti-Dumping Agreement* to the USITC's cumulative analysis and failed to make an objective assessment as required under Article 11 of the DSU. Mexico requests

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<sup>42</sup>Mexico's appellant's submission, p. 23, heading II.B.2.c.i.

<sup>43</sup>Mexico's second written submission to the Panel, para. 192 (quoted in Mexico's appellant's submission, para. 82). (emphasis omitted)

<sup>44</sup>Mexico's appellant's submission, para. 86.

<sup>45</sup>*Ibid.*, para. 94.

<sup>46</sup>*Ibid.*

<sup>47</sup>*Ibid.* (footnote omitted)

<sup>48</sup>*Ibid.*, p. 27, heading II.B.2.c.iv.

<sup>49</sup>*Ibid.*, para. 103.

<sup>50</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127 (quoted in Mexico's appellant's submission, para. 101).

the Appellate Body to find that the USITC's likelihood-of-injury determination is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

3. Margins of Dumping in Sunset Reviews

20. Mexico argues that the Panel exercised false judicial economy by "declining to decide Mexico's claims concerning the margin likely to prevail".<sup>51</sup> Mexico contends that "the Panel reasoned that, because the Anti-Dumping Agreement does not require authorities to determine and report a margin likely to prevail, an authority's determination of a margin likely to prevail cannot contravene the Anti-Dumping Agreement."<sup>52</sup> According to Mexico, by deciding not to examine Mexico's arguments, the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU.

21. Mexico submits that the Panel erred in its interpretation of Articles 2 and 11.3 of the *Anti-Dumping Agreement*. Citing the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*<sup>53</sup>, Mexico argues that, when an investigating authority "uses a specific methodology that the Anti-Dumping Agreement does not require, the authority must not apply that methodology in a manner that otherwise conflicts with the Agreement."<sup>54</sup> Otherwise, according to Mexico, "the use of a WTO-inconsistent methodology in a sunset review would also render the determination inconsistent with Article 11.3."<sup>55</sup> Mexico submits that "the Panel effectively reasoned that the United States is free to select any dumping margin for use in the [USDOC's] and [the USITC's] respective likelihood determinations, regardless of whether that margin was calculated in accordance with the requirements of the Agreement, including with the disciplines of Article 2."<sup>56</sup>

22. Mexico also argues that, "[p]ursuant to Articles 1 and 18.3, any dumping margin used in the context of a sunset review must be the result of the application of the *Anti-Dumping Agreement*, and it also must be consistent with the Agreement, including the requirements of Article 2."<sup>57</sup> According to Mexico, the "margin of dumping likely to prevail" that the USDOC reported to the USITC resulted from an investigation initiated before the entry into force of the *WTO Agreement*, and thus this

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<sup>51</sup>Mexico's appellant's submission, para. 131.

<sup>52</sup>*Ibid.*, para. 132.

<sup>53</sup>*Ibid.*, para. 114 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>54</sup>*Ibid.*, para. 115.

<sup>55</sup>*Ibid.*

<sup>56</sup>*Ibid.*, para. 116.

<sup>57</sup>*Ibid.*, para. 121.

margin could not be the result of the application of the *Anti-Dumping Agreement*, as required by Article 18.3.

23. Mexico observes that, "[d]uring the Panel proceedings, the United States claimed that the staff report appended to the USITC's sunset determination 'clearly addresses each of the factors enumerated in Article 3.4.'"<sup>58</sup> Mexico points out that those factors include the "magnitude of the margin of dumping".<sup>59</sup> As Mexico sees it, the United States later retreated from this position, as it contended that "the [US]ITC did not rely on or otherwise factor the reported likely margin into its analysis."<sup>60</sup> Mexico argues that "the United States cannot have it both ways on this issue. Either the [USITC] 'evaluated' the dumping margin ... and thus must accept the logical legal consequences of this margin affecting its determination, or the [USITC] 'did not rely on or otherwise factor the ... margin into its analysis'".<sup>61</sup>

24. Mexico therefore requests the Appellate Body to find that the Panel failed to make an objective assessment under Article 11 of the DSU, because it declined to rule on Mexico's claim that the USDOC's determination of the margin likely to prevail and the USITC's use of that margin were inconsistent with Articles 1, 2, 11.3, and 18.3 of the *Anti-Dumping Agreement*. Mexico also requests the Appellate Body to rule that the United States acted inconsistently with these provisions.

#### 4. The "Legal Basis" for Continuing Anti-Dumping Duties

25. Mexico argues that the Panel acted inconsistently with Article 11 of the DSU by declining to make a finding that the United States had no legal basis to impose anti-dumping duties on OCTG from Mexico after the five-year period set out in Article 11.3 of the *Anti-Dumping Agreement*. Mexico requests the Appellate Body to make such a finding.

26. Mexico maintains that Article 11.3 of the *Anti-Dumping Agreement* requires Members to terminate anti-dumping duties within five years of their imposition unless: (a) the Member has initiated a review before the expiry of the five-year period; and (b) the authorities have properly determined that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Although the United States initiated a review within the relevant time period, the

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<sup>58</sup>Mexico's appellant's submission, para. 128 (quoting United States' first written submission to the Panel, para. 315).

<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.* (quoting United States' response to Question 13 posed by the Panel at the first panel meeting, Panel Report, p. E-45).

<sup>61</sup>*Ibid.*, para. 129 (referring to United States' first written submission to the Panel, para. 315; and quoting United States' response to Question 13 posed by the Panel at the first panel meeting, Panel Report, p. E-45).

Panel found that the USDOC's likelihood-of-dumping determination was inconsistent with the United States' WTO obligations. Therefore, the United States has not fulfilled the requirements for invoking the exception in Article 11.3, and, in accordance with the Appellate Body's reasoning in *US – Corrosion-Resistant Steel Sunset Review*<sup>62</sup>, it must terminate immediately the anti-dumping duties on OCTG from Mexico.

27. Mexico argues that it "specifically, and repeatedly"<sup>63</sup> asked the Panel to find that the United States had no legal basis to continue imposing anti-dumping duties on OCTG from Mexico. Mexico contends that, by not doing so, the Panel failed to make "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements", as required by Article 11 of the DSU. Mexico asserts that the Panel had to make the finding requested by Mexico to enable the DSB to make "sufficiently precise recommendations and rulings"<sup>64</sup> in relation to implementation. Mexico adds that a panel's discretion to exercise judicial economy is limited.

28. Mexico maintains that, for the United States to bring its inconsistent measure into conformity with Article 11.3 of the *Anti-Dumping Agreement*, it has no option but to terminate the anti-dumping duty order on OCTG from Mexico. The initiation of a new sunset review of this order would be inconsistent with Article 11.3. By analogy, Mexico refers to the Appellate Body's agreement with the Panel in *US – Steel Safeguards* that the measures at issue in that case had been "deprived of a legal basis".<sup>65</sup> For these reasons, Mexico requests the Appellate Body to find that the United States had no legal basis to continue imposing anti-dumping duties on OCTG from Mexico beyond the five-year period established in Article 11.3.

## 5. Mexico's Conditional Appeals

### (a) The "Standard" for USDOC Determinations in Sunset Reviews

29. In the event that the Appellate Body reverses the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, Mexico requests the Appellate Body to find that Section 752(c)(1) of the Tariff Act, the SAA, and the SPB, "as such", are

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<sup>62</sup>Mexico's appellant's submission, para. 137 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104).

<sup>63</sup>*Ibid.*, para. 136.

<sup>64</sup>Appellate Body Report, *US – Wheat Gluten*, para. 180 (quoted in Mexico's appellant's submission, para. 140).

<sup>65</sup>Appellate Body Report, *US – Steel Safeguards*, para. 511 (quoted in Mexico's appellant's submission, para. 136).

inconsistent with Article 11.3 because, "collectively and independently"<sup>66</sup>, they establish a standard for USDOC determinations in sunset reviews that is inconsistent with Article 11.3.

30. According to Mexico, Article 11.3 of the *Anti-Dumping Agreement* precludes authorities from finding that the expiry of an anti-dumping duty would be likely to lead to continuation or recurrence of dumping unless the evidence shows that dumping would be likely or probable in those circumstances. In contrast, United States law directs the USDOC to make an affirmative determination where the likelihood of dumping is "less than, or other than, probable".<sup>67</sup> In particular, this is confirmed by the SAA, which allows the USDOC to make an affirmative determination where dumping is merely a possible outcome of revoking an anti-dumping duty order.

31. Mexico suggests that the Panel "declined to rule" on whether the Tariff Act, the SAA, and the SPB establish a standard that is contrary to Article 11.3 of the *Anti-Dumping Agreement*.<sup>68</sup> However, Mexico submits that the Panel record contains sufficient findings for the Appellate Body to complete the analysis of this issue. In particular, the Panel found that the USDOC treats the existence of dumping and declining import volumes as conclusive evidence that the revocation of an anti-dumping duty order would be likely to lead to continuation or recurrence of dumping. Mexico emphasizes that the Panel based this finding on a "qualitative assessment" of the consistent practice of the USDOC in sunset reviews.

(b) Article X:3(a) of the GATT 1994

32. In the event that the Appellate Body reverses the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, Mexico requests the Appellate Body to find that the United States has failed to administer its laws, regulations, decisions, and rulings in an impartial and reasonable manner as required by Article X:3(a) of the GATT 1994.

33. Mexico points out that sunset reviews by the USDOC fall within the types of laws and regulations described in Article X:1 of the GATT 1994 and, therefore, that the USDOC's administration of United States laws, regulations, decisions, and rulings pertaining to sunset reviews is subject to Article X:3(a). Mexico declares that it has established a clear pattern of "biased and unreasonable"<sup>69</sup> decision-making by the USDOC in administering these provisions. The USDOC made an affirmative likelihood determination in all the sunset reviews in which at least one domestic producer participated, and it treated historical dumping margins and/or declining import volumes as

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<sup>66</sup>Mexico's appellant's submission, para. 160.

<sup>67</sup>*Ibid.*

<sup>68</sup>Mexico's Notice of Appeal, para. 5(a) (referring to Panel Report, para. 6.6).

<sup>69</sup>Mexico's appellant's submission, paras. 172 and 173.

determinative of likely dumping in all expedited and full sunset reviews. According to Mexico, the USDOC's systematic maintenance of anti-dumping duties beyond the five-year period set out in Article 11.3 of the *Anti-Dumping Agreement* damages the competitive position of foreign exporters.

34. Mexico observes that the Panel declined to rule on Mexico's claim under Article X:3(a) of the GATT 1994. However, Mexico submits that the Panel record contains sufficient findings for the Appellate Body to complete the analysis of this issue. In particular, Mexico maintains that the Panel conducted a thorough qualitative analysis of individual sunset determinations by the USDOC and found that the USDOC has consistently based its affirmative likelihood determinations in sunset reviews solely on the scenarios set out in the SPB. Mexico argues that the Appellate Body needs merely to apply Article X:3(a) to these findings to conclude that the United States administers sunset reviews contrary to that provision.

35. For these reasons, if the Appellate Body reverses the Panel's finding that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, Mexico asks the Appellate Body to find that the United States has acted inconsistently with Article X:3(a) of the GATT 1994.

B. *Arguments of the United States – Appellee*

1. Requirement to Establish a Causal Link in Sunset Reviews

36. The United States argues that the Appellate Body should not consider Mexico's arguments regarding "causation" on appeal. According to the United States, Mexico could have formulated these arguments as claims in and of themselves before the Panel, but Mexico elected not to do so. Referring to the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*, the United States contends that, "[f]aced with an Appellate Body report that considers Article 3—including Article 3.5—inapplicable to sunset reviews and with the Panel report that followed that reasoning, it appears that Mexico is trying to devise an alternative means to have the requirements of Article 3.5 read into sunset reviews."<sup>70</sup>

37. According to the United States, Mexico's additional arguments on causation merely confirm that a causation analysis under Article 3.5 of the *Anti-Dumping Agreement* is required in *original investigations*. Mexico's arguments add nothing, however, to support its assertion that "a similar analysis is required in addressing the *likelihood* of injury in *sunset reviews*, and they certainly do not establish that the actual requirements of Article 3.5 apply in sunset reviews."<sup>71</sup> The United States recalls that the Appellate Body has clarified that sunset reviews are separate and distinct from original

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<sup>70</sup>United States' appellee's submission, para. 41.

<sup>71</sup>*Ibid.*, para. 42. (original emphasis)

investigations, and that the requirements for an original investigation cannot "be automatically imported" into a sunset review.<sup>72</sup> The United States contends, therefore, that Mexico's reliance on substantive legal obligations that apply to original investigations does "not support its assertion that the AD Agreement or Article VI of GATT 1994 contain some sort of 'inherent' causation requirements for sunset reviews."<sup>73</sup>

38. The United States argues that Article VI of the GATT 1994 does not contemplate sunset reviews. Rather than speaking of a determination of likelihood of continuation or recurrence of injury, Article VI refers only to a determination of injury. In other words, there is no support for Mexico's argument that Article VI of the GATT 1994 imposes independent or inherent causation requirements in sunset reviews. Similarly, Mexico does not explain how Article 11.1 of the *Anti-Dumping Agreement* creates, in Article 11.3, a causal requirement of the nature Mexico suggests. The United States emphasizes that the Appellate Body has already made it clear that "neither a determination of dumping, nor a determination of injury, need be made under Article 11.3."<sup>74</sup>

39. Turning to Mexico's claim that the Panel acted inconsistently with Article 11 of the DSU, the United States recalls the ruling of the Appellate Body, in *Dominican Republic – Import and Sale of Cigarettes*, that "there is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU."<sup>75</sup> The United States submits that, therefore, "Mexico must show that the Panel's findings that Mexico had failed to substantiate its assertions were in error and prevented the Panel from making an objective assessment of the matter."<sup>76</sup> According to the United States, Mexico has not done so. Instead, the United States underscores that "[t]he Panel objectively concluded that Mexico did no more than make assertions about the relevance of Article VI of the GATT 1994 and Article 11.1 of the Antidumping Agreement."<sup>77</sup>

40. The United States further argues that "[t]here is simply no basis" for Mexico's assertion that "the DSB rulings 'combined with the Panel's finding in this case, establish that there was no WTO-

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<sup>72</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 359 (quoted in United States' appellee's submission, para. 42).

<sup>73</sup>United States' appellee's submission, para. 42.

<sup>74</sup>*Ibid.*, para. 50 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280).

<sup>75</sup>Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125 (quoted in United States' appellee's submission, para. 8).

<sup>76</sup>United States' appellee's submission, para. 8.

<sup>77</sup>*Ibid.*, para. 16.

consistent basis for a finding of likely dumping for *any* Member that was included' in the USITC's cumulative analysis."<sup>78</sup> According to the United States, "Mexico's proposition relies on new facts—its chart in paragraph 57 [of Mexico's appellant's submission]—and therefore is beyond the scope of Appellate Body review."<sup>79</sup> The United States notes that not all of the likelihood-of-dumping determinations to which Mexico refers have even been subject to WTO dispute settlement. In addition, referring to Mexico's allegation that Mexico had "developed this argument with sufficient elaboration for the Panel to have made a finding and the Panel's conclusion to the contrary is erroneous"<sup>80</sup>, the United States argues that Mexico did not identify "where its request for such a finding is located or where the Panel denied to make such a finding".<sup>81</sup>

41. For these reasons, the United States requests the Appellate Body to dismiss Mexico's appeal in relation to causation.

## 2. Cumulation in Sunset Reviews

42. The United States agrees with the Panel that Article 11.3 of the *Anti-Dumping Agreement* does not prescribe a methodology for cumulation in sunset reviews. Further, the United States recalls that the Appellate Body found in *US – Oil Country Tubular Goods Sunset Reviews* that Article 3.3 of the *Anti-Dumping Agreement* does not apply to sunset reviews. The United States emphasizes that, "if Article 3.3 does not apply, then neither do its conditions."<sup>82</sup>

43. Regarding Mexico's allegation that the USITC applied a WTO-inconsistent standard in the course of conducting its likelihood-of-injury determination, the United States argues, first, that the Appellate Body has already found that "the 'likely' standard of Article 11.3 applies to the overall determinations regarding dumping and injury; it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury."<sup>83</sup> Therefore, according to the United States, there is no "likelihood of simultaneity" standard for cumulation of imports, as Mexico suggests.<sup>84</sup> Secondly, the USITC determination focused on the existence of simultaneity before and after the order was imposed. In the absence of contrary evidence, it was reasonable for the USITC to

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<sup>78</sup>United States' appellee's submission, para. 32 (quoting Mexico's appellant's submission, para. 57). (Mexico's emphasis)

<sup>79</sup>*Ibid.* (footnote omitted)

<sup>80</sup>Mexico's appellant's submission, para. 59 (quoted in United States' appellee's submission, para. 33).

<sup>81</sup>United States' appellee's submission, para. 33.

<sup>82</sup>*Ibid.*, para. 22 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 301).

<sup>83</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 323 (quoted in United States' appellee's submission, para. 60).

<sup>84</sup>United States' appellee's submission, para. 60.

conclude that "simultaneous presence of the subject imports would continue if the order were revoked."<sup>85</sup> Thirdly, "the Appellate Body already considered this issue in connection with the exact same determination, noting that the USITC's decision to cumulate, including its simultaneity determination, was not inconsistent with Article 11.3."<sup>86</sup>

44. In relation to Mexico's contention that the Panel should have found that the USITC determination was flawed, because the determination did not specify the time-frame within which subject imports would be simultaneously present in the United States market and within which injury would occur, the United States observes that the Appellate Body has already explained that Article 11.3 of the *Anti-Dumping Agreement* "does not require an investigating authority to specify the timeframe on which it bases its determination of injury."<sup>87</sup>

45. Turning to Mexico's claims under Article 11 of the DSU, the United States agrees with the Panel that "Mexico failed to 'explain or elaborate on its bare assertion that Article 11.3 somehow establishes "inherent" obligations for cumulation independent of those in Article 3.3.'"<sup>88</sup> The United States maintains that Mexico does not explain, even in its appellant's submission, why conditions for cumulation exist "irrespective of the applicability of Article 3.3" to Article 11.3.<sup>89</sup>

46. Accordingly, the United States requests the Appellate Body to dismiss Mexico's appeal in relation to cumulation.

### 3. Margins of Dumping in Sunset Reviews

47. The United States submits that the Panel correctly found that nothing in the *Anti-Dumping Agreement* requires investigating authorities to determine or consider a "margin likely to prevail" in the context of a likelihood-of-dumping determination. The United States maintains that "reporting" of a margin likely to prevail is an element of United States law "that is not derived from any element" of the *Anti-Dumping Agreement*.<sup>90</sup>

48. The United States recalls that "[t]he Appellate Body has recognized that there is 'no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining

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<sup>85</sup>United States' appellee's submission, para. 60.

