

ANNEX C

EXECUTIVE SUMMARIES OF THE SECOND SUBMISSIONS OF THE PARTIES

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ANNEX C-1

SECOND WRITTEN SUBMISSION OF MEXICO

(19 July 2004)

I. INTRODUCTION

1. The US view that Article 11 contains few (if any) substantive obligations¹ is untenable. With Articles 11.1, 11.2, and 11.3, WTO Members placed strict disciplines on the imposition of anti-dumping duties, including definitive temporal limitations. At the heart of these provisions, and central to this dispute, is the obligation to terminate anti-dumping duties: under Article 11.2, when they are no longer necessary to offset dumping; and, under Article 11.3, after five years.

2. The US determinations in this case to maintain duties under Articles 11.2 and 11.3 are based on presumptions, inferences, speculation and conjecture and not on positive evidence. For this reason, they are insufficient to invoke the limited exception to continue an anti-dumping duty beyond five years under Article 11.3, and they cannot be used to evade the obligation in Article 11.2 to immediately terminate the duty when it is no longer necessary.

II. THE DEPARTMENT'S SUNSET DETERMINATION

A. THE UNITED STATES HAS FAILED TO REBUT MEXICO'S *PRIMA FACIE* CASE THAT DEMONSTRATES THAT US LAW ESTABLISHES A WTO-INCONSISTENT PRESUMPTION THAT DUMPING IS LIKELY TO CONTINUE OR RECUR

3. The statute (19 U.S.C. § 1675a(c)(1)), the US Statement of Administrative Action ("SAA") (pages 889-890), and the Sunset Policy Bulletin ("SPB") (Section II.A.3), operating independently and together, establish a presumption that dumping would be likely to continue or recur.² This presumption is inconsistent with Article 11.3 of the Anti-Dumping Agreement and the United States has failed to rebut Mexico's *prima facie* case demonstrating this inconsistency.

4. The United States asserts that Mexico's argument relies on the assumption that the three scenarios outlined in the SPB "are the only possible ones and that as a result Commerce will always make an affirmative finding."³ Mexico does not argue that the three scenarios in Section II.A.3 of the SPB are the only possible outcomes. Mexico argues that, under US law, the Department treats the fulfilment of any one of the three scenarios as conclusive of likely dumping – to the exclusion of other relevant evidence. MEX-62 and MEX-65 demonstrate that the Department follows Section II.A.3 in every sunset review, and every time it finds that at least one of the three criteria of the SPB is satisfied, it makes an affirmative finding of likely dumping without considering additional factors. It follows, then, that Section II.A.3 instructs the Department to attach decisive weight to historical dumping margins and declining import volumes (or cessation of imports) in every case.

¹ See, e.g., US First Submission, paras. 2, 90-91.

² Mexico's First Submission, paras. 87-109.

³ US First Submission, para. 97.

5. Contrary to US assertions that the US system provides the Department with the ability to consider information apart from dumping margins and import volumes through the "good cause" provisions,⁴ the actual application of this provision shows that the "good cause" route has led only to affirmative likelihood determinations. This is not surprising because, as MEX-62 and MEX-65 demonstrate, the Department has never rendered a not likely determination in any full or expedited sunset review.

6. The US arguments that the SPB and the Department's practice cannot be challenged must be rejected. This issue has been settled. The Appellate Body overruled the Panel's finding that the SPB is not a measure that is challengeable, as such, in WTO dispute settlement.⁵ The Appellate Body held that "measure" for purposes of WTO challenge is cast broadly, and includes administrative instruments such as the SPB.⁶ The Appellate Body's reasoning in *Sunset Review of Steel from Japan* similarly compels the conclusion that the Department's consistent practice may be challenged as such.⁷

7. In sum, the statute, the SAA, and the SPB are measures that direct the Department to give decisive guidance to historical dumping margins and import volume declines. Mexico's Exhibits MEX-62 and MEX-65 (which set forth the Department's consistent practice) demonstrate that the Department follows the instruction of the statute, the SAA, and the SPB in every sunset review, and every time it finds that at least one of the three criteria of the SPB is satisfied, the Department makes an affirmative finding of likely dumping without considering additional factors.