<sup>86</sup>*Ibid.* (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 326 and 328-329).

<sup>87</sup>*Ibid.*, para. 62 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 364).

<sup>88</sup>*Ibid.*, para. 23 (quoting Panel Report, para. 6.19).

<sup>89</sup>*Ibid.* (quoting Mexico's appellant's submission, para. 83).

<sup>90</sup>*Ibid.*, para. 67 (quoting Panel Report, para. 7.83).

the likelihood of continuation or recurrence of dumping."<sup>91</sup> According to the United States, "[t]he Panel's conclusion that nothing in the AD Agreement requires determination, or consideration, of a 'margin likely to prevail'" in the context of a likelihood-of-dumping determination is consistent with that finding.<sup>92</sup>

49. The United States agrees with the Panel's conclusion that, "[i]n 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 finding a violation of Article 2" of the *Anti-Dumping Agreement*.<sup>93</sup> Because the Panel found that the USDOC "did not rely on the margin" in making its likelihood-of-dumping determination, the rulings in the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* to which Mexico refers are "simply inapposite".<sup>94</sup>

50. Turning to Mexico's allegation that the Panel erred in failing to find that the USITC determination was also flawed as a result of the margin likely to prevail determined by the USDOC, the United States submits that "it is not clear how the margin likely to prevail could render the USITC determination WTO-inconsistent when the Panel made a factual finding that the USITC did not 'use' the margin in question."<sup>95</sup>

51. The United States therefore requests the Appellate Body to dismiss Mexico's appeal in relation to margins of dumping.

#### 4. The "Legal Basis" for Continuing Anti-Dumping Duties

52. The United States contends that the Panel did not act inconsistently with Article 11 of the DSU in declining to make a finding that the United States had no legal basis to impose anti-dumping duties on OCTG from Mexico after the five-year period set out in Article 11.3 of the *Anti-Dumping Agreement*.

53. The United States submits that Mexico's appeal conflicts with Members' rights in deciding how to implement recommendations and rulings of the DSB. "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."<sup>96</sup> In response to Mexico's reliance on *US – Steel Safeguards*,

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<sup>91</sup>United States' appellee's submission, para. 69 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>92</sup>*Ibid.* (quoting Panel Report, para. 7.83).

<sup>93</sup>Panel Report, para. 7.82 (quoted in United States' appellee's submission, para. 70).

<sup>94</sup>United States' appellee's submission, para. 70.

<sup>95</sup>*Ibid.*, para. 73.

<sup>96</sup>*Ibid.*, para. 80.

the United States argues that, in that case, neither the panel nor the Appellate Body suggested that the United States should terminate the measure, even though the Appellate Body concluded that the measure had no legal basis.

54. The United States disagrees with "Mexico's contention that the Panel abused its discretion in exercising judicial economy".<sup>97</sup> Panels may be said to exercise judicial economy with respect to a claim, but the Panel ruled on Mexico's claim. In addition, the United States notes that the Panel explained its conclusion that it was unnecessary to make any further findings.<sup>98</sup>

55. For these reasons, the United States requests the Appellate Body to dismiss Mexico's appeal regarding the absence of a specific finding by the Panel that the United States had no legal basis to continue to impose anti-dumping duties on OCTG from Mexico.

## 5. Mexico's Conditional Appeals

### (a) The "Standard" for USDOC Determinations in Sunset Reviews

56. The United States argues that the Appellate Body should dismiss Mexico's request that the Appellate Body rule on whether the Tariff Act, the SAA, and the SPB establish a standard that is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

57. According to the United States, Mexico is mistaken in asserting that "the Panel 'declined to decide' this 'claim.'"<sup>99</sup> The Panel stated that it had ruled on Mexico's claim regarding the Tariff Act, the SAA, and the SPB.<sup>100</sup> The United States contends that Mexico's alleged "claim" regarding the standard established by these instruments is simply an "argument".

58. The United States submits that, in any event, the Appellate Body would be unable to "complete the analysis" of this issue because it lacks a sufficient factual basis. The Panel stated that it made no findings on this aspect of Mexico's arguments. The findings on which Mexico suggests the Appellate Body should rely are related to the SPB, not the Tariff Act or the SAA. The United States adds that "the Panel did not find the SAA to be a measure in the first place".<sup>101</sup> Finally, the United States maintains that the Panel's findings regarding the SPB are the very findings that the Appellate Body would have to overturn in order to reach this aspect of Mexico's appeal, given that it is

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<sup>97</sup>United States' appellee's submission, para. 79.

<sup>98</sup>*Ibid.*, para. 76 (referring to Panel Report, para. 6.22).

<sup>99</sup>*Ibid.*, para. 83 (quoting Mexico's appellant's submission, paras. 157-158).

<sup>100</sup>*Ibid.* (referring to Panel Report, para. 6.6).

<sup>101</sup>*Ibid.*, para. 84.

conditioned on the Appellate Body reversing the Panel's conclusions regarding the SPB. Thus, the Appellate Body would not be in a position to rely on them to complete the analysis.

59. Accordingly, the United States requests the Appellate Body to dismiss Mexico's conditional appeal regarding the standard established by the Tariff Act, the SAA, and the SPB.

(b) Article X:3(a) of the GATT 1994

60. Regarding Mexico's request that the Appellate Body rule that the United States has acted inconsistently with Article X:3(a) of the GATT 1994, the United States argues that Argentina submitted, in *US – Oil Country Tubular Goods Sunset Reviews*, essentially the same evidence and exactly the same argument that Mexico is submitting in this dispute. The United States contends that, "based on this evidence"<sup>102</sup>, the Appellate Body stated in that earlier appeal that "it would be impossible to conclude on the basis of the overall statistics alone that the determinations were flawed due to lack of objectivity on the part of the USDOC."<sup>103</sup> The United States also argues that Mexico's appellant's submission does not conform with the Appellate Body's earlier statement that the evidence offered in an Article X:3(a) claim must reflect the "gravity"<sup>104</sup> of such a claim.

61. The United States observes that the Panel made no findings on this issue. In addition, the United States alleges that the only findings the Appellate Body could use to complete the analysis under Article X:3(a) are the very findings the Appellate Body would have to overturn to reach this aspect of Mexico's appeal, given that it is conditioned on the Appellate Body reversing the Panel's conclusions regarding the SPB. Thus, the Appellate Body would not be in a position to rely on them to complete the analysis.

62. For these reasons, the United States requests the Appellate Body to dismiss Mexico's conditional appeal regarding Article X:3(a) of the GATT 1994.

C. *Claims of Error by the United States – Appellant*

1. Consistency of the Sunset Policy Bulletin "As Such"

63. The United States contends that the Panel erred in finding that Section II.A.3 of the SPB, "as such", is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

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<sup>102</sup>United States' appellee's submission, para. 87.

<sup>103</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 219 (quoted in United States' appellee's submission, para. 87).

<sup>104</sup>*Ibid.*, para. 217 (quoted in United States' appellee's submission, para. 86).

64. The United States puts forward three main reasons for its claim that the Panel made a legal error in its finding of inconsistency with respect to the SPB: (i) the Panel erred in allocating the burden of proof; (ii) the Panel applied an improper standard; and (iii) the Panel failed to make an objective assessment of the matter before it (including an objective assessment of the facts of the case) as required by Article 11 of the DSU. The United States also highlights the serious nature of an "as such" challenge, and the particular rigour required in assessing such a challenge. In addition, the United States did not have "a meaningful opportunity to rebut the evidence created and presented by the Panel"<sup>105</sup> until the interim review stage, and, even after the interim review, the Panel did not address all of the United States' comments on this issue. The United States also argues that its opportunity for rebuttal was curtailed by the fact that the Panel did not identify each specific determination it considered or how that determination supported its conclusion.

65. First, in relation to the burden of proof, the United States submits that the Panel erred in finding that Mexico had established a *prima facie* case that the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. The United States alleges that the Panel made Mexico's case for it, instead of limiting itself to the evidence and arguments that Mexico presented, which comprised the text of the SPB and the outcomes in previous sunset reviews. According to the United States, Mexico did not conduct a "qualitative assessment" of the USDOC determinations it presented, although the Appellate Body has held that such an assessment is required to establish inconsistency of the SPB with Article 11.3.<sup>106</sup> Given that Mexico's argument involved a mere statistical analysis of the outcomes in previous sunset reviews, it was not up to the Panel to make a "qualitative assessment" of its own accord.

66. The United States points to the Appellate Body's decisions in *Canada – Wheat Exports and Grain Imports* and *US – Gambling* as demonstrating that a complainant must provide evidence and arguments, including an explanation of the measure's inconsistency and the relationship between the evidence and its claims. However, "Mexico simply provided factual information, and the Panel mined that information for facts supporting a legal argument that Mexico did not even advance."<sup>107</sup>

67. Secondly, in relation to the standard that the Panel applied in assessing this claim, the United States argues that the Appellate Body found, in *US – Corrosion-Resistant Steel Sunset Review*, that it is not clear from the text of the SPB alone whether it instructs the USDOC to treat dumping margins and import volumes as conclusive of the likelihood of dumping under Article 11.3 of the *Anti-*

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<sup>105</sup>United States' other appellant's submission, para. 3.

<sup>106</sup>*Ibid.*, paras. 13-14 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 209 and 212).

<sup>107</sup>*Ibid.*, para. 19.

*Dumping Agreement.* The Appellate Body's reasoning in *US – Oil Country Tubular Goods Sunset Reviews* suggests that a qualitative analysis of USDOC determinations is required to show whether the SPB directs the USDOC to treat certain scenarios as determinative of the likelihood of future dumping, even though other factors might show that the revocation of an order would not be likely to lead to continuation or recurrence of dumping. The United States contends that the Panel failed to conduct an analysis of this kind.

68. According to the United States, the Panel did not have before it the underlying decision memorandum for each determination, nor did it examine all those determinations. Moreover, the Panel failed to focus on the role of the SPB in the USDOC determinations and whether the SPB caused the USDOC to make particular affirmative determinations. Instead, the Panel simply conducted its own assessment as to whether the facts before the USDOC fit any of the scenarios in the SPB, regardless of whether the USDOC itself even identified such a scenario as being relevant, let alone compelling a particular outcome. Similarly, the United States indicates that, in assessing the USDOC's alleged disregard of evidence of other factors, the Panel considered neither whether the SPB caused the USDOC to disregard such evidence, nor whether such evidence had probative value outweighing that of any particular SPB scenario.

69. The United States also refers to certain factual deficiencies in the Panel's analysis. The United States points out that the Panel reviewed only an unidentified "sampling"<sup>108</sup> of the 206 determinations that the Panel identified as involving no or minimal participation by foreign respondents. In addition, the United States indicates that the Panel did not consider whether evidence of other factors was presented in these sunset reviews (which would be unlikely, given the incomplete participation of foreign respondents).

70. In relation to the 15 cases in which the Panel concluded that dumping continued after the order was issued, the United States argues that the Panel stated that the USDOC "appears to have considered"<sup>109</sup> that scenario (a) applied, but the Panel did not examine whether the SPB was responsible for that outcome. In any event, in seven of these cases the USDOC received no evidence of other factors, so they cannot shed light on whether the SPB requires the USDOC to make an affirmative likelihood determination even when probative evidence might outweigh the scenarios of the SPB. In five of the 15 cases, the Panel was unable to state definitively whether foreign respondents had alleged other factors, or whether the USDOC had considered such factors. The Panel stated that, in one particular preliminary determination<sup>110</sup>, the USDOC said that it did not consider the

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<sup>108</sup>Panel Report, para. 7.53 (quoted in United States' other appellant's submission, paras. 30 and 35)

<sup>109</sup>*Ibid.*, para. 7.56 (quoted in United States' other appellant's submission, para. 41).

<sup>110</sup>Tab 89 of Exhibit MEX-62 submitted by Mexico to the Panel.

interested parties' arguments regarding other factors. However, in making this determination, the USDOC relied not only on the continuation of dumping, but also on the decline in import volumes, and it made no reference to the SPB. In addition, the respondent did not contend that it was introducing evidence of other factors. The arguments regarding other factors that the USDOC decided not to consider were made by domestic interested parties, in response to the respondent's suggestion that revocation of the order would not significantly alter import volumes or prices. Given that the current dumping margin for the exporter that the respondent supplied was more than 20 per cent, this suggestion by the respondent could not constitute probative evidence in favour of revoking the order. As for the remaining three cases in this category<sup>111</sup>, the Panel stated that the USDOC rejected the foreign respondents' assertion of good cause to consider other factors. In fact, according to the United States, the USDOC did consider the evidence of other factors, but determined that its probative value was outweighed by the evidence of continued dumping, low import volumes, and the relationship between the two.

71. Turning to the four cases in which dumping had been eliminated and import volumes had declined significantly, the United States refers to the Panel's statement that, in one case<sup>112</sup>, the USDOC originally asserted that it was willing to consider additional evidence and arguments, but it later relied on declining import volumes in making an affirmative determination. The United States declares that, in that case, the respondent did not take up the opportunity to provide additional evidence and arguments. Even so, the USDOC still considered the evidence of other factors and concluded that it did not outweigh the probative value of the decline in import volumes.

72. Thirdly, in relation to the Panel's alleged failure to conduct an objective assessment pursuant to Article 11 of the DSU, the United States reiterates many of its arguments regarding the Panel's allegedly flawed analysis of the USDOC determinations submitted by Mexico. The United States contends that the Panel: failed to provide a "reasoned explanation"<sup>113</sup> for its conclusion regarding its unidentified "sampling"<sup>114</sup> of certain determinations; misunderstood the facts in certain individual cases, as already mentioned; and "selectively cited certain statements from the determinations while failing to acknowledge countervailing statements".<sup>115</sup>

73. The United States also queries the Panel's analysis of several other determinations. The Panel did not explain its categorization of the cases, including its conclusion that, in five cases, respondents

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<sup>111</sup>Including Tab 78 of Exhibit MEX-62 submitted by Mexico to the Panel.

<sup>112</sup>*Ibid.*, Tab 165.

<sup>113</sup>United States' other appellant's submission, para. 52.

<sup>114</sup>Panel Report, para. 7.53 (quoted in United States' other appellant's submission, para. 52).

<sup>115</sup>United States' other appellant's submission, para. 55.

discussed other factors without specifically asserting good cause. As an example, in one of these five cases<sup>116</sup>, the only respondent that participated submitted arguments relating to its own dumping margin. It is not clear that such arguments involved evidence of other factors and, in any event, the dumping margins of individual companies are not relevant to whether the revocation of an anti-dumping duty order is likely to lead to the continuation or recurrence of dumping. In relation to certain other cases<sup>117</sup>, the Panel stated that the USDOC rejected the assertion that good cause existed to consider other factors. In fact, in the cases the Panel quoted, the United States insists that the USDOC did consider the probative value of the evidence of other factors, but did not find it to be overriding.

74. With respect to two other cases, the United States notes that the Panel focused on the fact that the USDOC made a negative preliminary determination followed by an affirmative final determination. The circumstances of the first case<sup>118</sup> demonstrate that the USDOC does consider evidence of other factors. For this reason, at the preliminary stage, the USDOC accepted the respondent's argument that the elimination of dumping and low import volumes should not be regarded as indicating that the revocation of the order would be likely to lead to the recurrence of dumping, because the respondent had acquired a United States company that would supply the United States market in future without the need for a significant volume of imports. However, the respondent subsequently admitted that, if the order were revoked, it would increase its import volume to pre-order levels. On this basis, the USDOC rejected the suggestion that this evidence of other factors demonstrated that the revocation of the order would not be likely to lead to continuation or recurrence of dumping.

75. In relation to the second case in which the USDOC made a negative preliminary determination and an affirmative final determination<sup>119</sup>, the Panel referred to the USDOC's unusual cost-of-production analysis to support its final determination. In that case, the USDOC initially rejected the assertion by a domestic interested party that good cause existed to consider cost-of-production information. Both parties then submitted information relating to the cost of production, and the USDOC therefore conducted an on-site verification and engaged in a cost-of-production analysis, which led to its affirmative determination. The United States contends that this conclusion was based on the evidence revealed in the verification, and not the SPB.

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<sup>116</sup>Tab 35 of Exhibit MEX-62 submitted by Mexico to the Panel.

<sup>117</sup>Including *ibid.*, Tab 201.

<sup>118</sup>*Ibid.*, Tab 32.

<sup>119</sup>*Ibid.*, Tab 261.

76. The United States submits that the Panel's finding that the scenarios in the SPB are determinative contradicts its finding that the relevant United States statute requires the USDOC to take into account other factors. The Panel's finding that the SPB imposes a requirement on the USDOC that is contrary to statute is unsupported by evidence. Further, the Panel disregarded statements by the USDOC (which issued the SPB) that the scenarios in the SPB are not determinative. The Panel also focused on the USDOC's alleged mechanistic application of the SPB, rather than whether the SPB instructs the USDOC to treat the three scenarios as determinative, in disregard of other factors. Finally, the United States asserts that the Panel lacked objectivity and had "an unsubstantiated preconception"<sup>120</sup> that the USDOC determinations were somehow flawed. The United States supports this assertion by reference to the Panel's "serious doubts about the consistency of some of the decisions reviewed"<sup>121</sup>, and the Panel's suggestion that these decisions might have included "some correct results".<sup>122</sup>

77. On these three grounds, the United States requests the Appellate Body to reverse the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

D. *Arguments of Mexico – Appellee*

1. Consistency of the Sunset Policy Bulletin "As Such"

78. Mexico argues that the Panel properly found that Section II.A.3 of the SPB, "as such", is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

79. Mexico rejects the three grounds of the United States' appeal, arguing that the Panel properly determined that Mexico established a *prima facie* case, applied the correct legal standard in evaluating the SPB under Article 11.3 of the *Anti-Dumping Agreement*, and made an objective assessment as required by Article 11 of the DSU.

80. In addition, in relation to the latter two grounds of appeal, Mexico asks the Appellate Body to decline the United States' request that it revisit the Panel's factual findings and reweigh the evidence that was before the Panel. Previous decisions of the Appellate Body demonstrate that panels enjoy a margin of discretion as triers of fact and that the Appellate Body is not to second-guess a panel's assessment of the evidence before it. Applying this reasoning to the present case, the Appellate Body

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<sup>120</sup>United States' other appellant's submission, para. 72.

<sup>121</sup>Panel Report, footnote 85 to para. 7.63 (quoted in United States' other appellant's submission, para. 73).

<sup>122</sup>*Ibid.*, footnote 86 to para. 7.64 (quoted in United States' other appellant's submission, para. 72).

should not disturb the Panel's factual finding that the USDOC regards the scenarios in the SPB as conclusive or determinative. These findings relate to the meaning and scope of a Member's municipal law, which—according to the United States' own position in previous disputes—is a question of fact falling outside the scope of appellate review. Mexico contends that the Appellate Body "should accord deference to the Panel with respect to its factual findings on the SPB".<sup>123</sup>

81. In relation to the United States' argument that Mexico failed to establish a *prima facie* case, Mexico submits that the Panel correctly applied the precedents contained in the Appellate Body Reports in *US – Corrosion-Resistant Steel Sunset Review* and *US – Oil Country Tubular Goods Sunset Reviews* in concluding that Mexico had established a *prima facie* case. In particular, Mexico contends that the Panel correctly recognized, based on these precedents, that determinations in sunset reviews must: be supported by "positive evidence" and a "sufficient factual basis"<sup>124</sup>; be based on a "rigorous examination" leading to a "reasoned conclusion"<sup>125</sup>; and not involve the "mechanistic application of presumptions".<sup>126</sup>

82. Mexico indicates that the Panel specifically and correctly concluded that Mexico had made a *prima facie* case. Contrary to the United States' reading, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body reversed the Panel's finding that the SPB was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the Panel had failed to comply with Article 11 of the DSU, not because the complainant had failed to establish a *prima facie* case. This is a critical distinction. Therefore, the Appellate Body's ruling in *US – Oil Country Tubular Goods Sunset Reviews* does not support the United States' appeal on this issue. On the contrary, this ruling confirms that "the obligation to make out a *prima facie* case may be satisfied in certain cases simply by submitting the text of the measure or, particularly where the text may be unclear, with supporting materials".<sup>127</sup> In the present case, the Panel found that Mexico identified the measure at issue, explained how it operated, and explained the basis for the alleged inconsistency with Article 11.3 of the *Anti-Dumping Agreement*.<sup>128</sup> According to Mexico, this shows that the Panel properly determined that Mexico established a *prima facie* case.

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<sup>123</sup>Mexico's appellee's submission, para. 63.

<sup>124</sup>*Ibid.*, para. 3 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 114; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 302).

<sup>125</sup>*Ibid.* (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 111 and 113; and Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 302).

<sup>126</sup>*Ibid.* (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 178).

<sup>127</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 263 (quoted in Mexico's appellee's submission, para. 36).

<sup>128</sup>Mexico's appellee's submission, para. 29 (referring to Panel Report, para. 6.28).

83. Mexico states that the Panel was required to conduct a qualitative analysis in fulfilling its functions under Article 11 of the DSU; this was not something that Mexico was required to do in meeting its burden of proof as complainant. In any case, Mexico provided to the Panel its own "qualitative assessment" of every sunset review conducted by the USDOC in the form of Exhibits MEX-62 and MEX-65. The charts at the front of these exhibits "simply could not have been prepared unless a qualitative analysis had already occurred in order to properly characterize the basis for the [USDOC's] determination in each case".<sup>129</sup> In addition, Mexico argues that it analyzed many individual sunset reviews in the course of the Panel proceedings.

84. In response to the United States' plea that it did not have an adequate opportunity to respond to the "evidence created and presented by the Panel"<sup>130</sup>, Mexico maintains that Mexico presented the evidence in question, comprising determinations of an agency of the United States government, with its first submission to the Panel. Therefore, the United States had an opportunity to rebut the evidence, but it chose not to do so as part of its litigation strategy. For example, Mexico argues that the United States could have responded to the evidence: in its first or second submissions; in response to questions posed by the Panel; upon the invitation of the Panel to comment on the Appellate Body decision in *US – Oil Country Tubular Goods Sunset Reviews*; or in an interim review meeting that it could have requested under Article 15.2 of the DSU.

85. Mexico disagrees with the United States' contention that the Panel failed to apply the correct standard in assessing the consistency of the SPB with Article 11.3 of the *Anti-Dumping Agreement*. The Panel did not "shoehorn" the sunset reviews or engage in an "outcomes" analysis.<sup>131</sup> The United States mischaracterizes the Panel's analysis and wrongly contests the Panel's factual assessment of the individual sunset reviews.

86. According to Mexico, the United States challenges the Panel's statement that, in one preliminary determination<sup>132</sup>, the USDOC said that it did not consider the interested parties' arguments regarding other factors. Responding to the United States' contention that this was not due to the SPB, Mexico argues that the USDOC relied on Section II.A.3 of the SPB in the first sentence of the same paragraph. Mexico submits that, contrary to the United States' arguments, respondents did introduce evidence of other factors in that case, and, even if they had not, it would not change the fact that the SPB determined the result. Mexico also refers to the United States' suggestion that, in one

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<sup>129</sup>Mexico's appellee's submission, para. 40. (emphasis omitted)

<sup>130</sup>United States' other appellant's submission, para. 3 (quoted in Mexico's appellee's submission, para. 48).

<sup>131</sup>Mexico's appellee's submission, para. 86 (quoting United States' other appellant's submission, paras. 9 and 39).

<sup>132</sup>Tab 89 of Exhibit MEX-62 submitted by Mexico to the Panel.

case in which the USDOC rejected arguments that good cause existed to consider other factors<sup>133</sup>, the USDOC did consider the evidence of other factors, but found the evidence of continued dumping and low import volumes more probative. Mexico responds that, in fact, the USDOC strictly followed the SPB, despite the dramatic fall in the dumping margin and without taking account of the evidence of other factors. Finally, with respect to another case<sup>134</sup>, Mexico challenges the United States' suggestion that the USDOC relied on decreased import volumes (the third SPB scenario). Mexico alleges that the USDOC relied on continued dumping margins (the first SPB scenario), despite the existence of zero or *de minimis* dumping margins in each administrative review.

87. In relation to the United States' claim that the Panel failed to make an objective assessment as required by Article 11 of the DSU, Mexico disputes the United States' representations about several individual sunset reviews. Beginning with the United States' criticism of the Panel's "sampling" of expedited sunset reviews, Mexico responds that the United States' position during the Panel proceedings was that these sunset reviews were not relevant because they were not contested. Mexico disagrees that these reviews were not relevant. Even where respondent interested parties do not participate, the USDOC is obliged to seek out relevant information, which it failed to do, as evidenced by the Panel's sampling.

88. Mexico also refutes the United States' contention that, in one review<sup>135</sup>, the respondent did not introduce evidence of other factors; Mexico lists seven other factors identified by the respondents in that review. In relation to another case<sup>136</sup>, Mexico disagrees with the United States' suggestion that the respondents' arguments related simply to the existence of *de minimis* dumping margins; Mexico states that the respondent in that case submitted arguments about import volumes and its ability to supply the United States market without dumping. In response to the United States' argument that the USDOC weighed the probative value of evidence of other factors in determining whether good cause had been shown in another sunset review<sup>137</sup>, Mexico maintains that the USDOC relied solely on the third SPB scenario in making its determination. In relation to another sunset review<sup>138</sup>, Mexico contests the United States' contention that the respondents did not submit additional evidence. In another case<sup>139</sup>, the United States contends that the USDOC relied on the respondent's admission that revocation of the order would be likely to lead to dumping. However, Mexico submits that the

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<sup>133</sup>Tab 78 of Exhibit MEX-62 submitted by Mexico to the Panel.

<sup>134</sup>*Ibid.*, Tab 165.

<sup>135</sup>*Ibid.*, Tab 89.

<sup>136</sup>*Ibid.*, Tab 35.

<sup>137</sup>*Ibid.*, Tab 201.

<sup>138</sup>*Ibid.*, Tab 165.

<sup>139</sup>*Ibid.*, Tab 32.

USDOC dismissed the respondent's explanation for the decline in import volumes, even though it had accepted that explanation during the preliminary stage and the evidence and arguments were unchanged. Finally, Mexico rebuts the United States' argument that the USDOC based one affirmative likelihood-of-dumping determination<sup>140</sup> on evidence of below-cost sales; Mexico argues that "[e]vidence of sales below cost in the home market cannot constitute evidence that an exporter would be likely to dump in the United States".<sup>141</sup> In any event, Mexico does not regard this case as directly relevant to its claim, as none of the SPB criteria was present.

89. Mexico also responds to the United States' arguments regarding alleged inconsistency between the Panel's findings regarding the Tariff Act, the SAA, and the SPB. According to Mexico, even assuming that the Panel is correct that the Tariff Act is consistent with Article 11.3 of the *Anti-Dumping Agreement*, that does not mean that the SPB conflicts with the Tariff Act or changes its meaning. The SPB simply goes beyond the requirement in the Tariff Act that the USDOC consider dumping margins and import volumes, in that the SPB establishes conclusive scenarios based on dumping margins and import volumes.

90. For these reasons, Mexico requests the Appellate Body to confirm the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

E. *Arguments of the Third Participants*

1. Argentina

91. In relation to Mexico's appeal regarding causation in sunset reviews, Argentina agrees with Mexico that investigating authorities may not determine that the expiry of a duty would be likely to lead to continuation or recurrence of injury under Article 11.3 of the *Anti-Dumping Agreement* without establishing a causal link between the likely injury and dumped imports. Even if Article 3.5 of the *Anti-Dumping Agreement* does not apply to sunset reviews under Article 11.3, causation is a fundamental requirement for anti-dumping duties, as reflected in Article VI of the GATT 1994 and in Articles 1, 3.5, 11.1, 11.3, and 18.1 of the *Anti-Dumping Agreement*. Therefore, according to Argentina, the United States was not entitled to continue the anti-dumping duties on OCTG from Mexico beyond five years without establishing the existence of a causal link in the sunset review. Argentina also contends that the USITC's likelihood-of-injury determination in the sunset review at issue was rendered WTO-inconsistent by virtue of the fact that the Panel found that the USDOC's

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<sup>140</sup>Tab 261 of Exhibit MEX-62 submitted by Mexico to the Panel.

<sup>141</sup>Mexico's appellee's submission, para. 117.

likelihood-of-dumping determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

92. Concerning Mexico's appeal as to the legal basis for continuation of the anti-dumping duties on OCTG from Mexico, Argentina agrees with Mexico that the Panel erred in declining to find that the continuation of the anti-dumping duty order on OCTG from Mexico lacks a legal basis. As the Panel found that the USDOC's likelihood-of-dumping determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, the United States has not fulfilled the conditions of Article 11.3 for continuing to impose anti-dumping duties on OCTG from Mexico. Accordingly, the United States should immediately terminate the anti-dumping duty order on OCTG from Mexico.

93. In response to the United States' appeal in connection with the SPB, Argentina agrees with Mexico that Mexico established a *prima facie* case and that the Panel did not make Mexico's case for it. In particular, Mexico identified the measure at issue (the SPB); explained the meaning of the SPB; and argued that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because it requires a "mechanistic application" of certain scenarios without a "reasoned analysis" of other factors.<sup>142</sup> Mexico also provided substantial evidence supporting this argument in the form of exhibits attached to its submissions. In evaluating Mexico's evidence and arguments, the Panel followed the Appellate Body's guidance in *US – Oil Country Tubular Goods Sunset Reviews*. Accordingly, Argentina supports Mexico's contention that the Appellate Body should dismiss the United States' claim that the Panel acted inconsistently with Article 11 of the DSU and uphold the Panel's finding that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

## 2. China

94. China agrees with Mexico that Article 11.3 of the *Anti-Dumping Agreement* requires investigating authorities to examine whether the expiry of the duty would be likely to lead to continuation or recurrence of injury caused by dumped imports or likely dumped imports. Although the text of Article 11.3 imposes no causation requirement explicitly, a finding of causation is necessary in order for the investigating authorities to conduct an objective examination. As regards the USITC's determination in the sunset review at issue, China finds it difficult to understand how the USITC could make a WTO-consistent likelihood-of-injury determination, given that the USDOC's likelihood-of-dumping determination was inconsistent with Article 11.3. China adds that, although the Panel correctly found that Article 11.3 does not prescribe any particular method for the likelihood-of-injury determination, the Panel did not provide an adequate explanation for its conclusion that the

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<sup>142</sup>Argentina's third participant's submission, para. 18.

USITC's likelihood-of-injury determination was consistent with Article 11.3 of the *Anti-Dumping Agreement*.

95. In relation to the United States' appeal concerning the SPB, China agrees with Mexico that the Panel was correct in finding that the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. First, the Panel correctly concluded that Mexico had established a *prima facie* case and discharged its burden of proof. Mexico submitted to the Panel extensive evidence and arguments regarding the meaning of Section II.A.3 of the SPB, including evidence of the USDOC's "consistent application" of Section II.A.3.<sup>143</sup> Secondly, the Panel properly analyzed Mexico's evidence, conducting a "qualitative assessment"<sup>144</sup> in accordance with the Appellate Body's guidance in *US – Oil Country Tubular Goods Sunset Reviews*. Thirdly, the Panel made an objective assessment of the matter before it and provided reasoned explanations for its conclusion that the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. In doing so, according to China, the Panel focused on the decision-making process of the USDOC, and not solely on the outcomes of sunset reviews.

### 3. European Communities

96. The European Communities argues that imposing a causation requirement in sunset reviews, together with the non-attribution requirements that go with causation, "might be pushing the possibilities of prospective determinations beyond reasonable limits".<sup>145</sup> The European Communities also contends that the use of the present tense in Article VI of the GATT 1994 and certain provisions of the *Anti-Dumping Agreement* does not provide a sufficient basis to read a causation requirement into Article 11.3 of the *Anti-Dumping Agreement*. Accordingly, the European Communities "would not generally support this part of Mexico's appeal".<sup>146</sup>

97. In response to Mexico's appeal as to cumulation in sunset reviews, the European Communities submits that Article 11.3 of the *Anti-Dumping Agreement* does not prohibit investigating authorities from conducting a cumulative analysis of injury in a sunset review. However, the European Communities agrees with Mexico that, if such an analysis is conducted, the

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<sup>143</sup>China's third participant's submission, para. 5.

<sup>144</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 209 (quoted in China's third participant's submission, para. 11.).

<sup>145</sup>European Communities' third participant's submission, para. 9.

<sup>146</sup>*Ibid.*, para. 11.

conditions set out in Article 3.3 of the *Anti-Dumping Agreement* must be fulfilled, either at the time of the sunset review or "at least within the reasonably foreseeable future".<sup>147</sup>

98. In relation to the United States' appeal regarding the SPB, the European Communities contends that the question is not whether the SPB mandates or instructs the USDOC to adopt a certain course of action in every case, but whether the SPB is consistent with the *Anti-Dumping Agreement*. The European Communities agrees with Mexico that, in answering this question, the Panel was correct to consider past USDOC determinations. The European Communities adds that, if the SPB is not intended to determine the outcomes of sunset reviews, as the United States suggests, it is not clear why the United States cannot simply amend the SPB to clarify this.

#### 4. Japan

99. Japan agrees with Mexico that an investigating authority conducting a sunset review pursuant to Article 11.3 of the *Anti-Dumping Agreement* may not determine that the expiry of the duty would be likely to lead to continuation or recurrence of injury without establishing that the likely injury would be caused by likely dumping. This flows from the overarching obligation in Article 11.1 of the *Anti-Dumping Agreement*, which makes clear that a Member may maintain an anti-dumping duty "only as long as and to the extent necessary to counteract dumping which is causing injury". The obligation under Article 11.1 for a Member to establish a causal link between dumping and injury "applies to the finding of 'injury' under Article 11.3".<sup>148</sup> This is also consistent with the basic principles of Article VI of the GATT 1994, which the *Anti-Dumping Agreement* implements. In particular, Japan argues that Articles VI:1 and VI:6(a) of the GATT 1994 confirm the necessity of a causal relationship between dumping and injury, which extends to sunset reviews under Article 11.3 of the *Anti-Dumping Agreement* as well.

100. Japan also agrees with Mexico that the Panel correctly concluded that the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. Mexico presented evidence and arguments to the Panel to substantiate its claim. This took the form of Exhibits MEX-62 and MEX-65, as well as the legal argument that this evidence shows that the SPB attributes determinative or conclusive weight to the factors of historical dumping margins and import volumes. Therefore, the Panel properly found that Mexico had established a *prima facie* case of inconsistency. According to Japan, it was then for

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<sup>147</sup>European Communities' third participant's submission, para. 14.

<sup>148</sup>Japan's third participant's submission, para. 11.

the Panel to assess the evidence in accordance with Article 11 of the DSU, which it did by conducting a "qualitative assessment" of Mexico's evidence and arguments.<sup>149</sup>

101. Japan maintains that, contrary to the United States' arguments, in *US – Oil Country Tubular Goods Sunset Reviews*, the finding of the Appellate Body was not that Argentina had failed to establish a *prima facie* case, but that the Panel had erred in its analysis of Argentina's evidence. In the present dispute, the Panel applied the correct standard in assessing the consistency of the SPB with Article 11.3 of the *Anti-Dumping Agreement*. Even assuming that the Panel committed factual errors in assessing the SPB (which Japan disputes), these would not be of the egregious kind necessary to create an error under Article 11 of the DSU. Accordingly, Japan supports Mexico's request that the Appellate Body uphold the Panel's finding that the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

### III. Issues Raised in this Appeal

102. The following issues are raised in this appeal:

- (a) in relation to causation:
  - (i) whether there is a requirement to establish the existence of a causal link between likely dumping and likely injury, as a matter of legal obligation, in a sunset review determination under Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and whether, therefore, the United States International Trade Commission (the "USITC") was required to demonstrate such a link in making its likelihood-of-injury determination<sup>150</sup> in the sunset review at issue in this dispute; and
  - (ii) whether the Panel acted inconsistently with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") in its assessment of Mexico's arguments in this regard;

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<sup>149</sup>Japan's third participant's submission, para. 22.

<sup>150</sup>In our discussion, we refer at times to the USITC's determination of the likelihood of continuation or recurrence of injury as the "likelihood-of-injury determination".

- (b) in relation to cumulation:
  - (i) whether the Panel erred in finding that the USITC's decision to conduct a cumulative assessment of imports in making its likelihood-of-injury determination was not inconsistent with Articles 3.3 and 11.3 of the *Anti-Dumping Agreement*; and
  - (ii) whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments in this regard;
- (c) in relation to dumping margins:
  - (i) whether the Panel acted inconsistently with Article 11 of the DSU in not addressing Mexico's claims under Article 2 of the *Anti-Dumping Agreement*;
  - (ii) whether the likelihood-of-dumping determination<sup>151</sup> of the United States Department of Commerce (the "USDOC") was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the USDOC determined a likely dumping margin inconsistently with Article 2 of the *Anti-Dumping Agreement*; and
  - (iii) whether the USITC's likelihood-of-injury determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the USITC relied on a likely dumping margin that was determined inconsistently with Article 2 of the *Anti-Dumping Agreement*;
- (d) whether the Panel acted inconsistently with Article 11 of the DSU in declining to make a specific finding that the United States had no legal basis to continue the anti-dumping duties on oil country tubular goods ("OCTG") from Mexico beyond the five-year period established by Article 11.3 of the *Anti-Dumping Agreement*;
- (e) in relation to the Sunset Policy Bulletin (the "SPB")<sup>152</sup>:
  - (i) whether, in assessing the consistency of the SPB, "as such", with Article 11.3 of the *Anti-Dumping Agreement*, the Panel failed to make an objective

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<sup>151</sup>In our discussion, we refer at times to the USDOC's determination of the likelihood of continuation or recurrence of dumping as the "likelihood-of-dumping determination".