B. THE DEPARTMENT'S LIKELIHOOD DETERMINATION IN THE SUNSET REVIEW OF OCTG FROM MEXICO VIOLATED ARTICLES 11.3 AND 2 OF THE ANTI-DUMPING AGREEMENT

1. The Department Impermissibly Relied on the Margin from the Original Investigation

8. The positive evidence submitted by the Mexican respondents demonstrated that dumping would not be likely.⁸ The evidence before the Department included information as to why the margin of dumping from the original investigation was not relevant to the question of likelihood of dumping, as well as the results of the recently conducted administrative reviews of the anti-dumping order, which resulted in consecutive zero margin (no dumping) determinations.

9. The Department relied on the lower Mexican OCTG import volume as the sole basis for disregarding this the positive evidence submitted by the Mexican respondents. After doing so, the only remaining information before the Department was the margin of dumping margin from the original investigation and the decline in volume. The Department then mechanically relied on this information despite the Appellate Body's admonition that "a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated."⁹

10. That the Department relied on the margin from the original investigation in this case necessarily follows from the design of the US system. The statute requires that the Department "shall consider" (1) "the dumping margins determined in the investigation and subsequent reviews" and (2)

⁴ See 19 U.S.C. § 1675a(c)(2) (MEX-24); 19 C.F.R. §§ 351.218(d)(3)(iv) and (e)(2)(iii) (MEX-25); Section II.C of the SPB.

⁵ Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 94-100.

⁶ *Id.* at paras. 82-88.

⁷ *Id.* at para. 78, 88.

⁸ See, e.g., MEX-64 (Evidence Chart from Mexico's First Oral Statement).

⁹ Appellate Body Report, *Sunset Review of Steel from Japan*, para. 177.

the volume of imports.¹⁰ The SAA indicates that the Department will normally select a margin "from the investigation, because that is the only calculated rate that reflects the behavior of exporters . . . without the discipline of an order or suspension agreement in place."¹¹ The regulations implementing the statute add that: "only under the most extraordinary circumstances will the Secretary rely on a . . . dumping margin other than those it calculated and published in its prior determinations. . . ."¹² The SPB confirms "that continued margins at any level would lead to a finding of likelihood."¹³ In fact, the Department's *Issues and Decision Memorandum* in this case, the margin from the original investigation was the only finding of dumping made by the Department.¹⁴ Mexico can find no other information on the record before the Department in the sunset review showing dumping by a Mexican exporter. As a result, it seems clear to Mexico that the Department necessarily relied on this margin.

2. The Department Impermissibly Presumed that Declining Import Volumes Demonstrated That Dumping Would Be likely to Recur

11. In relying solely on the decline in import volume as a basis to ignore the positive evidence submitted by the respondents, the Department made two assumptions, neither one of which was supported by positive evidence, and then linked these two assumptions to make the likely dumping determination. First, the Department inferred that the decline in import volume alone was sufficient to show that the Mexican exporters could not compete in the United States without dumping. Second, further compounding the error of the first assumption, the Department reasoned that simply because it had inferred that the exporters could not compete in the United States without dumping, they would likely dump in the United States upon revocation.

3. The Department Dismissed Relevant Evidence Demonstrating That Dumping Would Not Be Likely

12. The Department failed to consider TAMSA's arguments and the positive evidence on the record that, but for the severe Mexican peso devaluation of 1994, an anti-dumping duty order on Mexican OCTG would not have been imposed in the first place. The Department calculated zero margins for TAMSA and Hylsa in the administrative reviews; therefore, if there had been no dumping in the original investigation, but for the unique circumstances in 1994, then dumping cannot "continue or recur" after revocation of the order. The Department also ignored that zero margins had been calculated for TAMSA and Hylsa in the most recent administrative reviews. This evidence is clearly relevant to the Department's likelihood determination.

13. The Department did not consider TAMSA's evidence, but rather dismissed it perfunctorily. The Department inferred from the lower import volumes that TAMSA could not export to the US market without dumping¹⁵ Inferences are not "positive evidence" of what is "likely."