<sup>152</sup>Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, *United States Federal Register*, Vol. 63, No. 73 (16 April 1998), p. 18871 (Exhibit MEX-32 submitted by Mexico to the Panel).

assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU;

- (ii) whether the Panel erred in finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and
  - (iii) whether the Panel erred in stating that Mexico had established a *prima facie* case that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and
- (f) if the Appellate Body reverses the Panel's finding that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*:
- (i) whether the Tariff Act of 1930 (the "Tariff Act"), the Statement of Administrative Action (the "SAA")<sup>153</sup>, and the SPB, "collectively and independently"<sup>154</sup>, establish a standard that is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and
  - (ii) whether the USDOC administers United States laws and regulations on sunset reviews in a uniform, impartial, and reasonable manner in accordance with Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

#### IV. Causation in Sunset Reviews

##### A. Introduction

103. Mexico argued before the Panel that the USITC's likelihood-of-injury determination with respect to the anti-dumping duty order on OCTG from Mexico was inconsistent with several provisions of Article 3 of the *Anti-Dumping Agreement*. Based on its analysis, the Panel found that "the obligations set out in Article 3 are not directly applicable in sunset reviews."<sup>155</sup>

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<sup>153</sup>Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994), reprinted in 1994 USCCAN 4040 (Exhibit MEX-26 submitted by Mexico to the Panel).

<sup>154</sup>Mexico's appellant's submission, para. 160.

<sup>155</sup>Panel Report, para. 7.117. (footnote omitted)

104. The Panel also concluded that:

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.<sup>156</sup>

105. Mexico challenges the Panel's interpretation of Article 11.3 of the *Anti-Dumping Agreement* and its failure to address the "inherent" causation requirements under that Article. Referring to the underlying principles in Articles 1, 3, 11.1, and 18.1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994, Mexico argues that, even assuming that Article 3.5 of the *Anti-Dumping Agreement* (dealing with causation) does not apply directly to sunset reviews, there is an "inherent" obligation to establish a causal link between likely dumping and likely injury in a sunset review determination under Article 11.3 of the *Anti-Dumping Agreement*.<sup>157</sup>

106. The United States contends that Mexico's reliance on substantive legal obligations that apply to original investigations does "not support its assertion that the AD Agreement or Article VI of GATT 1994 contain some sort of 'inherent' causation requirements for sunset reviews."<sup>158</sup> The United States recalls in this respect that the Appellate Body has previously clarified that sunset reviews are separate and distinct from original investigations, and that the requirements for an original investigation cannot "be automatically imported" into a sunset review.<sup>159</sup>

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<sup>156</sup>Panel Report, para. 6.12.

<sup>157</sup>Mexico's appellant's submission, para. 38. Mexico clarified at the oral hearing that it does not appeal the Panel's finding that Article 3 of the *Anti-Dumping Agreement* does not, as such, apply to sunset reviews.

<sup>158</sup>United States' appellee's submission, para. 42.

<sup>159</sup>*Ibid.* (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 359).

B. *Requirement to Establish a Causal Link Between Likely Dumping and Likely Injury in a Sunset Review*

107. We begin our analysis with the text of Article 11.3 of the *Anti-Dumping Agreement*:

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 ... 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. ... (footnote omitted)

108. On its face, Article 11.3 does not require investigating authorities to establish the existence of a "causal link" between likely dumping and likely injury. Instead, by its terms, Article 11.3 requires investigating authorities to determine whether the *expiry of the duty* would be likely to lead to *continuation or recurrence of dumping and injury*. Thus, in order to continue the duty, there must be a nexus between the "expiry of the duty", on the one hand, and "continuation or recurrence of dumping and injury", on the other hand, such that the former "would be likely to lead to" the latter. This nexus must be clearly demonstrated.<sup>160</sup> In this respect, we further note that, under Article 11.3 of the *Anti-Dumping Agreement*, the termination of the anti-dumping duty at the end of five years is the rule and its continuation beyond that period is the "exception".

109. Although Article 11.3 is silent as to whether investigating authorities are required to establish the existence of a "causal link" between likely dumping and likely injury, this "silence does not exclude the possibility that the requirement was intended to be included by implication."<sup>161</sup> We therefore proceed to examine whether there is a requirement to establish a causal link between likely dumping and likely injury in a sunset review under Article 11.3 flowing from other provisions of the *Anti-Dumping Agreement* and Article VI of GATT 1994.

110. We start with Article VI of the GATT 1994, as the *Anti-Dumping Agreement* implements that provision in respect of anti-dumping measures. This is clear from Article 1 of the *Anti-Dumping Agreement*, which states that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994". It further stipulates that the provisions of

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<sup>160</sup>The use of the word "likely" in Article 11.3 shows that "an affirmative likelihood determination may be made only if the evidence demonstrates that dumping [and injury] would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible." (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111)

<sup>161</sup>Appellate Body Report, *US – Carbon Steel*, para. 65. The Appellate Body said in that case that "the task of ascertaining the meaning of a treaty provision with respect to a specific requirement does not end once it has been determined that the text is silent on that requirement." (*Ibid.*)

the *Anti-Dumping Agreement* "govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations".

111. Paragraph 1 of Article VI of the GATT 1994 states that dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a Member or materially retards the establishment of a domestic industry". Paragraph 2 of Article VI provides that, "[i]n order to offset or prevent dumping", a Member may levy on a dumped product an anti-dumping duty not exceeding the margin of dumping. Paragraph 6(a) further stipulates that no anti-dumping duty shall be levied unless the importing Member "determines that the effect of the dumping ... 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." Thus, Article VI of the GATT 1994 establishes the fundamental principle that there must be a causal link between dumping and injury to a domestic industry, if an anti-dumping duty is to be levied on a dumped product. It further establishes that the purpose of an anti-dumping duty is to counteract dumping that causes injury.

112. Several provisions of the *Anti-Dumping Agreement* confirm and reinforce this fundamental principle. Article 3, entitled "Determination of Injury", states in paragraph 1 that:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the 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.* (emphasis added)

In evaluating the impact of the dumped imports on the domestic industry, paragraph 5 of Article 3 stipulates that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, ... causing injury" to the domestic industry within the meaning of the *Anti-Dumping Agreement*. Article 3.5 further requires that investigating authorities examine any known factors other than the dumped imports "which at the same time are injuring the domestic industry", and that the "injuries caused by these other factors ... not be attributed to the dumped imports."

113. Article 5 of the *Anti-Dumping Agreement*, which deals with "Initiation and Subsequent Investigation", lays down in paragraph 2 that an application by the domestic industry for initiation of an investigation by competent authorities shall include evidence (not simple assertions) of "(a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by [the *Anti-Dumping Agreement*] and (c) a causal link between the dumped imports and the alleged injury." Sub-paragraph (iv) of paragraph 2 further stipulates that the application by the domestic industry must include, *inter alia*, information on "the consequent impact of the imports on the domestic industry, as

demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3." Paragraph 8 of Article 5 requires rejection of an application by the domestic industry and termination of the investigation if there is not sufficient evidence either of dumping or of injury, or if the injury is found to be "negligible".

114. Article 9 of the *Anti-Dumping Agreement*, which deals with the "Imposition and Collection of Anti-Dumping Duties", states in paragraph 1 that "[i]t is desirable that ... the [anti-dumping] duty be less than the [full] margin [of dumping] if such lesser duty would be adequate to remove the injury to the domestic industry."

115. We now turn to the provisions of the *Anti-Dumping Agreement* that deal with the "review" of anti-dumping duties that have been levied after an original investigation. Article 11.1 of the Agreement establishes an overarching principle for "duration" and "review" of anti-dumping duties in force.<sup>162</sup> It provides 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." This principle applies during the entire life of an anti-dumping duty. If, at any point in time, it is demonstrated that no injury is being caused to the domestic industry by the dumped imports, the rationale for the continuation of the duty would cease.<sup>163</sup>

116. Following the principle of Article 11.1, Article 11.2 provides, in part:

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.

117. It is clear from Article VI of the GATT 1994 and the above-mentioned provisions of the *Anti-Dumping Agreement*, and indeed from the design and structure of that Agreement as a whole, that the *Anti-Dumping Agreement* deals with counteracting injurious dumping and that an anti-dumping duty can be imposed and maintained *only* if the dumping (as properly established) causes injury to the domestic industry. Absent injury to the domestic industry, the rationale for either

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<sup>162</sup>See Appellate Body Report, *US – Carbon Steel*, para. 70. Although the Appellate Body's reasoning in that case related to the interpretation of Article 21.1 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"); we consider that it applies, *mutatis mutandis*, to the interpretation of Article 11.1 of the *Anti-Dumping Agreement*, given that these provisions are almost identical.

<sup>163</sup>Under this broad principle, however, we recognize that, in a sunset review determination under Article 11.3, it could be properly determined that there may be a likelihood of recurrence of injury if the duty expires. We further note that, under Article 11.3, an anti-dumping duty may continue even though there is no injury at the time of the review.

imposing the duty in the first place, or maintaining it at any time after its imposition, does not exist.<sup>164</sup> A causal link between dumping and injury to the domestic industry is thus fundamental to the imposition and maintenance of an anti-dumping duty under the *Anti-Dumping Agreement*.

118. We therefore agree with Mexico that this fundamental principle is expressed in Article VI of the GATT 1994 and in various provisions of the *Anti-Dumping Agreement*. The United States does not question this principle *per se*. However, this does not mean that a causal link between dumping and injury is required to be established anew in a "review" conducted under Article 11.3 of the *Anti-Dumping Agreement*. This is because the "review" contemplated in Article 11.3 is a "distinct" process with a "different" purpose from the original investigation.<sup>165</sup>

119. The Appellate Body has underlined that "[t]he 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", and that "[t]he disciplines applicable to original investigations *cannot, therefore, be automatically imported* into review processes."<sup>166</sup>

120. As the Appellate Body has explained in *US – Oil Country Tubular Goods Sunset Reviews*:

Original investigations require an investigating authority, in order to *impose* an anti-dumping duty, to make a determination of the existence of dumping in accordance with Article 2, and subsequently to determine, in accordance with Article 3, whether the domestic industry is facing injury or a threat thereof at the time of the original investigation. In contrast, Article 11.3 requires an investigating authority, in order to *maintain* an anti-dumping duty, to review an anti-dumping duty order that has already been established—following the prerequisite determinations of dumping and injury—so as to determine whether that order should be continued or revoked.<sup>167</sup>

121. An anti-dumping duty comes into existence following an original investigation that has established a causal link between dumping and injury to the domestic industry in accordance with the requirements of Article 3 of the *Anti-Dumping Agreement*, including, in particular, the requirement that the injury caused by any other known factor not be attributed to dumping. In contrast, when a "review" takes place under Article 11.3, and it is determined that the "expiry of the duty" would "likely ... lead to continuation or recurrence of dumping and injury", it is reasonable to assume that,

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<sup>164</sup>We recognize that, in a sunset review determination under Article 11.3, it could be properly determined that there may be a likelihood of recurrence of injury if the duty expires.

<sup>165</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 359.

<sup>166</sup>*Ibid.*, paras. 328 and 359 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107; and Appellate Body Report, *US – Carbon Steel*, para. 87). (emphasis added)

<sup>167</sup>*Ibid.*, para. 279. (original italics; underlining added)

where dumping and injury continues or recurs, the causal link between dumping and injury, established in the original investigation, would exist and need not be established anew.

122. We envisage a variety of circumstances that may exist when a review under Article 11.3 is conducted. For instance, dumping may have continued throughout the life of the anti-dumping duty order and the domestic industry may not have recovered despite the existence of the duty. In such a case, the injury may continue or may even be aggravated if the duty is terminated. There may be other cases where dumping is continuing, with significant import volumes and dumping margins, but the domestic industry may have recovered by the time of the review because of the effect of the anti-dumping duty. It may be, however, that, if the duty is revoked, the injury may recur. There may be yet other cases where the dumping may have ceased, with or without imports also having ceased, and the domestic industry also may have recovered by the time of the review. In such cases, convincing evidence will be needed to establish that revocation of the duty would be likely to lead to both recurrence of imports (if imports had ceased) and of dumping, as well as recurrence of injury to the domestic industry. In the types of cases indicated above, there may be further variations in circumstances, such as, for example, when the dumping or imports ceased during the intervening period; the magnitude of dumped imports; dumping margins and the price effects if dumping is continuing; the extent to which the domestic industry has recovered; and the relative shares of imports and domestic production in the market.

123. As we stated earlier, in a sunset review determination under Article 11.3, the nexus to be demonstrated is between "the expiry of the duty" on the one hand, and the likelihood of "continuation or recurrence of dumping and injury" on the other hand.<sup>168</sup> We note that Article 11.3, in fact, expressly postulates that, at the time of a sunset review, dumping and injury, or either of them, may have ceased, but that expiration of the duty may be likely to lead to "recurrence of dumping and injury". Therefore, what is essential for an affirmative determination under Article 11.3 is proof of likelihood of continuation or recurrence of dumping and injury, if the duty expires. The nature and extent of the evidence required for such proof will vary with the facts and circumstances of the case under review. Furthermore, as the Appellate Body has emphasized previously, determinations under Article 11.3 must rest on a "sufficient factual basis" that allows the investigating authority to draw "reasoned and adequate conclusions".<sup>169</sup> These being the requirements for a sunset review under Article 11.3, we do not see that the requirement of establishing a causal link between likely dumping and likely injury flows into that Article from other provisions of the GATT 1994 and the

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<sup>168</sup>See *supra*, para. 108.

<sup>169</sup>See, for example, Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 311.

*Anti-Dumping Agreement*. Indeed, adding such a requirement would have the effect of converting the sunset review into an original investigation, which cannot be justified.

124. Our conclusion that the establishment of a causal link between likely dumping and likely injury is not required in a sunset review determination does not imply that the causal link between dumping and injury envisaged by Article VI of the GATT 1994 and the *Anti-Dumping Agreement* is severed in a sunset review. It only means that re-establishing such a link is not required, as a matter of legal obligation, in a sunset review.

125. For these reasons, we are unable to agree with Mexico that there is a requirement to establish the existence of a causal link between likely dumping and likely injury, as a matter of legal obligation, in a sunset review determination under Article 11.3, and that, therefore, the USITC was required to demonstrate such a link in making its likelihood-of-injury determination in the sunset review at issue in this dispute.

126. Mexico further argues that "[t]he Panel's finding that the [USDOC's] likelihood of dumping determination with respect to Mexican OCTG imports was WTO-inconsistent necessarily meant that the [USITC's] likelihood of injury determination was also WTO-inconsistent."<sup>170</sup> According to Mexico, "a WTO-consistent determination of likely dumping is a legal predicate to a WTO-consistent determination of likely injury."<sup>171</sup> Mexico posits that, "[a]s there was no WTO-consistent determination of likely dumping of OCTG from Mexico, the [USITC's] determination was concomitantly WTO-inconsistent."<sup>172</sup>

127. Mexico offers no textual support for this claim. We recognize that a WTO-consistent likelihood-of-dumping determination and a WTO-consistent determination of likelihood-of-injury are two pillars on which a WTO-consistent sunset review determination under Article 11.3 rests. If either of them is flawed, the sunset review determination would be inconsistent with Article 11.3. But, if the likelihood-of-dumping determination is flawed, it does not follow that the likelihood-of-injury determination is *ipso facto* flawed as well. The two inquiries are separate, regardless of whether they are carried out by the same or different authorities in a Member's administrative system. If an affirmative likelihood-of-dumping determination is *later* found to be flawed, we fail to see why this should lead *automatically* to the conclusion that the likelihood-of-injury determination must also be regarded as flawed. However, if a likelihood-of-injury determination rests upon a likelihood-of-

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<sup>170</sup>Mexico's appellant's submission, para. 52.

<sup>171</sup>*Ibid.*, para. 54.

<sup>172</sup>*Ibid.*

dumping determination that is later found to be flawed, the former determination may also be found to be WTO-inconsistent, after a proper examination of the facts of that determination.

128. Mexico further argues that the rulings of the Dispute Settlement Body (the "DSB") in *US – Oil Country Tubular Goods Sunset Reviews*, "combined with the Panel's finding in [the case at hand], establish that there was no WTO-consistent basis for a finding of likely dumping for *any* Member that was included in the USITC's cumulative analysis."<sup>173</sup> The United States submits that Mexico's proposition relies on new facts and is therefore beyond the scope of Appellate Body review. The United States adds that "not all of the likelihood of dumping determinations Mexico references have even been subject to WTO dispute settlement."<sup>174</sup>

129. We observe, first, that the DSB rulings in *US – Oil Country Tubular Goods Sunset Reviews* cannot, in and of themselves, "establish" that there was no WTO-consistent basis for the USITC's likelihood-of-injury determination in the case before us now, even though there may be factual similarities between the two cases.<sup>175</sup> More importantly, however, as we have explained above, Mexico's premise for this assertion, namely, that "a WTO-consistent determination of likely dumping is a legal predicate to a WTO-consistent determination of likely injury"<sup>176</sup>, is not legally tenable.

130. We turn next to Mexico's claim under Article 11 of the DSU with respect to causation.

C. *Claims under Article 11 of the DSU*

131. On appeal, Mexico submits that the Panel failed to conduct an "objective assessment of the matter" under Article 11 of the DSU by failing to address Mexico's argument that the "inherent" and "fundamental causation principles" of Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to sunset reviews as well, regardless of the applicability of Article 3.5 to sunset reviews.<sup>177</sup> Mexico submits that "[t]he Panel record shows that, despite Mexico's repeated explanation and elaboration, the Panel simply ignored [Mexico's] argument and failed to make any assessment of it."<sup>178</sup> Mexico maintains that Article 11 of the DSU "does not allow Panels to ignore

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<sup>173</sup>Mexico's appellant's submission, para. 57. (original emphasis)

<sup>174</sup>United States' appellee's submission, para. 32.

<sup>175</sup>See Mexico's appellant's submission, table at para. 57.

<sup>176</sup>*Ibid.*, para. 54.

<sup>177</sup>*Ibid.*, para. 66.

<sup>178</sup>*Ibid.*, para. 67.

arguments in this manner, and then claim that an insufficient explanation or elaboration justifies a decision not to assess the argument."<sup>179</sup>

132. The United States refers to the ruling of the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* and argues that "Mexico must show that the Panel's findings that Mexico had failed to substantiate its assertions were in error and prevented the Panel from making an objective assessment of the matter."<sup>180</sup> According to the United States, Mexico has not done so. The United States submits that "[t]he Panel objectively concluded that Mexico did no more than make assertions about the relevance of Article VI of the GATT 1994 and Article 11.1 of the Antidumping Agreement."<sup>181</sup>

133. Mexico points to three passages in the Panel record in which it allegedly provided arguments regarding its claim that the USITC was required to establish the existence of a causal link between likely dumping and likely injury irrespective of the applicability of Article 3.5. First, Mexico refers to a passage in its first written submission to the Panel.<sup>182</sup> Secondly, it points to a passage in its closing statement following the first meeting with the Panel.<sup>183</sup> Finally, Mexico points to its comments in response to the Panel's questioning on the relevance of the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*.<sup>184</sup> In these passages, there are assertions, but we see no explanation or elaboration by Mexico that the causal link must be established in a sunset review irrespective of the applicability of Article 3.5, which the Panel found did not apply to sunset reviews.<sup>185</sup> We are, therefore, not convinced that the Panel erred in concluding that Mexico "did not explain or elaborate on its bare assertion that Article 11.1 of the AD Agreement and Article VI of the GATT 1994 establish 'inherent' causation requirements, parallel to but independent of those in Article 3.5".<sup>186</sup>

134. In any event, as the Appellate Body has stated in *Dominican Republic – Import and Sales of Cigarettes*, "there is no obligation upon a panel to consider each and every argument put forward by

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<sup>179</sup>Mexico's appellant's submission, para. 67.

<sup>180</sup>United States' appellee's submission, para. 8 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125).

<sup>181</sup>*Ibid.*, para. 16.

<sup>182</sup>Mexico's appellant's submission, para. 42 (referring to Mexico's first written submission to the Panel, para. 241).

<sup>183</sup>*Ibid.*, para. 43 (quoting Mexico's closing statement at the first meeting of the Panel).

<sup>184</sup>*Ibid.*, para. 46 (quoting Mexico's response to the Panel's request for comments on Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*).

<sup>185</sup>Panel Report, para. 7.117.

<sup>186</sup>*Ibid.*, para. 6.12 (quoted in Mexico's appellant's submission, para. 45).

the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU."<sup>187</sup> Moreover:

So long as it is clear in a panel report that a panel *has reasonably considered a claim*, the fact that a particular argument relating to that claim is not specifically addressed in the "Findings" section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the "objective assessment of the matter before it" required by Article 11 of the DSU.<sup>188</sup> (emphasis added)

135. Based on our review of the Panel record, we are of the view that the Panel did "reasonably consider Mexico's claim", and that the Panel was not under an obligation to address specifically in its findings Mexico's argument regarding "inherent" causation requirements, particularly when the Panel had reason to conclude that Mexico had not explained or elaborated upon its bare assertion in this respect.

136. For all these reasons, we *find* that the Panel did not act inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments on causation.

## V. Cumulation in Sunset Reviews

### A. Introduction

137. In its likelihood-of-injury determination, the USITC found that revocation of the anti-dumping duty orders on OCTG from Argentina, Italy, Japan, Korea, and Mexico would be likely to lead to a continuation or recurrence of injury. In other words, the USITC based its determination that injury would be likely to continue or recur on the effects of imports from all the sources, and not only the effects of the imports from Mexico. Mexico challenged the USITC's decision to conduct a cumulative assessment in the sunset review at issue.

138. The Panel began its analysis by observing that "the text of Article 11.3 does not mention cumulation at all" and that other provisions of the *Anti-Dumping Agreement* also contain no "direct guidance on this matter".<sup>189</sup> Referring to the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*, the Panel found that "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

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<sup>187</sup>Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125 (footnote omitted).

<sup>188</sup>Appellate Body Report, *EC – Poultry*, para. 135.

<sup>189</sup>Panel Report, para. 7.147.

reviews."<sup>190</sup> The Panel also found that cumulation, when used in sunset reviews, does not need to satisfy the conditions of Article 3.3 of the *Anti-Dumping Agreement*, because that provision "on its face establishes conditions for the use of cumulative analysis which apply *only* in original anti-dumping investigations."<sup>191</sup> As a result, the Panel concluded that the USITC's cumulative analysis in the sunset review at issue was not inconsistent with Articles 3.3 and 11.3 of the *Anti-Dumping Agreement*.

139. Mexico challenges this conclusion of the Panel on several grounds<sup>192</sup>, including that the Panel disregarded certain of Mexico's arguments and based its conclusion solely on its finding that Article 3.3 does not apply to sunset reviews. We address these allegations of error in turn below, beginning with Mexico's assertion that the Panel acted inconsistently with Article 11 of the DSU.

B. *Claims under Article 11 of the DSU*

140. In response to comments submitted by Mexico at the interim review stage of the Panel proceedings, the Panel stated that:

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. ... 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.<sup>193</sup>

141. On appeal, Mexico argues that the Panel acted inconsistently with Article 11 of the DSU by not making findings with respect to Mexico's argument that, regardless of the applicability of Article 3.3 to sunset reviews, "the USITC likely injury determination failed to satisfy the requirements applicable to the conduct of any cumulative injury assessment."<sup>194</sup> Mexico submits that it "fully

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<sup>190</sup>Panel Report, para. 7.148 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 294).

<sup>191</sup>*Ibid.*, para. 7.150. (original emphasis; footnote omitted)

<sup>192</sup>See Mexico's appellant's submission, para. 70.

<sup>193</sup>Panel Report, para. 6.19.

<sup>194</sup>Mexico's appellant's submission, para. 73. We refer to this argument below as Mexico's "third cumulation argument", which is the term that Mexico used before the Panel. In response to questioning at the oral hearing, Mexico further clarified that its third cumulation argument was that, as the USITC chose to cumulate, it was required to comply with the obligations set forth in Article 3.3 of the *Anti-Dumping Agreement*.

explained the legal and factual basis to support its position" and refers, in this respect, to several explanations it allegedly provided to the Panel, arguing that these explanations were disregarded by the Panel.<sup>195</sup>

142. The United States, in contrast, submits that the Panel was correct in concluding that "Mexico had failed to 'explain or elaborate on its bare assertion that Article 11.3 somehow establishes 'inherent' obligations for cumulation independent of those in Article 3.3.'"<sup>196</sup> The United States adds that Mexico does not explain, even in its appellant's submission, why conditions for cumulation exist "irrespective of the applicability of Article 3.3" to Article 11.3.<sup>197</sup>

143. Based on our reading of the Panel record, we believe that the Panel "reasonably considered" Mexico's claim regarding cumulation and that it was not under an obligation to address specifically in its findings Mexico's argument regarding inherent cumulation requirements.<sup>198</sup> As in the case of Mexico's allegation with regard to causation, we see no reason to disturb the Panel's conclusion that "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."<sup>199</sup> We are therefore not persuaded that the Panel acted inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments on cumulation.

C. *Whether the Panel Erred in Its Interpretation and Application of Article 11.3 with Respect to Cumulation*

1. Was the Panel's Finding Regarding Consistency with Article 11.3 Based Solely on Its Finding that Article 3.3 Does Not Apply to Sunset Reviews?

144. We turn now to Mexico's allegation that the Panel erred in its interpretation and application of Article 11.3 of the *Anti-Dumping Agreement* with respect to cumulation.

145. Mexico contends that the Panel "simply assumed" that, "because ... Article 3.3 does not apply to sunset reviews, the USITC's cumulative injury determination could not be inconsistent with Article 11.3."<sup>200</sup> Mexico submits that the Panel erred because it "wrongly assumed that its findings regarding two of Mexico's cumulation arguments were sufficient to address Mexico's separate and

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<sup>195</sup>Mexico's appellant's submission, para. 73 and footnote 52 thereto.

<sup>196</sup>United States' appellee's submission, para. 23 (quoting Panel Report, para. 6.19).

<sup>197</sup>*Ibid.* (quoting Mexico's appellant's submission, para. 83).

<sup>198</sup>See *supra*, para. 134.

<sup>199</sup>Panel Report, para. 6.19.

<sup>200</sup>Mexico's appellant's submission, para. 77.

wholly independent argument that was not linked to Article 3.3."<sup>201</sup> In addition, Mexico submits that "the Panel did not evaluate Mexico's arguments in terms of the requirements of Article 11.3."<sup>202</sup>

146. We observe, first, that the Panel did not "simply assume" that, "because ... Article 3.3 does not apply to sunset reviews, the USITC's cumulative injury determination could not be inconsistent with Article 11.3."<sup>203</sup> Rather, the Panel found that the text of Article 11.3 of the *Anti-Dumping Agreement* does not speak to whether cumulation is permitted beyond the context of original investigations and noted that other provisions of the *Anti-Dumping Agreement* contain no "direct guidance" on this matter.<sup>204</sup> The Panel then disagreed with Mexico's view that "to allow cumulation in sunset reviews ... would be inconsistent with the plain meaning and object and purpose of Article 11.3."<sup>205</sup> The Panel further emphasized that "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."<sup>206</sup> In its analysis of Article 11.3 of the *Anti-Dumping Agreement*, the Panel also addressed and rejected Mexico's argument that the reference in that provision to "*any* anti-dumping duty", in the singular, indicates an intent not to authorize cumulation in sunset reviews. In the Panel's view, the reference in Article 11.3 to "*any* anti-dumping duty" has "both singular and plural meanings", and it could therefore apply to an anti-dumping measure covering more than one country.<sup>207</sup> The Panel also found 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."<sup>208</sup> The Panel stated that, "[e]ven 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."<sup>209</sup>

147. In the light of this extensive reasoning by the Panel, we do not agree with Mexico that the Panel "simply assumed" that, "because ... Article 3.3 does not apply to sunset reviews, the USITC's cumulative injury determination could not be inconsistent with Article 11.3."<sup>210</sup> We also do not agree with Mexico's assertion that "the Panel did not evaluate Mexico's arguments in terms of the

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<sup>201</sup>Mexico's appellant's submission, para. 77.

<sup>202</sup>*Ibid.*

<sup>203</sup>*Ibid.*

<sup>204</sup>Panel Report, para. 7.147.

<sup>205</sup>*Ibid.*

<sup>206</sup>*Ibid.*, para. 7.148.

<sup>207</sup>*Ibid.*, para. 7.149 (original emphasis) (referring to *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993).

<sup>208</sup>*Ibid.*

<sup>209</sup>*Ibid.*

<sup>210</sup>Mexico's appellant's submission, para. 77.

requirements of Article 11.3."<sup>211</sup> Clearly it did. The Panel's analysis is based on the text of that provision, including its context and the object and purpose of the *Anti-Dumping Agreement*.

2. "Threshold Finding" Regarding Simultaneous Presence of Subject Imports

148. Mexico suggests that the USITC was under a separate obligation to "ensure that cumulation was appropriate in light of the conditions of competition".<sup>212</sup> To do that, the USITC was, in Mexico's view, "required" to make "a threshold finding that the subject imports would be simultaneously present in the U.S. market".<sup>213</sup> According to Mexico, the Panel erred in declining "to examine and make a finding on this issue".<sup>214</sup>

149. The United States argues that Mexico "fails to identify where Mexico requested such a finding, or where the Panel declined to make such a finding."<sup>215</sup> In any event, the Panel found that the *Anti-Dumping Agreement* "simply does not prescribe a methodology for cumulation in sunset reviews".<sup>216</sup> Hence, according to the United States, "Mexico's contention that the Panel erred in failing to determine whether a sunset review under Article 11.3 requires a threshold finding of any kind is just wrong."<sup>217</sup> According to the United States, "[t]he Panel implicitly found that no such thresholds exist."<sup>218</sup>

150. Mexico offers no textual support for its proposition that the USITC was required, in making its sunset review determination, to set out a "threshold finding"<sup>219</sup> regarding the simultaneous presence of subject imports. On its face, Article 11.3 makes no mention of such a "threshold finding". The immediate context of Article 11.3, in paragraphs 1, 2, 4, and 5 of Article 11, also does not reveal any such requirement. Even Article 3.3, which is "the only provision in the *Anti-Dumping Agreement* that specifically addresses the practice of cumulation"<sup>220</sup> in an original investigation, does not require investigating authorities to make a threshold finding regarding cumulation.

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<sup>211</sup>Mexico's appellant's submission, para. 77.

<sup>212</sup>*Ibid.*, p. 23, heading II.B.2.c.i.

<sup>213</sup>*Ibid.*

<sup>214</sup>*Ibid.*, para. 85.

<sup>215</sup>United States appellee's submission, para. 57.

<sup>216</sup>*Ibid.*, para. 58.

<sup>217</sup>*Ibid.*

<sup>218</sup>*Ibid.*

<sup>219</sup>Mexico's appellant's submission, para. 85.

<sup>220</sup>Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 108.

151. As the Appellate Body stated in *US – Corrosion-Resistant Steel Sunset Review*:

... Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination.<sup>221</sup> (footnote omitted)

152. Given that Article 11.3 does not prescribe any particular methodology to be followed by an investigating authority in conducting a sunset review, we fail to see why the USITC was required, under that provision, to follow the specific step of making a "threshold finding" on the simultaneous presence of subject imports before resorting to cumulation.

153. This is not to say that it is never necessary for an investigating authority, performing a cumulative analysis of injury caused by imports from all sources, to examine whether imports are "in the market together and competing against each other".<sup>222</sup> In order to arrive at a reasoned and adequate conclusion, an examination of whether imports are in the market together and competing against each other may, in certain cases, be needed in a likelihood-of-injury determination where an investigating authority chooses to cumulate the imports from several countries. But the need for such an examination flows from the particular facts and circumstances of a given case and not from a legal requirement under Article 11.3.

3. Whether the USITC Had a Sufficient Factual Basis to Find that the Subject Imports Would Be Simultaneously Present in the Domestic Market

154. Mexico contends that "nowhere in [the USITC's] analysis is there positive evidence demonstrating that imports from Mexico, Argentina, Italy, Korea, and Japan would be present in the United States market at the same time ... if the order were revoked."<sup>223</sup> According to Mexico, information from the time of the original investigation "cannot replace the need for a prospective analysis of what is likely to happen if the order were revoked."<sup>224</sup> Moreover, in Mexico's view, "the fact that imports may have been simultaneously present in the U.S. market at the time of the original investigation is not positive evidence that such imports would be likely to be simultaneously present in the U.S. market in the event of revocation of the order."<sup>225</sup>

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<sup>221</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 123.

<sup>222</sup> Mexico's second written submission to the Panel, para. 192 (quoted in Mexico's appellant's submission, para. 82).

<sup>223</sup> Mexico's appellant's submission, para. 86.

<sup>224</sup> *Ibid.*, para. 87 (referring to Appellate Body Report, *US – Carbon Steel*, para. 88).

<sup>225</sup> *Ibid.*

155. The United States argues that Mexico's "conclusion does not withstand the application of logic."<sup>226</sup> According to the United States, "[i]f imports were simultaneously present before the order and imports were simultaneously present after the order, it is unclear how Mexico arrives at the conclusion that imports would *not* be simultaneously present if the order were revoked."<sup>227</sup>

156. As we have stated above, an investigating authority is *not* required, under Article 11.3 of the *Anti-Dumping Agreement*, to make a separate threshold finding regarding simultaneous presence of imports. We also note that "simultaneous presence" was only one of several factors that the USITC examined in deciding to conduct a cumulative assessment of imports. As we understand it, the USITC's decision to cumulate was based mainly on an analysis of four factors: (i) whether subject imports from any of the subject countries were likely to have an adverse impact on the domestic industry; (ii) whether the imports from Argentina, Italy, Korea, Japan, and Mexico, and the domestic like products, are fungible; (iii) whether the imports from Argentina, Italy, Korea, Japan, and Mexico, and the domestic like products, would likely be sold through similar channels of distribution if the orders were revoked; and (iv) whether the imports from all the subject countries and the domestic like products would be sold in the same geographic markets and simultaneously be present in the market if the orders were revoked.

157. With respect to simultaneous presence and sales in the same geographic market, the USITC found that "[e]vidence gathered ... indicates that most large distributors are headquartered in the Houston, Texas, area, though they may have supply depots in other parts of the country."<sup>228</sup> The USITC further found that "[t]here is some division of distribution by geographic area, but most distributors sell nationwide."<sup>229</sup> Moreover, "[i]mporters similarly reported selling throughout the continental United States."<sup>230</sup> We fail to see why the USITC could not rely on this information in the context of examining the appropriateness of cumulating subject imports.

158. Mexico suggests that the United States did not conduct "a prospective analysis of what is likely to happen if the order were revoked".<sup>231</sup> We disagree. In our view, the information collected by the USITC to support its conclusion regarding simultaneous presence of imports, which we

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<sup>226</sup>United States appellee's submission, para. 27.

<sup>227</sup>*Ibid.* (original emphasis)

<sup>228</sup>Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico—Investigation Nos. 701-TA-364 and 731-TA-711 and 713-616 (Review): Determination and Views of the Commission, USITC Publication 3434 (June 2001) (Exhibit MEX-20 submitted by Mexico to the Panel) (the "USITC's Sunset Determination"), p. 13. (footnote omitted)

<sup>229</sup>USITC's Sunset Determination, p. 13.

<sup>230</sup>*Ibid.*

<sup>231</sup>Mexico's appellant's submission, para. 87 (referring to Appellate Body Report, *US – Carbon Steel*, para. 88).

acknowledge relates to *current* market conditions, is relevant as a basis to draw reasoned conclusions regarding likely *future* market conditions and to determine "what is likely to happen if the order were revoked." The fact that the USITC referred, for instance, to data showing that most distributors and importers sell "nationwide", does not, taken alone, mean that the USITC's assessment was not "prospective".<sup>232</sup> We recall the Appellate Body's finding in *US – Oil Country Tubular Goods Sunset Reviews* that "[a] sunset review determination, although 'forward-looking', is to be based on existing facts as well as projected facts."<sup>233</sup> As we see it, in this case, the USITC conducted such a prospective analysis based on inferences drawn from the evidence on the record.