¹⁰ 19 U.S.C. 1675a(c)(1) (MEX-24).

¹¹ *US Statement of Administrative Action*, accompanying the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) at 890, reprinted in 1994 U.S.C.C.A.N. 4040 ("SAA").

¹² 19 C.F.R. § 351.218(e)(2)(i) (emphasis added) (MEX-25).

¹³ Section II.A.4 (emphasis added).

¹⁴ *Issues and Decision Memorandum for the Full Sunset Review of the Anti-dumping Duty Order on Oil Country Tubular Goods from Mexico* (9 Mar. 2001) (final results) at 56 (MEX-19) ("[t]he Department continues to find that the margin rates from the original investigation are the appropriate rates to report to the Commission. (emphasis added). . .").

¹⁵ *Sunset Review Issues and Decision Memorandum* at 4 (MEX-19).

III. THE COMMISSION'S SUNSET DETERMINATION

A. THE COMMISSION'S "LIKELY" STANDARD IS INCONSISTENT AS SUCH AND AS APPLIED WITH ARTICLE 11.3

14. The authority must find that expiry of the duty is "likely" to lead to a continuation or recurrence of injury. It is beyond doubt that "likely" means "probable." Mexico demonstrated that the Commission argued vigorously in the NAFTA dispute involving this same sunset review that the SAA precludes the Commission from applying a "probable" standard. The Commission argued: "The SAA explains, unambiguously, that after the revocation '[t]here may be *more than one* likely outcome.' SAA at 883. The possibility of 'more than one likely outcome' shows that Congress did not intend 'likely' to mean 'probable' or 'more probable than not.'"¹⁶

15. The United States cannot undo the Commission's statements. At the time that it made the Article 11.3 injury determination in this case, the Commission admitted that it did not need to establish that injury was the probable result of revocation.

16. Mexico is challenging the standard used by the Commission both as such and as applied. If the Panel finds that the Commission used the wrong standard, the Panel cannot now reassess the evidence on its own to make a determination as to whether the evidence would have supported a finding of "likely" injury. This would be tantamount to a prohibited *de novo* review.¹⁷ The Panel's job is not to perform the analysis the Commission was obligated to perform (but which it affirmatively disavowed) in the first instance.

B. ARTICLE 3 APPLIES TO THE LIKELIHOOD OF INJURY DETERMINATION UNDER ARTICLE 11.3

17. The United States argues that footnote 9 "is simply a drafting device that avoids unnecessary repetitions" ¹⁸ The United States also confuses the issue, and makes the text much more complicated than it is. The issue is not whether the inquiry in an original investigation is identical to the likelihood inquiry in a sunset review. The issue is whether "injury" in Articles 11.1 and 11.3 is different than "injury" defined by footnote 9, and whether "injury" in Articles 11.1 and 11.3 is to be interpreted in accordance with the provisions of Article 3. That analysis must begin with the text, and for Mexico and all of the Third Parties, footnote 9 settles the issue.

18. The Appellate Body found in *Sunset Review of Steel from Japan* that the term "dumping" used in Article 2 "for the purpose of the Agreement" is the same "dumping" used in Article 11.3.¹⁹ For the same reason, the term "injury" used in Article 3 "under this Agreement" is the same "injury" used in Article 11.3. The Appellate Body did not find that the phrase "continuation or recurrence of" changes the meaning of "dumping." The Panel cannot find that this same phrase changes the meaning of "injury."

¹⁶ ITC Brief, *Oil Country Tubular Goods from Mexico: Results of Five-Year Review*, USA-MEX-201-1904-06 (8 Feb. 2002) (non-proprietary version) at 43 (MEX-47).

¹⁷ See Panel Report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, paras. 7.15, 7.16 ("*Softwood Lumber from Canada*").

¹⁸ *Id.* at para. 245.

¹⁹ Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 108-109 (emphasis removed).