159. For all these reasons, we do not agree with Mexico that the USITC's approach "does not reflect a prospective analysis, based on positive evidence, of whether imports from the five cumulated countries were likely to be simultaneously present in the market in the event of termination" of the anti-dumping duty order.<sup>234</sup> As the Appellate Body found in *US – Oil Country Tubular Goods Sunset Reviews*, "it does not follow from the fact that sunset reviews evaluate *likelihood* of injury that an investigating authority will not have an evidentiary basis for considering whether cumulation is appropriate in a given case."<sup>235</sup>

#### 4. The Standard Applied by the USITC

160. Regarding the standard applied by the USITC for determining simultaneous presence of imports in the domestic market, Mexico points to the following USITC findings:

Nothing in the record of these reviews suggests that if the orders are revoked subject imports and the domestic like product *would not be simultaneously* present in the domestic market.

*Therefore, we conclude that there likely would be a reasonable overlap of competition* between the subject imports and the domestic like product, and among the subject imports themselves, if the orders are revoked.<sup>236</sup> (emphasis added by Mexico; footnote omitted)

161. According to Mexico, these statements demonstrate that the USITC "did not apply the legal standard required by Article 11.3 in connection with its assessment of likelihood of simultaneity."<sup>237</sup>

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<sup>232</sup>Mexico's appellant's submission, para. 87.

<sup>233</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 299. (footnote omitted)

<sup>234</sup>Mexico's appellant's submission, para. 91.

<sup>235</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 299. (original emphasis)

<sup>236</sup>Mexico's appellant's submission, para. 93 (quoting USITC's Sunset Determination, p. 14).

<sup>237</sup>*Ibid.*, para. 94.

In Mexico's view, "[b]y requiring a demonstration that the imports 'would not' be simultaneously in the market, the [USITC] used a standard that is inconsistent with Article 11.3 of the Anti-Dumping Agreement."<sup>238</sup> Mexico adds that "the mere absence of contradictory information is not positive evidence of what is likely to happen."<sup>239</sup>

162. Referring to the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*, the United States argues that there is no "likelihood of simultaneity" standard, as Mexico suggests.<sup>240</sup> The United States adds that the USITC determination focused on the existence of simultaneity before and after the order was imposed, and, in the absence of contrary evidence, it was reasonable for the USITC to conclude that "simultaneous presence of the subject imports would continue if the order were revoked."<sup>241</sup>

163. Mexico has misunderstood the Appellate Body Report in *US – Oil Country Tubular Goods Sunset Reviews*. In that case, the Appellate Body found that "the 'likely' standard of Article 11.3 applies to the overall determinations regarding dumping and injury" and that "it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury."<sup>242</sup> Even assuming, *arguendo*, that it might apply to the USITC's "assessment of likelihood of simultaneity"<sup>243</sup>, we do not agree with Mexico that the USITC used a standard that is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* "[b]y requiring a demonstration that the imports 'would not' be simultaneously in the market".<sup>244</sup> Although the USITC made reference to the fact that nothing in the Panel record indicates that the products would not be simultaneously present, it cited other reasons as well. As noted above, the USITC found, *inter alia*, that "[e]vidence gathered ... indicates that most large distributors are headquartered in the Houston, Texas, area, though they may have supply depots in other parts of the country" and that, although "[t]here is some division of distribution by geographic area, ... most distributors sell nationwide."<sup>245</sup> The USITC further observed that "[i]mporters similarly reported selling throughout the continental United States."<sup>246</sup>

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<sup>238</sup>Mexico's appellant's submission, para. 94.

<sup>239</sup>*Ibid.* (footnote omitted)

<sup>240</sup>United States' appellee's submission, para. 60 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 323).

<sup>241</sup>*Ibid.*

<sup>242</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 323 (quoted in United States' appellee's submission, para. 60).

<sup>243</sup>Mexico's appellant's submission, para. 94.

<sup>244</sup>*Ibid.*

<sup>245</sup>USITC's Sunset Determination, p. 13.

<sup>246</sup>*Ibid.*

164. We understand Mexico to argue that the USITC's ultimate conclusion was based on no more than the USITC's analysis of "simultaneous presence". As noted earlier, this does not appear to be the case.<sup>247</sup> Instead, as we understand it, the USITC used its analysis of "fungibility", "channels of distribution", and "simultaneous presence" to support its ultimate conclusion that "there likely would be a reasonable overlap of competition between the subject imports and the domestic like product" if the orders were revoked.<sup>248</sup> The USITC based this analysis on data relating to current market conditions and on inferences it drew from that data. We do not, therefore, agree with Mexico that the USITC had only a "mere absence of contradictory information" upon which to rely.<sup>249</sup>

5. Alleged Requirement to Identify a Time-frame within which Imports Would Be Simultaneously Present

165. We turn next to Mexico's contention that the USITC's likelihood-of-injury determination is inconsistent with Article 11.3 "because [the USITC] failed to identify a time-frame within which subject imports would be simultaneously present in the U.S. market and the corresponding likely injury would take place."<sup>250</sup>

166. On its face, Article 11.3 does not establish a requirement for an investigating authority to specify the time-frame within which the "simultaneous presence" of subject imports and the corresponding likely injury would occur. As the Appellate Body found in *US – Oil Country Tubular Goods Sunset Reviews*, "the mere fact that the timeframe of an injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination."<sup>251</sup> The Appellate Body noted in that case that a determination of likelihood-of-injury "can be properly reasoned and rest on a sufficient factual basis even though the timeframe for the [likelihood-of-injury] determination is not explicitly mentioned."<sup>252</sup> As long as a likelihood-of-injury determination rests on a sufficient factual basis, the mere fact that an investigating authority does not specify the time-frame within which the "simultaneous presence" of subject imports and the corresponding injury would be likely to occur, does not, in our view, undermine that determination. Therefore, we do not agree with Mexico that the USITC's likelihood-of-injury determination is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the USITC did not indicate the time period that it considered to be applicable for its likelihood-of-injury determination.

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<sup>247</sup>*Supra*, para. 156.

<sup>248</sup>USITC's Sunset Determination, p. 14.

<sup>249</sup>Mexico's appellant's submission, para. 86.

<sup>250</sup>*Ibid.*, p. 27, heading II.B.2.c.iv.

<sup>251</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 364.

<sup>252</sup>*Ibid.*

6. Applicability of Article 3.3 of the *Anti-Dumping Agreement*

167. We now return to the merits of the "third cumulation argument" of Mexico.<sup>253</sup> Mexico argues that, having "decided to cumulate Mexican imports with imports from the other four countries that were cumulated in the original investigation", the USITC "was required to do so consistently with the requirements of Article 3.3", regardless of whether that provision "appl[ies] directly to sunset reviews".<sup>254</sup> Mexico purports to find support for its position in the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body stated that, "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."<sup>255</sup> We understand Mexico to suggest that what is relevant for calculation of dumping margins is also relevant for determination of injury.

168. The United States refers to the finding of the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* that Article 3.3 of the *Anti-Dumping Agreement* does not apply to sunset reviews. The United States emphasizes that, "if Article 3.3 does not apply, then neither do its conditions."<sup>256</sup>

169. Article 3.3 of the *Anti-Dumping Agreement* provides, in relevant part, that:

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 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.

170. The Appellate Body has previously found that Article 3.3 "speaks to the situation '[w]here imports of a product from more than one country are simultaneously subject to anti-dumping investigations'"<sup>257</sup>; that the "text of Article 3.3 plainly limits its applicability to original

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<sup>253</sup>See *supra*, footnote 194.

<sup>254</sup>Mexico's appellant's submission, para. 103 (quoting Panel Report, para. 7.150).

<sup>255</sup>*Ibid.*, para. 101 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>256</sup>United States' appellee's submission, para. 22 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 301).

<sup>257</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 294. (emphasis added)

investigations"<sup>258</sup>; and that "the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews."<sup>259</sup> Moreover, the Appellate Body has observed that "original investigations and sunset reviews are distinct processes with different purposes. The disciplines applicable to original investigations cannot, therefore, be automatically imported into review processes."<sup>260</sup> It is clear from these statements that Article 3.3 does not apply *per se* in sunset reviews under Article 11.3.

171. We do not, however, suggest that, when an authority chooses to cumulate imports in a likelihood-of-injury determination under Article 11.3, it is never necessary for it to determine whether such a cumulative assessment is appropriate in the light of the conditions of competition in the market place. In particular cases, a cumulative assessment of the effects of the imports may be found to be inappropriate and, therefore, inconsistent with the fundamental requirement that a determination rest on a sufficient factual basis and reasoned and adequate conclusions.<sup>261</sup> However, this fundamental requirement derives from the obligations under Article 11.3 itself, and not from the conditions specified in Article 3.3.

172. Referring to the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, Mexico argues that, having "decided to cumulate Mexican imports with imports from the other four countries that were cumulated in the original investigation", the USITC "was required to do so consistently with the requirements of Article 3.3".<sup>262</sup> We note, however, that the Appellate Body found in *US – Oil Country Tubular Goods Sunset Reviews* that the "text of Article 3.3 plainly limits its applicability to original investigations"<sup>263</sup>; and that "the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews."<sup>264</sup> The fact that an investigating authority has not undertaken all the analyses detailed in Article 3.3 is not, by itself, sufficient to undermine a determination under Article 11.3.

173. In the light of these considerations, we *uphold* the Panel's findings, in paragraphs 7.150, 7.151, and 8.8 of the Panel Report, that the USITC's decision to conduct a cumulative assessment of

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<sup>258</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 301.

<sup>259</sup>*Ibid.*, para. 302.

<sup>260</sup>*Ibid.*, para. 359 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 106-107; and Appellate Body Report, *US – Carbon Steel*, para. 87). (footnote omitted)

<sup>261</sup>See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

<sup>262</sup>Mexico's appellant's submission, para. 103, and footnote 80 to para. 101 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>263</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 301.

<sup>264</sup>*Ibid.*, para. 302.

imports in making its likelihood-of-injury determination was not inconsistent with Articles 3.3 and 11.3 of the *Anti-Dumping Agreement*.

## VI. Margins of Dumping in Sunset Reviews

174. Having found that the USDOC's likelihood-of-dumping determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*<sup>265</sup>, the Panel exercised judicial economy with regard to Mexico's claims against that determination under Article 2 of that Agreement. The Panel added 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 made any findings concerning Article 2 even if we had reached a different conclusion on the adequacy of USDOC's consideration of the evidence."<sup>266</sup> In this respect, the Panel referred to the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body stated that:

... 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."<sup>267</sup>

175. The Panel further explained that:

... with respect to Mexico's claims concerning the margin of dumping reported to the USITC as the margin likely to prevail, we recall that ... 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.<sup>268</sup>

176. On appeal, Mexico argues that the Panel acted inconsistently with Article 11 of the DSU in exercising judicial economy with regard to Mexico's claims under Article 2 of the *Anti-Dumping Agreement*. Mexico alleges that, in doing so, "the Panel reasoned that, because the Anti-Dumping

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<sup>265</sup>Panel Report, para. 7.80.

<sup>266</sup>*Ibid.*, para. 7.81.

<sup>267</sup>*Ibid.*, para. 7.82 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>268</sup>*Ibid.*, para. 7.83.

Agreement does not require authorities to determine and report a margin likely to prevail, an authority's determination of a margin likely to prevail cannot contravene the Anti-Dumping Agreement."<sup>269</sup>

177. The United States agrees with the Panel's conclusion that the *Anti-Dumping Agreement* does not require investigating authorities to determine or consider a "margin likely to prevail" in the context of a likelihood-of-dumping determination. In this respect, the United States notes that "[t]he Appellate Body has recognized that there is 'no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping.'"<sup>270</sup> Accordingly, the United States agrees with the Panel that, "[i]n a case such as this one, where the United States acknowledges that USDOC explicitly relied solely on import volumes in making its determination, ... there can be no basis for a finding of violation of Article 2" of the *Anti-Dumping Agreement*.<sup>271</sup>

178. In our view, the Panel did not commit an error of law in deciding to exercise judicial economy with regard to the issue of whether the USDOC determination was consistent with Article 2, as it had already found that determination to be inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. In *Canada – Wheat Exports and Grain Imports*, the Appellate Body found that the practice of judicial economy "allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."<sup>272</sup> Mexico has not explained why an additional finding on Mexico's claim under Article 2 of the *Anti-Dumping Agreement* is necessary to resolve the dispute.<sup>273</sup> And we find no such need.<sup>274</sup>

179. In any event, we note that Mexico's arguments are premised on the assumption that the United States "used" a dumping margin in the context of the sunset review at issue.<sup>275</sup> Thus, Mexico submits, for instance, that the USDOC'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 [USITC],

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<sup>269</sup>Mexico's appellant's submission, para. 132.

<sup>270</sup>United States' appellee's submission, para. 69 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>271</sup>Panel Report, para. 7.82 (quoted in United States' appellee's submission, para. 70).

<sup>272</sup>Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. (original emphasis; footnote omitted)

<sup>273</sup>See Appellate Body Report, *Australia – Salmon*, para. 223.

<sup>274</sup>For the same reason, we also do not find it necessary to consider Mexico's arguments, in paras. 119-126 of its appellant's submission, related to Articles 1 and 18.3 of the *Anti-Dumping Agreement*.

<sup>275</sup>Mexico's response to questioning at the oral hearing. See also Mexico's appellant's submission, para. 120.

tainted both the [USDOC's] and the [USITC's] likelihood determinations."<sup>276</sup> Although the USDOC "calculated" dumping margins for OCTG, the Panel found that "it is clear that USDOC *did not rely* on historical dumping margins ... , but solely on import volumes"<sup>277</sup> in making its determination of likelihood of continuation or recurrence of dumping in the sunset review at issue. Hence, we do not see how a margin that the USDOC did not "rely upon" could taint the USITC's and the USDOC's determinations in the context of the OCTG sunset review at issue.

180. Moreover, the Panel's finding that the USDOC did *not* rely on historical dumping margins is a factual finding. No reason was given to us why we should "interfere"<sup>278</sup> with this finding by the Panel. Nor has Mexico pointed to any evidence in the Panel record to suggest that the USITC relied on or otherwise factored in the margin of dumping likely to prevail that was reported to it by the USDOC. Also, the Panel Report contains no factual findings regarding this issue.

181. As a separate matter, we refer to Mexico's characterization of the finding in paragraph 127 of the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*. According to Mexico, the Appellate Body clarified in that appeal that, when an investigating authority "uses a specific methodology that the Anti-Dumping Agreement does not require, the authority must not apply that methodology in a manner that otherwise conflicts with the Agreement."<sup>279</sup> In fact, the Appellate Body found in *US – Corrosion-Resistant Steel Sunset Review* that, "should investigating authorities *choose to rely upon* dumping margins [in the context of a sunset review determination], the calculation of these margins must conform to the disciplines of Article 2.4."<sup>280</sup> Thus, the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review* does not stand for the proposition that a WTO-inconsistent methodology used for the calculation of a dumping margin will, in and of itself, taint a sunset review determination under Article 11.3. The only way the use of such a methodology would render a sunset review determination inconsistent with Article 11.3 is if the investigating authority *relied upon* that margin of dumping to support its likelihood-of-dumping or likelihood-of-injury determination.

182. In our view, it has not been established that the Panel acted inconsistently with Article 11 of the DSU in not addressing Mexico's claims under Article 2 of the *Anti-Dumping Agreement*.

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<sup>276</sup>Mexico's appellant's submission, para. 125.

<sup>277</sup>Panel Report, para. 7.81. (emphasis added)

<sup>278</sup>See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170.

<sup>279</sup>Mexico's appellant's submission, paras. 114-115 (referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

<sup>280</sup>Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127. (emphasis added)

## VII. The "Legal Basis" for Continuing Anti-Dumping Duties

183. The Panel found, in paragraphs 7.80 and 8.2 of the Panel Report, that the USDOC acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in its review of the anti-dumping duty order on OCTG from Mexico. The United States has not appealed this finding. However, Mexico argues that the Panel did not fulfil its obligations under Article 11 of the DSU because it failed to find, in addition to its findings in paragraphs 7.80 and 8.2 of the Panel Report, that "the United States had no legal basis to continue its anti-dumping measure on OCTG from Mexico beyond its scheduled expiration date, i.e., five years from its imposition."<sup>281</sup> Mexico requests that we make such a finding.<sup>282</sup> In response to questioning at the oral hearing, Mexico clarified that it does not request us to make a suggestion regarding implementation pursuant to the second sentence of Article 19.1 of the DSU.

184. As we understand it, the finding that Mexico asked the Panel to make, and is requesting us to make, is another way of stating that the United States acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement*, with the added consequence that the anti-dumping duty order at issue must therefore be terminated immediately. In our view, it was within the Panel's discretion to decide whether or not to adopt the formulation proposed by Mexico in making its findings.

185. Mexico contends that, if a Member has acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in conducting a sunset review of an anti-dumping duty, the Member has no choice but to terminate the duty immediately.<sup>283</sup> According to Mexico, if a new sunset review is undertaken in such a case, it would necessarily entail a further inconsistency with Article 11.3 because that provision imposes a five-year time-limit on the continuation of anti-dumping duties.<sup>284</sup> Therefore, Mexico submits that, upon adoption of the Panel Report, the only way for the United States to implement the recommendations and rulings of the DSB regarding the anti-dumping duties on OCTG from Mexico would be to terminate those duties immediately.<sup>285</sup>

186. Mexico is correct that Article 11.3 of the *Anti-Dumping Agreement* imposes an obligation on Members to terminate anti-dumping duties at the end of five years, except where they choose to conduct a sunset review as envisaged by that provision, or, having conducted such a review, they determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping

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<sup>281</sup>Mexico's appellant's submission, para. 134 (referring to Panel Report, para. 6.22).

<sup>282</sup>*Ibid.*, para. 146.

<sup>283</sup>*Ibid.*, para. 139.

<sup>284</sup>*Ibid.*, para. 142.

<sup>285</sup>*Ibid.*, para. 145.

and injury. The Appellate Body elaborated on these requirements in *US – Corrosion-Resistant Steel Sunset Review*, as Mexico indicates in its submission.<sup>286</sup>

187. The fact that the USDOC acted inconsistently with the requirements of Article 11.3 in its likelihood-of-dumping determination does not necessarily imply that the underlying anti-dumping duties must be terminated immediately. The mere fact that Article 11.3 sets a temporal limit for termination of an anti-dumping duty, in the absence of a review leading to a WTO-consistent determination under that Article for its continuation, does not affect the other provisions of the DSU governing the implementation of the recommendations and rulings of the DSB, including, *inter alia*, the means of implementation and the reasonable period of time accorded to the implementing Member for implementation.