C. THE COMMISSION'S SUNSET DETERMINATION WAS INCONSISTENT WITH ARTICLE 11.3, 3.1, AND 3.2 BECAUSE IT WAS NOT BASED ON POSITIVE EVIDENCE AND AN OBJECTIVE ASSESSMENT OF VOLUME, PRICE AND IMPACT; THE COMMISSION'S SUNSET DETERMINATION ALSO VIOLATED ARTICLES 3.4 AND 3.5

19. The positive evidence and objective examination requirements of Article 3.1 are fundamental to an Article 11.3 injury finding. The positive evidence and objective assessment requirement is also inherent in Article 11.3 injury determinations, apart from the applicability of Article 3.

20. In evaluating "injury" in this case, the Commission did not develop "positive evidence" necessary to determine that injury would likely follow from expiry. The information gathered regarding volume, price, and impact did not rise to the level of positive evidence, and an objective decision maker could not have concluded that injury was "likely" based on this information. In numerous instances, the Commission relied on assumptions and unsupported inferences. In other relevant parts of the determination, the Commission based its conclusions on findings made during the original investigation.

21. The United States argues based on the text of Article 3.4 that that provision "cannot practicably be applied to all sunset reviews, and certainly could not be applied to sunset reviews in the same systematic and comprehensive manner that has been required in original dumping investigations."²⁰ However, that dumped imports may not be present at the time of the sunset review does not mean that Article 3.4 does not apply to Article 11.3 reviews. In the context of a sunset review, the authority must examine the "likely" impact of dumped imports on the domestic industry. Without a thorough understanding of the state of the domestic industry, the authority cannot determine whether injury would be likely to continue or recur in a manner consistent with Article 11.3.

22. The fundamental requirement of Article 3.5 is that the authority must establish a causal link between dumped imports and injury to the domestic industry. This causation requirement reflects the requirement in Article VI of GATT 1994. The United States fails to explain how this concept cannot apply in a sunset review.

D. THE US STATUTORY REQUIREMENTS GOVERNING THE TIME FRAME WITHIN WHICH INJURY WOULD BE LIKELY TO CONTINUE OR RECUR ARE INCONSISTENT, BOTH AS SUCH AND AS APPLIED, WITH ARTICLES 11 AND 3 OF THE ANTI-DUMPING AGREEMENT

23. The United States argues that Article 11.3 does not specify the time frame relevant to a sunset inquiry, and thus, the relevant time period is within each Member's discretion.²¹ In this regard, the United States notes that "[t]he words 'to lead to' affirmatively indicate that the Agreement contemplates the passage of some period of time between the revocation of the order and the continuation or recurrence of injury."²²

24. The United States ignores the immediate context of Article 11.3. Article 11.1 requires that anti-dumping measures "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Accordingly, it is evident that the time frame in which injury would be likely to continue or recur under Article 11.3 must be as curtailed as possible to ensure that anti-dumping measures are maintained only as long as necessary to counteract injurious dumping. The phrase "to lead to" does not change this principle. The phrase merely links the expiry or termination with the likely dumping and the likely injury.

²⁰ US First Submission, para. 312.

²¹ US First Submission, paras. 330-331.

²² *Id.* at para. 330.

25. An undefined time frame is not consistent with the "likely" standard of Article 11.3, and even less so when considered in light of Article 11.1. US law does not define, nor has the Commission articulated, what constitutes "a reasonably foreseeable time." Furthermore, US law creates an impermissible "gap" which is inconsistent with Article VI of the GATT and Article 11.1 of the Anti-Dumping Agreement. Finally, the violation arising from the application of the law in this case is clear. The Commission never even disclosed when the injury was likely to continue or recur.

E. THE COMMISSION'S DETERMINATION TO CONDITION MEXICO'S RIGHT TO REVOCATION OF THE ANTI-DUMPING DUTY ORDER AGAINST MEXICAN OCTG ON THE BEHAVIOUR OF EXPORTERS FROM OTHER COUNTRIES VIOLATED ARTICLES 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT

26. The United States misconstrues Mexico's primary cumulation argument. Mexico does not argue that Article 11.3 is silent with respect to cumulation. Mexico asserts that Article 11.3 – both pursuant to its terms ("duty" in the singular) and as interpreted in its context – expressly prohibits cumulation.

27. The United States contends that "the reference in Article 11.3 to 'the duty' is merely descriptive and is not evidence that the drafters intended to prohibit cumulation."²³ The US argument is inconsistent with the position it took in *Sunset Review of Steel from Japan*, in which it argued that "the meaning of the word 'duty' in Article 11.3 is explained in Article 9.2 of the *Anti-Dumping Agreement*, which 'makes clear that the definitive duty is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis."²⁴ The Appellate Body agreed that Article 9.2 informs the interpretation of "duty" in Article 11.3.²⁵ Thus, the Appellate Body confirmed that the use of "duty" in the singular means that the authority must determine whether the termination of a single anti-dumping order – and not multiple orders – would be likely to lead to injury.

28. Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 would have precluded cumulation in this case. In the event that the Panel finds that cumulation is not prohibited by Articles 11.3 and 3.3, then the authorities must respect the substantive standards for cumulation in Article 3.3.

29. Finally, in arguing that Article 3.3 cannot apply to Article 11.3 injury reviews, the United States never mentions clause (b) of Article 3.3. More than an additional requirement under Article 3.3, this clause re-states a basic justification for cumulation in any injury determination under the Agreement. If the imports are not in the market together and competing against each other, what possible justification could exist to evaluate the effects of the imports in a cumulative manner?

²³ US First Submission, para. 339.

²⁴ Appellate Body Report, *Sunset Review of Steel from Japan*, para. 150.

²⁵ *Id.*

IV. THE DEPARTMENT'S FOURTH ADMINISTRATIVE REVIEW AND DETERMINATION NOT TO REVOKE THE ANTI-DUMPING DUTY

A. ARTICLE 11.2 IS NOT LIMITED TO ORDER-WIDE OBLIGATIONS TO TERMINATE ANTI-DUMPING MEASURE

30. According to the United States, "Article 11.2 does not address, and does not require, termination on a company-specific basis."²⁶ The US arguments should be rejected as they are inconsistent with: (1) the text of Article 11.2; (2) the United States' implementation of its Article 11.2 obligations; and (3) the Panel Report in *DRAMS from Korea*.

31. First, the US position is inconsistent with the text of Article 11.2, which refers to "any interested party" and "interested parties." These references to "interested parties" and "any interested party" in the context of the anti-dumping review must be interpreted to include individual exporters, who are arguably the most interested parties in an anti-dumping review. It is difficult to imagine why Members would have granted such rights to individual exporters to request a review, and would have imposed an obligation on Members to perform such a review, if the obligation to terminate was limited to an "order-wide" basis. Equally important, the explicit reference to "interested parties" in Article 11.2 distinguishes that provision from Article 11.3, which does not refer to interested parties. In *Sunset Review of Steel from Japan*, the Appellate Body noted this distinction as a basis for finding that Article 11.3 does not require company-specific sunset reviews.²⁷

32. Second, the US regulations that implement the US Article 11.2 obligation undermine the US Position. The United States indicates that section 351.222(g), "The changed circumstance review most directly implements US obligations under Article 11.2 and can be conducted on an order-wide or a company-specific basis."²⁸ However, the United States has never revoked an anti-dumping duty under Section 351.222(g) based on a substantive analysis of whether the continued imposition of the duty was necessary to offset dumping. Section 351.222(g) is chiefly a mechanism for revocation where the US industry is no longer interested in the continuation of the anti-dumping order, not a means through which the Department examines the substantive standard of Article 11.2 – whether continued imposition of the duty is necessary to offset dumping.

33. The United States indicates that "Section 351.222(b)(1) provides a second option for an individual company to request revocation on an order-wide basis, so long as all exporters and producers covered at the time of the revocation have not dumped for at least three consecutive years."²⁹ However, Section 351.222(e)(1) unambiguously limits the ability of an individual company to request revocation only as it pertains to itself: "an exporter or producer may request in writing that the Secretary revoke an order or terminate a suspended investigation under paragraph (b) of this section with regard to that person if the person submits with the request" the requisite certifications pertaining to its export behaviour.³⁰

34. Finally, the Panel Report in *DRAMS from Korea* makes the US position untenable. The Panel Report in *DRAMS from Korea*, and the US implementation of the DSB's rulings and recommendations in the wake of that report, leave no doubt that Article 11.2 creates obligations to terminate anti-dumping orders on a company-specific basis. Following the adverse ruling of the Panel, the United States clarified to its trading partners the nature of the changes it was making to the US regulation

²⁶ US First Submission, para. 148.