188. Mexico submits that, in declining to make a finding regarding the absence of a legal basis for the anti-dumping duties on OCTG from Mexico, the Panel failed to make "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements", as required by Article 11 of the DSU.<sup>287</sup> Mexico asserts that the Panel had to make the finding requested by Mexico to enable the DSB to make "sufficiently precise recommendations and rulings" in relation to implementation.<sup>288</sup> In this context, Mexico relies, in particular, on the Appellate Body Report in *EC – Export Subsidies on Sugar*.<sup>289</sup>

189. The facts of the present appeal are quite different from those in *EC – Export Subsidies on Sugar*. First, the Appellate Body's finding of non-compliance with Article 11 of the DSU in that dispute related to the obligation of panels to make a recommendation under Article 4.7 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") regarding the time period for withdrawal of a prohibited subsidy.<sup>290</sup> The *Anti-Dumping Agreement* has no provision similar to Article 4.7 of the *SCM Agreement* that panels must follow. The applicable provision in the present dispute regarding suggestions for implementation is the second sentence of Article 19.1 of the

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<sup>286</sup>Mexico's appellant's submission, para. 137 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 104).

<sup>287</sup>*Ibid.*, para. 140.

<sup>288</sup>*Ibid.*, paras. 140 and 145 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 180).

<sup>289</sup>*Ibid.*, para. 141 (quoting Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 328 and 331).

<sup>290</sup>Article 4.7 of the *SCM Agreement* provides:

If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn. (emphasis added)

DSU<sup>291</sup>, which Mexico does not rely on in this appeal, and which, in any event, does not oblige panels to make such a suggestion. Secondly, the panel's error in *EC – Export Subsidies on Sugar* was in wrongly exercising judicial economy—that is, failing to rule on a claim before it. The Panel in the present dispute did not exercise judicial economy with respect to Mexico's claim that the USDOC acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in the sunset review of the anti-dumping duty order on OCTG from Mexico. On the contrary, as noted above, the Panel upheld Mexico's claim of inconsistency.<sup>292</sup>

190. For these reasons, we *find* that the Panel did not fail to comply with Article 11 of the DSU in declining to make a specific finding that the United States had no legal basis to continue the anti-dumping duties on OCTG from Mexico beyond the five-year period established by Article 11.3 of the *Anti-Dumping Agreement*.

#### **VIII. Consistency of the Sunset Policy Bulletin "As Such"**

191. The United States appeals the Panel's finding, in paragraphs 7.64 and 8.1 of the Panel Report, that Section II.A.3 of the SPB is, *as such*, inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. The United States contends that the Panel failed to apply the correct standard in its assessment of the consistency of the SPB, as such, with Article 11.3, and, in doing so, the Panel also failed to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case", as required by Article 11 of the DSU. The United States also submits, as part of its appeal, that the Panel erred in stating, in paragraph 6.28 of the Panel Report, that Mexico had established a *prima facie* case that the SPB is, as such, inconsistent with Article 11.3.

##### *A. The Panel's Articulation of the Standard*

192. We begin our analysis by examining the standard articulated and applied by the Panel. Based on its own analysis, and relying upon the Reports of the Appellate Body in *US – Carbon Steel*, *US – Corrosion-Resistant Steel Sunset Review*, and *US – Oil Country Tubular Goods Sunset Reviews*, the

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<sup>291</sup>Article 19.1 of the DSU provides:

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. (emphasis added; footnotes omitted)

<sup>292</sup>Panel Report, paras. 7.80 and 8.2.

Panel articulated the standard that it would apply in assessing the consistency of the SPB, as such, with Article 11.3 of the *Anti-Dumping Agreement* in these terms:

- (a) in relation to the requirements of Article 11.3:

... 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[s] *without the possibility of consideration of all the facts and circumstances*. ... [I]f 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.<sup>293</sup> (emphasis added)

- (b) in relation to the "qualitative assessment":

... it seems clear that we must undertake a qualitative assessment of the evidence concerning USDOC's sunset review determinations. ...

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 ... .

... 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.<sup>294</sup> (footnote omitted)

... 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.<sup>295</sup>

193. The parties are broadly in agreement that the Panel's articulation of the standard to be applied is substantially consistent with previous Appellate Body rulings, except that the United States is of the

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<sup>293</sup>Panel Report, para. 7.27. See also Panel Report, paras. 7.25-7.26.

<sup>294</sup>*Ibid.*, paras. 7.49-7.51.

<sup>295</sup>*Ibid.*, para. 7.49 (quoting, as guidance, Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 209).

view that the Panel should also have stressed, following previous Appellate Body rulings, these elements: whether the probative value of other factors might have outweighed that of the factual scenarios in Section II.A.3 of the SPB, and whether it is the SPB that "required" the USDOC to arrive at the determinations it did in individual cases.<sup>296</sup> Having said that, the United States asserts that it is in the *application* of the standard that the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case.

B. *The Panel's Application of the Standard*

194. We begin our analysis with the text of the SPB in issue in this dispute. Section II.A.3 of the SPB provides:

II. Sunset Reviews in Antidumping Proceedings

A. *Determination of Likelihood of Continuation or Recurrence of Dumping*

...

3. Likelihood of Continuation or Recurrence of Dumping

...

[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—

- (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.<sup>297</sup>

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<sup>296</sup>United States' response to questioning at the oral hearing.

<sup>297</sup>We note that "Mexico does not challenge the 'good cause' aspects of US law". (Panel Report, footnote 48 to para. 7.34; and confirmed by Mexico in response to questioning at the oral hearing)

195. At the outset, we note Mexico's argument that the Panel's conclusions and findings in paragraphs 7.53 to 7.64 of the Panel Report, in making its "qualitative assessment" of how the USDOC perceives the factual scenarios of the SPB, are "factual findings". Mexico also argues that the United States had ample opportunity to rebut the evidence adduced by Mexico at the Panel stage, but chose not to do so, and that, therefore, these "factual findings" are outside the scope of appellate review.<sup>298</sup> We disagree. The Panel's conclusions and findings in paragraphs 7.53 to 7.64 of the Panel Report involve a "legal characterization of ... facts"<sup>299</sup> in the Panel's determination of the consistency of the SPB, as such, with the requirements of Article 11.3 of the *Anti-Dumping Agreement*. They are, therefore, subject to our review.

196. Before we proceed to review the Panel's application of the standard it articulated, we consider two matters that, in our view, are important for examining the "qualitative assessment" carried out by the Panel. First, the Appellate Body emphasized in *US – Oil Country Tubular Goods Sunset Reviews* that, in making a "qualitative assessment" of individual determinations, a panel must determine whether the factual scenarios of the SPB are regarded as "determinative/conclusive" and "mechanistically applied" by the USDOC "to the exclusion of other factors", or "in disregard of other factors", or "even though the probative value of other factors might have outweighed that of the identified scenario."<sup>300</sup> The relevance and probative value of other factors, and the USDOC's treatment of them—whether the USDOC ignored them or did not treat them objectively—are crucial for a "qualitative assessment" of individual determinations.

197. Secondly, each of the three factual scenarios of the SPB comprises variations depending, in particular, on the duration and magnitude of dumping, and the trends in volume of imports, with or without dumping (including cessation of imports), after the issuance of the anti-dumping duty order. Such variations will determine whether it is a case of likelihood of *continuation* of dumping or a *recurrence* of dumping, and this, in turn, may have a bearing on the nature and extent of evidence required for an objective determination and who bears the onus of introducing the evidence.

198. For example, under scenario (a), dumping may have continued during the entire period between the issuance of the anti-dumping duty order and the time of the sunset review, possibly with significant import volumes and dumping margins. Alternatively, dumping may have continued for a substantial period after the issuance of the order and may have ceased only a short time before the sunset review was undertaken. In such cases, unless the respondent party adduces evidence and explains how its pricing behaviour will change or why its imports will cease or not recur, it may be

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<sup>298</sup>Mexico's appellee's submission, paras. 48-54 and 59-63.

<sup>299</sup>Appellate Body Report, *EC – Hormones*, para. 116.

<sup>300</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 209 and 212.

open for an objective investigating authority to conclude that dumping is likely to continue or recur if the duty is revoked.

199. In contrast, if the dumping had ceased soon after the issuance of the order, and there was no dumping or there were no imports for a substantial period before the sunset review, the investigating authority will need credible evidence to come to the conclusion that dumping will "recur" if the anti-dumping duty order is revoked. A respondent party may have the responsibility to introduce relevant evidence in its favour, but the investigating authority also has a duty to seek information to ensure that its determination rests on a sufficient evidentiary foundation. An affirmative determination cannot rest merely on a presumption, as envisaged under scenario (b) or (c), that the cessation of dumping or of imports was due *solely* to the anti-dumping duty order.

200. Likewise, scenario (c) also could have many variations within it. This scenario deals with situations where imports continue, but without dumping, and an affirmative determination under this scenario is therefore a determination that dumping will "recur" if the anti-dumping duty order is revoked. The underlying presumption in scenario (c) is that, if import volumes had declined significantly, it was due solely to the anti-dumping duty order, and that, if the order were revoked, the company concerned would resort to dumping to increase its import volumes. Such a presumption cannot be the sole basis for a determination of "recurrence" of dumping. A company's strategy and ability to increase or decrease its exports to particular markets depend on a variety of market conditions, such as, in particular, the opportunities available in different markets and the competitive conditions in the market place. Therefore, unless all relevant factors are taken into account, there may not be an objective evaluation in such cases of the causes of the variations in import volumes in the importing Member's market.

201. Thus, the factual scenarios of the SPB must not be mechanically applied. The responding parties do have a responsibility to submit information and evidence in their favour, particularly about their pricing behaviour, import volumes, and dumping margins. But the investigating authority has a duty to seek out information on relevant factors and evaluate their probative value in order to ensure that its determination is based not on presumptions, but on a sufficient factual basis.

202. Keeping these considerations in mind, we turn to a review of the "qualitative assessment" of the USDOC determinations by the Panel as contained in paragraphs 7.53 to 7.63 of the Panel Report. We agree with the Panel that "[t]he 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."<sup>301</sup>

203. In paragraph 7.53 of the Panel Report, the Panel considered 206 sunset reviews that were "expedited" because "foreign respondent parties either did not participate at all, or did not fully participate in the proceedings".<sup>302</sup> These constituted the bulk of the 232 cases in which the USDOC made affirmative determinations. The Panel reviewed "a sampling" of these 206 cases and stated that, "in each of those we considered, USDOC's final affirmative determination ... was based on one of the three affirmative scenarios."<sup>303</sup> The Panel Report does not reveal the size of the sample, which individual determinations it reviewed, which of the factual scenarios were involved, or whether other factors ought to have been taken into account in any of them. More importantly, the Panel merely speculated that "there may well have been other facts that might [have been] relevant or probative [in these 206 cases], but they were not before USDOC, and thus were not addressed."<sup>304</sup> Therefore, even in respect of the "sampling" of cases that the Panel reviewed, the Panel Report does not reveal whether the USDOC excluded or disregarded evidence or factors that might have outweighed the probative value of the factual scenarios of the SPB. Nor does the Panel's analysis indicate whether, in those cases, the USDOC wrongly relied on one of the scenarios in the SPB, despite the evidence before it. It is quite possible that a number of these 206 cases were cases where the dumping had continued for the entire life of the anti-dumping duty order or for a substantial period after the issuance of the order. In such cases, unless the respondent interested parties had adduced evidence to show that the dumping would not continue or recur, the USDOC could well have had reason to make an affirmative determination. We simply do not know. In respect of these 206 cases, the Panel Report does not reveal that the USDOC's affirmative determinations, although based on one of the factual scenarios, were made in disregard or to the exclusion of other factors because of the SPB.

204. Leaving out five determinations of "suspended" investigations, which the Panel considered irrelevant to its task, the Panel proceeded to examine the remaining 21 of the 232 affirmative determinations.<sup>305</sup> In paragraphs 7.56 to 7.59 of the Panel Report, the Panel addressed 15 of these cases in which, according to it, the "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*."<sup>306</sup>

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<sup>301</sup>Panel Report, para. 7.51. (footnote omitted) In paragraph 7.52 of the Panel Report, the Panel explained that, of the 306 cases covered by Exhibits MEX-62 and MEX-65, it did not take into account 74 cases in which the USDOC revoked the anti-dumping duty order due to a lack of domestic industry participation.

<sup>302</sup>*Ibid.*, para. 7.53.

<sup>303</sup>*Ibid.*

<sup>304</sup>*Ibid.*

<sup>305</sup>*Ibid.*, paras. 7.54-7.55.

<sup>306</sup>*Ibid.*, para. 7.56. (emphasis added)

In seven of these cases, the Panel stated that "there *appears* to have been no arguments or information put before USDOC by respondent interested parties concerning other factors which might be relevant".<sup>307</sup> However, the Panel did not explain the facts of these cases, including matters such as the period in which dumping continued, and the trends in the volume of imports and dumping margins. Nor does the Panel's analysis reveal whether other factors ought to have been taken into account by the USDOC on its own initiative.

205. In five other cases, the Panel concluded that foreign respondents "*appear* to have made arguments concerning the relevance of the scenarios and other evidence" and the "USDOC *may* have considered the existence of facts fitting scenario (a) as determinative."<sup>308</sup> The Panel stated that, in one case, the USDOC indicated that it had not considered arguments regarding other factors because it had based its results on the continuation of dumping. However, in relation to the other four cases, the Panel did not explain whether the USDOC took into account the arguments submitted by foreign respondents, or whether it properly evaluated those arguments or simply followed the SPB scenarios to the exclusion of other evidence.

206. In the remaining three of the 15 "scenario (a)" cases, the Panel found that the USDOC rejected foreign respondents' arguments that good cause existed to consider other factors.<sup>309</sup> However, this alone does not demonstrate that the SPB instructs the USDOC to treat dumping margins and import volumes as conclusive of the likelihood of dumping, to the exclusion of other factors. In order to determine whether the USDOC made a final affirmative determination in these three cases due to the SPB, it would have been necessary for the Panel to have analyzed the USDOC's reasoning, in the light of the specific facts of the cases and the arguments of the foreign respondents. The Panel Report contains no such analysis. The Panel also stated, in relation to these three cases, that "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."<sup>310</sup> Yet, as the Panel itself noted<sup>311</sup>, the significance for its analysis of the determinations of the USDOC lies not in their results, but whether the USDOC is required to make an affirmative determination when one of the factual scenarios of the SPB is present.

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<sup>307</sup>Panel Report, para. 7.57. (emphasis added)

<sup>308</sup>*Ibid.*, para. 7.58. (emphasis added)

<sup>309</sup>*Ibid.*, para. 7.59.

<sup>310</sup>*Ibid.* (emphasis added)

<sup>311</sup>*Ibid.*, para. 7.51.

207. In paragraph 7.60 of the Panel Report, the Panel turned to four cases in which the "USDOC *appears* to have considered that scenario (c) of the SPB applied".<sup>312</sup> The Panel noted that the USDOC rejected the arguments of foreign respondents in each case, but the Panel did not evaluate whether the USDOC did so solely because of the SPB, or on the basis of a reasoned assessment of the evidence before it. The Panel described as "troubling" the following statement of the USDOC in one of these cases: "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".<sup>313</sup> In relation to another case, the Panel stated that, "despite an asserted willingness in the preliminary phase to consider additional evidence and arguments, USDOC made a final affirmative determination of likelihood, relying on a decline in import volumes, as set out in one of the SPB scenarios."<sup>314</sup> Although the Panel found the outcome of these cases troubling because affirmative determinations were made, the Panel's analysis does not reveal that the evidence before the USDOC was insufficient to lead to an affirmative determination, or that the SPB required the USDOC to make affirmative determinations in the face of contrary evidence.

208. Finally, in paragraph 7.62 of the Panel Report, the Panel addressed two cases in which the USDOC made a negative preliminary determination followed by an affirmative final determination.<sup>315</sup> In relation to one of these cases, the Panel stated that "scenario (c) *appeared* to be relevant".<sup>316</sup> In relation to the other, the Panel said that the USDOC made a final affirmative determination based on continued dumping, "as suggested by SPB scenario (a)".<sup>317</sup> The Panel's analysis does not reveal the nature of the evidence and arguments submitted to the USDOC at the preliminary and final stages and the USDOC's assessment thereof. The fact that the USDOC's final determinations differed from its preliminary determinations does not, without more, suggest that the SPB establishes scenarios that are determinative or conclusive.

209. In summary, having reviewed the 232 determinations in the aforesaid manner in paragraphs 7.53 to 7.63 of the Panel Report, the Panel concluded that the "USDOC has consistently based its determinations in sunset reviews exclusively on the scenarios, to the disregard of other factors."<sup>318</sup> But, as we have explained above, the Panel's analysis does not reveal that the affirmative

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<sup>312</sup>Panel Report, para. 7.60. (emphasis added)

<sup>313</sup>*Ibid.* (quoting Memorandum from Jeffrey May to Robert LaRussa, "Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada; Preliminary Results" (18 February 2000) (Tab 201 of Exhibit MEX-62 submitted by Mexico to the Panel, pp. 6-7)).

<sup>314</sup>*Ibid.* (footnote omitted)

<sup>315</sup>*Ibid.*, para. 7.62.

<sup>316</sup>*Ibid.* (emphasis added)

<sup>317</sup>*Ibid.* (referring to Tab 261 of Exhibit MEX-62 submitted by Mexico to the Panel).

<sup>318</sup>*Ibid.*, para. 7.63. (footnote omitted)

determinations, in the 21 specific cases reviewed by it<sup>319</sup>, were based *exclusively on the scenarios to the disregard of other factors*. Nor does the Panel's review of these cases reveal that the USDOC's affirmative determinations were based solely on the SPB scenarios, when the probative value of other factors might have outweighed that of the identified scenarios. Accordingly, we conclude that the Panel did not conduct a "qualitative assessment" of the USDOC's determination such that the Panel could properly conclude that the SPB requires the USDOC to treat the factual scenarios of Section II.A.3 of the SPB as determinative or conclusive.

210. For these reasons, we *find* that, in assessing the consistency of the SPB, as such, with Article 11.3 of the *Anti-Dumping Agreement*, the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU. Accordingly, we *reverse* the Panel's finding, in paragraphs 7.64 and 8.1 of the Panel Report, that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

211. Having reached this conclusion, we do not address the Panel's statement, in paragraph 6.28 of the Panel Report<sup>320</sup>, that Mexico had established a *prima facie* case that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. As a result of our reversal of the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, that statement is moot and of no legal effect.

## **IX. Mexico's Conditional Appeals**

### *A. The "Standard" for USDOC Determinations in Sunset Reviews*

212. As we have reversed the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, we consider Mexico's request that we find that Section 752(c)(1) of the Tariff Act<sup>321</sup>, the SAA, and the SPB, as such, are inconsistent with Article 11.3 because, "collectively and independently"<sup>322</sup>, they establish a "standard" for USDOC

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<sup>319</sup>The Panel also reviewed a "sampling" of 206 cases, and decided that five cases were not relevant to its task, as mentioned above in paragraphs 203-204.