²⁷ Appellate Body Report, *Sunset Review of Steel from Japan*, para. 149.

²⁸ Opening Statement of the United States at the First Meeting of the Panel With the Parties, May 25, 2004, para. 3.

²⁹ US Answers to Questions from Mexico, para. 36 (emphasis added).

³⁰ 19 C.F.R. § 351.222(e)(1) (emphasis added) (MEX-12).

implementing its Article 11.2 obligations. The United States provided notice that the company-specific revocation procedure outlined in 19 C.F.R. § 351.222(b) was the way in which the United States implements its obligations under Article 11.2 to determine whether the continued imposition of the duty is necessary to offset dumping. The United States cannot deny these statements and its practice on implementing its Article 11.2 obligations now for the expediency of defending against the Article 11.2 claim brought by Mexico.

B. THE DEPARTMENT'S DETERMINATION NOT TO REVOKE THE ANTI-DUMPING DUTY ORDER ON OCTG FROM MEXICO VIOLATED ARTICLE 11.2

35. The Department violated Article 11.2 of the Anti-Dumping Agreement because the Department did not terminate the anti-dumping duty on OCTG from Mexico immediately upon the demonstration that the continued imposition of the duty was not necessary to offset dumping.

36. The Department's determination not to revoke the anti-dumping duty on OCTG from Mexico was not based on positive evidence that the continued imposition of the duty was necessary to offset dumping. With respect to Hylsa, the Department's determination not to revoke the duty violated Articles 11.2, 2.4, and 2.4.2 of the Anti-Dumping Agreement because the Department failed to make a fair comparison between export price and normal value, by "zeroing" Hylsa's negative margins. By relying on the positive margin that resulted from this unlawful methodology as justification for not revoking the anti-dumping duty on OCTG from Mexico with respect to Hylsa, the Department did not determine whether the duty was necessary to offset dumping.

37. With respect to TAMSA, the Department's determination not to revoke violated Article 11.2 of the Anti-Dumping Agreement because the Department: (i) applied a standard which required a demonstration that dumping was "not likely" in the future; (ii) arbitrarily imposed a "commercial quantities" requirement test which is inconsistent with, and has no basis in, Article 11.2; and (iii) ignored positive evidence that demonstrated that the measure was no longer necessary to offset dumping.

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

V. MEXICO'S REQUEST UNDER DSU ARTICLE 19.1

39. Even assuming that the United States could even cure many of the violations of the Anti-Dumping Agreement through another sunset review, there would be no way for the United States to comply with the fundamental time-bound obligations of Article 11.2 to terminate immediately upon a showing that the duty is no longer necessary to offset dumping, or of Article 11.3 to terminate after five years in the absence of the requisite likelihood findings. The violations of Article 11.2 and 11.3 in this case cannot be cured retroactively. Therefore, the only way to bring the United States measures into conformity with the Anti-Dumping Agreement would be through the immediate termination of the order.

VI. CONCLUSION

40. Mexico refers the Panel to specific requests it made of the Panel in paragraphs 375 through 381 of Mexico's First Submission.

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(19 July 2004)

I. INTRODUCTION

1. Mexico has proffered, but not substantiated, a variety of claims regarding the sunset review of OCTG, as well as the fourth administrative review of TAMSA and Hylsa. The United States more fully rebutted these claims in its first written submission, the first meeting, and answers to questions. In this submission, the United States will limit its remarks to exposing further several basic flaws in Mexico's arguments.

II. ISSUES RELATING TO MEXICO'S SUNSET REVIEW CLAIMS

2. Mexico has advanced various claims regarding the US conduct of sunset reviews. Having already addressed Mexico's claims in detail in its first submission, the United States will limit its discussion in this submission to the most basic flaws in those claims, first with respect to Commerce's determination, and then with respect to the ITC's determination.

A. COMMERCE'S CONDUCT OF SUNSET REVIEWS

3. Mexico has essentially argued that the *Sunset Policy Bulletin* is a measure that mandates that Commerce accord decisive weight to dumping margins and lower import volumes. A proper legal analysis of Mexico's claims, as well as a review of the evidentiary support for them, reveals that Mexico has not met its burden of proving those claims.

1. Legal Framework for Assessing whether the Sunset Policy Bulletin is a Measure that Mandates a Breach

4. Mexico seeks to establish that the *Sunset Policy Bulletin* is a measure and mandates a breach by citing the results of full and expedited sunset reviews. As the United States stated at the first meeting of the parties, this approach is not legally correct. Proper legal analysis of the question of whether the *Sunset Policy Bulletin* is a measure that mandates a breach requires a two-step approach. First, the Panel should examine whether the *Sunset Policy Bulletin* is a measure. Second, if the *Sunset Policy Bulletin* were a measure, the Panel would then examine whether it mandates a breach.

5. As the United States described in its first written submission and its responses to Panel Questions 29 and 41, the *Sunset Policy Bulletin* does not "do" anything. Regardless of the terms of the *Sunset Policy Bulletin*, or the number of times it is cited in reviews, the *Sunset Policy Bulletin* has no legal effect. It is not a measure. In addition, the *Sunset Policy Bulletin* does not mandate a breach of any WTO provisions. As noted above, as a matter of US law the *Sunset Policy Bulletin* cannot "mandate" that Commerce do anything. It certainly cannot mandate a breach.

2. Mexico Fails to Substantiate its Claim that the *Sunset Policy Bulletin* Mandates that Commerce Give "Decisive Weight" to Dumping Margins and Import Volumes When Making the Likelihood of Dumping Determination in a Sunset Review

6. Mexico offers its Exhibit MEX-62 as "evidence" that the *Sunset Policy Bulletin* mandates an affirmative likelihood determination whenever there is evidence of dumping margins and depressed import volumes, to the exclusion of any other evidence, in a sunset review. As a matter of US municipal law – that is, as a matter of fact – this is simply incorrect. A document like the *Sunset Policy Bulletin* which does nothing more than explain to the public Commerce's thinking with regard to a variety of issues does not become binding simply because Mexico submits a misleading statistical analysis of past results in sunset reviews. The meaning of the *Sunset Policy Bulletin* can only be determined by examining US law, and Mexico has failed to explain how its statistical analysis is part of, or changes, US municipal law.

7. Exhibit MEX-62 demonstrates that Commerce made reasoned and reasonable likelihood determinations in each of the sunset reviews in the exhibit and has provided an explanation on each affirmative determination. To set the record straight, there was not an affirmative finding in "all sunset reviews." Mexico would have the Panel come away with the impression that Commerce made an affirmative finding in every sunset review; but that is not the case.

8. Therefore, Mexico's claim concerns a subset of sunset reviews. Mexico's assertion in this dispute is that the 227 cases in Exhibit MEX-62 are evidence that Commerce makes an affirmative likelihood determination in every review simply because dumping margins or depressed import volumes are present and the *Sunset Policy Bulletin* "mandates" that Commerce so find without reviewing other evidence. Exhibit MEX-62 does nothing of the sort.

9. The question is whether the results in the 227 reviews in question are "mandated" by the *Sunset Policy Bulletin*. Mexico appears to assert that the fact that no respondent has been able to overcome the so-called "decisive weight" of dumping margins and depressed import volumes, as described in the *Sunset Policy Bulletin*, proves that the *Sunset Policy Bulletin* mandates an affirmative likelihood finding in every case. This is nothing more than circular reasoning.