<sup>320</sup>This paragraph appears in the "Interim Review" section of the Panel Report.

<sup>321</sup>This provision is codified in Section 1675a(c)(1) of Title 19 of the *United States Code* (Exhibit MEX-24 submitted by Mexico to the Panel).

<sup>322</sup>Mexico's appellant's submission, para. 160.

determinations in sunset reviews that is inconsistent with Article 11.3.<sup>323</sup> Mexico argues that the Panel "declined to rule" on this "claim".<sup>324</sup>

213. The Panel found that Section 752(c)(1) of the Tariff Act, by itself, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.<sup>325</sup> Mexico does not appeal this finding *per se*. The Panel regarded the SAA as confirming its reading of the Tariff Act.<sup>326</sup> The Panel did not address the WTO-consistency of the SAA "standing alone", because Mexico "made no independent claims concerning the SAA", and it did not present "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."<sup>327</sup> Finally, the Panel found that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because it "establishes an irrebuttable *presumption* that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping".<sup>328</sup>

214. We have reversed the Panel's finding that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. In these circumstances, we see no merit in Mexico's contention that the Tariff Act, the SAA, and the SPB, "collectively and independently", establish a standard that is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

B. *Article X:3(a) of the GATT 1994*

215. As we have reversed the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, we consider Mexico's request that we find that the United States has failed to administer its laws, regulations, decisions, and rulings in an impartial and reasonable manner as required by Article X:3(a) of the GATT 1994.<sup>329</sup> Mexico contends that Exhibits MEX-62 and MEX-65 submitted by Mexico to the Panel demonstrate "a clear and undeniable pattern of biased and unreasonable decision making by the [USDOC] in its administration of the laws, regulations, decisions, and rulings pertaining to sunset reviews."<sup>330</sup>

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<sup>323</sup>Mexico's appellant's submission, paras. 158 and 160.

<sup>324</sup>Mexico's Notice of Appeal, para. 5(a) (referring to Panel Report, para. 6.6). Mexico does not appeal the Panel's conclusion that Mexico's claim against the "practice" of the USDOC, as such, fell outside its terms of reference. (Mexico's response to questioning at the oral hearing; Panel Report, paras. 7.21 and 8.4)

<sup>325</sup>Panel Report, paras. 7.64 and 7.66.

<sup>326</sup>*Ibid.*, para. 7.38.

<sup>327</sup>*Ibid.*, footnote 49 to para. 7.35.

<sup>328</sup>*Ibid.*, para. 8.1. (emphasis added) See also Panel Report, paras. 7.64 and 7.67.

<sup>329</sup>Mexico's Notice of Appeal, para. 5(b); Mexico's appellant's submission, para. 167.

<sup>330</sup>Mexico's appellant's submission, para. 172.

216. Article X:3(a) of the GATT 1994 provides:

Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

217. Article X:1 of the GATT 1994 refers to "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member".

218. In our view, an assessment of the USDOC's determinations for the purpose of determining whether the USDOC administers United States laws and regulations on sunset reviews in a uniform, impartial, and reasonable manner in accordance with Article X:3(a) of the GATT 1994 entails an inquiry much different from that involved in determining whether the SPB instructs the USDOC to treat certain scenarios as conclusive or determinative contrary to Article 11.3 of the *Anti-Dumping Agreement*. Therefore, in the absence of any consideration by the Panel of this claim, we are not in a position to rule on it.

## **X. Findings and Conclusions**

219. For the reasons set forth in this Report, the Appellate Body:

(a) in relation to causation:

- (i) finds that there is no requirement to establish the existence of a causal link between likely dumping and likely injury, as a matter of legal obligation, in a sunset review determination under Article 11.3 of the *Anti-Dumping Agreement* and that, therefore, the USITC was not required to demonstrate such a link in making its likelihood-of-injury determination in the sunset review at issue in this dispute; and
- (ii) finds that the Panel did not act inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments in this regard;

(b) in relation to cumulation:

- (i) upholds the Panel's findings, in paragraphs 7.150, 7.151, and 8.8 of the Panel Report, that the USITC's decision to conduct a cumulative assessment of imports in making its likelihood-of-injury determination was not inconsistent with Articles 3.3 and 11.3 of the *Anti-Dumping Agreement*; and

- (ii) finds that the Panel did not act inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments in this regard;
- (c) in relation to dumping margins:
  - (i) finds that the Panel did not act inconsistently with Article 11 of the DSU in not addressing Mexico's claim under Article 2 of the *Anti-Dumping Agreement*; and
  - (ii) finds it unnecessary to rule on Mexico's claim relating to Article 2 of the *Anti-Dumping Agreement*;
- (d) finds that the Panel did not act inconsistently with Article 11 of the DSU in declining to make a specific finding that the United States had no legal basis to continue the anti-dumping duties on OCTG from Mexico beyond the five-year period established by Article 11.3 of the *Anti-Dumping Agreement*;
- (e) in relation to the SPB:
  - (i) finds that, in assessing the consistency of the SPB, as such, with Article 11.3 of the *Anti-Dumping Agreement*, the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU;
  - (ii) reverses the Panel's finding, in paragraphs 7.64 and 8.1 of the Panel Report, that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and
  - (iii) finds that the Panel's statement, in paragraph 6.28 of the Panel Report, that Mexico had established a *prima facie* case that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, is moot and of no legal effect; and
- (f) having reversed the Panel's finding that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*:
  - (i) finds no merit in the argument that the Tariff Act, the SAA, and the SPB, "collectively and independently", establish a standard that is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

- (ii) finds that it is not in a position to rule on Mexico's claim that the USDOC does not administer United States laws and regulations on sunset reviews in a uniform, impartial, and reasonable manner in accordance with Article X:3(a) of the GATT 1994.

220. As there is no appeal from the Panel's finding that the USDOC's likelihood-of-dumping determination in the sunset review at issue in this dispute was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, we do not make any *additional* recommendation regarding that finding. Given that we have not found in this Report that the United States acted inconsistently with any of its WTO obligations, we make no recommendation to the DSB pursuant to Article 19.1 of the DSU in this regard.

Signed in the original in Geneva this 18th day of October 2005 by:

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A.V. Ganesan  
Presiding Member

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John Lockhart  
Member

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Yasuhei Taniguchi  
Member

Annex I

**WORLD TRADE  
ORGANIZATION**

**WT/DS282/6**  
10 August 2005

(05-3559)

Original: Spanish

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

Notification of an Appeal by Mexico under Article 16.4 and Article 17 of the Understanding  
on Rules and Procedures Governing the Settlement of Disputes (DSU) and  
Rule 20(1) of the Working Procedures for Appellate Review

The following notification dated 4 August 2005, from the delegation of Mexico, is being circulated to Members.

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Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Mexico notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282/R) (the "Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. Mexico seeks review by the Appellate Body of the Panel's failure to find that the Sunset Review Determination of the US International Trade Commission ("USITC") in OCTG from Mexico was inconsistent with the Anti-Dumping Agreement and Article VI of the GATT 1994 because the USITC did not establish the required causal link between the likely dumping and the likely injury.<sup>1</sup> The Panel's conclusions on this issue are in error, and are based on erroneous findings on issues of law and related legal interpretations:

- a. By failing to find that a WTO-consistent determination of likely dumping is a legal predicate to a WTO-consistent determination of likely injury, the Panel erred in its interpretation and application of Articles 1, 3, 11.1, 11.3 and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, and failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it.<sup>2</sup>
- b. Although the Panel found that the Sunset Review Determination of the US Department of Commerce ("USDOC") was inconsistent with Article 11.3 of the Anti-Dumping

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<sup>1</sup>Panel Report, paragraph. 8.7.

<sup>2</sup>Panel Report, paragraphs. 6.12, 6.14, 7.113, 7.114, 7.115, 7.117, 7.121, 7.122, 7.123, 7.130, 7.138, 7.143, 7.144, 8.7.

Agreement<sup>3</sup>, it failed to find that the USITC Sunset Review Determination was also WTO-inconsistent. The Panel dismissed Mexico's claim that the Anti-Dumping Agreement and the GATT 1994 established inherent causation requirements, parallel to but independent of those in Article 3.5.<sup>4</sup> The Panel incorrectly interpreted Articles 1, 3, 11.1, 11.3, and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. The Panel also failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it.<sup>5</sup>

- c. The Panel failed to apply the rulings adopted by the Dispute Settlement Body in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (DS268).<sup>6</sup> The DSB rulings in DS268, combined with the Panel's rulings in this case, establish that there is no WTO-consistent basis for a finding of likely dumping for any of the reviews of the WTO Members included in the USITC's cumulative likelihood of injury analysis. The Panel in the present case erroneously failed to find that the USITC lacked a WTO-consistent basis for its determinations on likely injury, likely price effects or likely impact.<sup>7</sup> The Panel thus erred in interpreting and applying Articles 1, 3, 11.1, 11.3, and 18.1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. The Panel also failed to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it.<sup>8</sup>

2. Mexico seeks review by the Appellate Body of the Panel's failure to find that the Sunset Review Determination of the USITC was WTO-inconsistent because the USITC failed to comply with the conditions for a WTO-consistent likelihood of injury analysis.<sup>9</sup> Although the Panel recognized that "Mexico requested a finding regarding its 'third cumulation argument' (regarding the evidentiary basis for the USITC's determination that imports would be simultaneously present in the US market)<sup>10</sup>, the Final Report contains no explanation of why it was appropriate for the Panel not to rule on Mexico's claim.<sup>11</sup> The Panel erred in interpreting and applying Articles 1, 11.3, and 18.3 of the Anti-Dumping Agreement, and failed to comply with its obligation under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement to make an objective assessment of the matter before it.<sup>12</sup> Mexico respectfully requests the Appellate Body to address, complete the analysis, and rule in favor of Mexico on the following issues of law and related legal interpretations, on which the Panel declined to rule:

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<sup>3</sup>Panel Report, paragraph. 8.2.

<sup>4</sup>Panel Report, paragraph. 6.12.

<sup>5</sup>Panel Report, paragraphs. 6.12, 6.14, 7.113, 7.114, 7.115, 7.117, 7.121, 7.122, 7.123, 7.130, 7.138, 7.143, 7.144, 8.7.

<sup>6</sup>See *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, DS282, Request of the Panel for Comments on the Appellate Body's Report in *US-OCTG from Argentina*, DS268, Nov. 22, 2004; see also Panel Report, Annex E-14, Annex E-15.

<sup>7</sup>Panel Report, paragraph. 8.7.

<sup>8</sup>Panel Report, paragraphs. 6.12, 6.14, 7.113, 7.114, 7.115, 7.117, 7.121, 7.122, 7.123, 7.130, 7.138, 7.143, 7.144, 8.7.

<sup>9</sup>Panel Report, paragraphs. 8.5, 8.7, 8.8.

<sup>10</sup>Panel Report, paragraph. 6.19; see also Panel Report, paragraph. 3.1 (16th bullet) ("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; 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").

<sup>11</sup>Panel Report, paragraphs. 6.19, 7.150, and 7.151.

<sup>12</sup>Panel Report, paragraphs. 6.19, 7.150, 7.151, 8.5, 8.7, 8.8.

- a. The Panel erroneously concluded that the USITC's analysis of the cumulated imports for purposes of its likelihood of injury determination was consistent with Article 11.3 exclusively because it determined that Article 3.3 of the Anti-Dumping Agreement does not apply to Article 11.3 reviews.<sup>13</sup>
- b. The Panel failed to find that the USITC's Sunset Review Determination was inconsistent with US obligations under the Anti-Dumping Agreement because:
  - (i) The likelihood of injury determination lacked a sufficient factual basis and could not result in an objective examination of whether the subject imports were likely to be simultaneously present in the domestic market for purposes of determining the likelihood of injury;
  - (ii) 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 subject imports would be simultaneously present in the US market;
  - (iii) The USITC employed a WTO-inconsistent standard in the cumulative likelihood of injury analysis<sup>14</sup>; and
  - (iv) The USITC's determination did not identify any time-frame within which the subject imports would be simultaneously present in the US market during which time the corresponding likely injury would occur.
- c. The Panel erroneously disregarded certain of Mexico's arguments supporting its claim regarding the WTO-inconsistency of the USITC's sunset review determination based on an erroneous finding that Mexico had failed to develop and elaborate its arguments.<sup>15</sup>
- d. The Panel also erroneously disregarded Mexico's separate claim that even assuming *arguendo* that the USITC was neither prohibited from, nor required to, conduct a cumulative injury assessment, because it decided to undertake cumulative analysis, then the USITC was obliged to make sure that the inherent conditions necessary to cumulate were satisfied.<sup>16</sup>

3. Mexico seeks review by the Appellate Body of the Panel's failure to comply with its obligation under Article 11 of the DSU to make an objective assessment of the matter before it, and its error in the interpretation and application of Articles 1, 2, 11.3, and 18.3 of the Anti-Dumping Agreement regarding Mexico's claims related to the USDOC's determination of the "margin likely to prevail."<sup>17</sup> Specifically:

- a. The Panel erred in failing to find that the USDOC's determination of the "margin likely to prevail" for OCTG from Mexico violated Articles 2 and 11.3 because the margin was

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<sup>13</sup>Panel Report, paragraphs. 7.150, 7.151, 8.8.

<sup>14</sup>Panel Report, paragraph. 8.5.

<sup>15</sup>Panel Report, paragraph. 6.19.

<sup>16</sup>See Panel Report, paragraphs. 7.150, 7.151, 8.8; *see also* Panel Report, paragraph. 3.1 (15th bullet) ("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").

<sup>17</sup>Panel Report, paragraphs. 6.10, 6.11, 7.78, 7.81, 7.83, 8.3.

not calculated in accordance with the requirements of Article 2, and was used as an integral part of the determination under Article 11.3;

- b. The Panel failed to find that the "margin likely to prevail" determined by the USDOC was a pre-WTO margin that was not the result of the application of the provisions of the Anti-Dumping Agreement and was therefore inconsistent with Articles 1, 2, 11.3, and 18.3 of the Agreement; and
- c. The Panel failed to find that the USITC's use of the WTO-inconsistent "margin likely to prevail" for purposes of its likelihood of injury analysis rendered its likelihood determination inconsistent with Article 11.3.

4. Mexico seeks review by the Appellate Body of the Panel's failure to make a specific finding that the United States had no legal basis to continue its anti-dumping measure on OCTG from Mexico beyond the maximum five year period established by Article 11.3 of the Anti-Dumping Agreement. The Panel's conclusions on this issue are in error, and are based on erroneous findings on issues of law and related legal interpretations. The erroneous findings of the Panel include the Panel's conclusions that "[o]ur 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."<sup>18</sup> In making this determination, the Panel erred in interpreting and applying Article 11.3.

5. In the event of appeal by the United States and reversal by the Appellate Body on any of the conclusions reached by the Panel regarding the USDOC's Sunset Policy Bulletin (SPB), Mexico respectfully requests the Appellate Body to address, complete the analysis, and rule in favor of Mexico on the following claims, on which the Panel declined to rule:

- a. Mexico's claim that the US statute, the US Statement of Administrative Action (SAA), and the SPB violate Article 11.3 of the Anti-Dumping Agreement as such. The Panel considered that it was not "obliged to make findings in this context with respect to each aspect of Mexico's arguments in support of its claim."<sup>19</sup>
- b. Mexico's claim that United States failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to the USDOC's sunset reviews of anti-dumping duty orders, in violation of Article X:3(a). Having found that the relevant portions of the SPB were inconsistent with Article 11.3, the Panel stated that it did not need to address this claim.<sup>20</sup>

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<sup>18</sup>Panel Report, paragraphs. 6.22. *See also* paragraph. 8.18.

<sup>19</sup>Panel Report, paragraph. 6.6.

<sup>20</sup>Panel report, paragraphs. 7.67, 8.13.

Annex II

**WORLD TRADE  
ORGANIZATION**

**WT/DS282/7**  
19 August 2005

(05-3686)

Original: English

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

Notification of an Other Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU)  
and Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification dated 16 August 2005, from the delegation of the United States, is being circulated to Members.

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Pursuant to Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Anti-dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282/R) ("Panel Report") and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the Sunset Policy Bulletin is inconsistent with Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement"). This conclusion is in error and is based on erroneous findings on issues of law and related interpretations, including:

- (a) The Panel failed to apply the correct burden of proof.<sup>1</sup> Although elsewhere in the report the Panel correctly articulated the standard for burden of proof and making a *prima facie* case<sup>2</sup>, the Panel failed to apply that standard in evaluating whether Mexico made a *prima facie* case with respect to the Sunset Policy Bulletin.<sup>3</sup> The Panel also misapplied the Appellate Body's analysis in *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* in concluding that Mexico had made a *prima facie* case.<sup>4</sup>

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<sup>1</sup>See, e.g., Panel Report, paras. 6.26-6.28, 8.1.

<sup>2</sup>Panel Report, para. 7.8.

<sup>3</sup>Panel Report, paras. 6.28, 7.49 and 7.64, footnote 85.

<sup>4</sup>Panel Report, para. 6.27.

- (b) The Panel failed to apply the correct standard in evaluating whether the Sunset Policy Bulletin is inconsistent with Article 11.3 of the Anti-Dumping Agreement.<sup>5</sup>

2 The United States seeks review by the Appellate Body, pursuant to Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), of the finding that the Sunset Policy Bulletin is inconsistent "as such" with the obligation set forth in Article 11.3 of the Antidumping Agreement.<sup>6</sup> The Panel failed to make an objective assessment of the matter before it, including a failure to make an objective assessment of the facts of the case, contrary to Article 11 of the DSU. For example, the United States noted that the Panel had failed to identify other factors that formed the basis for Commerce's determination in *Sugar and Syrups from Canada*<sup>7</sup>, but the Panel simply dismissed the consideration of other factors as "subsidiary".<sup>8</sup> The Panel also selectively quoted statements from the sunset determinations it analyzed, ignoring exculpatory statements found in the same determinations.<sup>9</sup> The Panel's analysis was also contradictory<sup>10</sup> and unsupported by the facts.<sup>11</sup>

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<sup>5</sup>Panel Report, paras. 7.55, 7.61, 7.63, footnote 86.

<sup>6</sup>Panel Report, para. 8.1.

<sup>7</sup>U.S. Comments on Interim Report, para. 8.

<sup>8</sup>Panel Report, para. 6.35.

<sup>9</sup>*See, e.g.*, paras. 6.35, 7.60. *See* U.S. Comments on Interim Report, paras. 6 and 8-9, Panel Report, para. 6.29.

<sup>10</sup>Panel Report, paras. 7.38, 7.40, 7.58, and 7.63.

<sup>11</sup>Panel Report, paras. 7.45, 7.55, and 7.61.