10. Even assuming *arguendo* that the *Sunset Policy Bulletin* could mandate results, Exhibit MEX-62 does not prove that the *Sunset Policy Bulletin* is what generated the results in question. The *Sunset Policy Bulletin* merely reflects logical principles. For example, if dumping continued over the life of the order, there is reason to be concerned that dumping will continue once the discipline of the order is removed. The Appellate Body agrees.¹ Therefore, if dumping continues over the life of the order, and Commerce concludes that continuation or recurrence of dumping is likely, then Commerce has so concluded because of logic – not the *Sunset Policy Bulletin*.²

11. A closer examination of the reviews in Exhibit MEX-62 reveals that Mexico's characterization of the 227 reviews is erroneous. In sum, a review of Exhibit MEX-62 reveals the following:

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

² We also note that, with regard to Mexico's claim that Exhibit MEX-62 proves that Commerce has never made an affirmative sunset determination without referring to the guidance provided in the *Sunset Policy Bulletin*, this assertion is incorrect as a factual matter. As we discussed in our answer to question 26 from the Panel in this case, Commerce did not rely on historical data when making the final affirmative sunset determination in the full sunset review of *Canada-Sugar*, but rather calculated a predicted future dumping margin based on information submitted by both the domestic and respondent interested parties. Exhibit MEX-62, Tab 261.

- in almost a quarter of the reviews found in Exhibit MEX-62, the order was revoked;
- in over 80 per cent of the remaining reviews, domestic interested parties placed evidence on the record indicating that dumping was likely to continue or recur, but respondents placed no evidence on the record at all;
- in all of these reviews, and the remaining ones, Commerce evaluated all the evidence on the record and presented a reasoned conclusion that dumping was likely to continue or recur.

12. This is hardly evidence that, in any of those reviews, Commerce attached "decisive" weight to dumping margins and import volumes without considering more.

3. Mexico's Claim Regarding an Alleged "Consistent Practice" is Beyond the Terms of Reference of This Panel

13. In Question 12, the Panel specifically asked Mexico to identify "where, in the request for establishment," Mexico set forth its claim regarding Commerce's alleged "consistent practice." Mexico responded by citing a section that fails to reference this allegedly consistent "practice." By contrast, Mexico did expressly refer to "practice" in Section D of its panel request (a claim concerning GATT Article X:3(a), not Article 11.3). Thus, when Mexico wished to include a claim concerning practice in its panel request, it knew how to do so. With respect to a claim in connection with Article 11.3, it did not do so. The Panel should therefore reject Mexico's claim as not being within the terms of reference of this dispute.

14. In any event, Mexico's claim – though beyond the terms of reference – is also without merit. Commerce "practice" is not a measure; it is no more than short-hand to refer to recent Commerce precedent. As the panel in *India Steel Plate* concluded, Commerce "practice" is not within the scope of measures that may be challenged under Article 18.4 of the AD Agreement, and mere repetition cannot turn such a "practice" into a procedure and thus a measure.³ In particular, repetition does not mean that Commerce's past applications of a law are binding as something called "practice."

B. ISSUES RELATING TO THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY IN A SUNSET REVIEW

1. Cumulation of imports from more than one subject country is permitted under Article 11.3

15. Mexico contends that cumulation is prohibited in sunset reviews, notwithstanding the silence of the Agreement on this issue. The Appellate Body has recognized that silence in an Agreement must have some meaning.⁴ Members are free to do that which is not prohibited. In this situation,

³ *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, Panel Report adopted 29 July 2002, para. 7.22 (citation omitted). For a more detailed discussion, see US First Written Submission, para. 113. That Mexico devoted eight paragraphs in its answers to Panel questions (paras. 46-53) without even referring to *India Steel Plate* is indicative of the feeble nature of this claim. Mexico instead elected to rely on question posed by the Appellate Body in *Japan Sunset* – "does the type of instrument itself – be it a law, regulation, procedure, practice, or something else – govern whether it may be subject to WTO dispute settlement?" Nowhere did the Appellate Body conclude that Commerce's "practice" may be challenged.

⁴ *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R, Appellate Body Report adopted 19 Dec. 2002 ("*German Sunset*"), paras. 64-65.

where nothing in the text of the AD Agreement prohibits cumulation and Article 11.3 is silent on the subject, the only logical conclusion is that cumulation is permitted.

16. Mexico attempts to pin its argument on the use of the word duty rather than duties in Article 11.3, as well as in Articles 11.1 and 11.2. Reliance on the reference to the singular word "duty" ignores that Article VI:6 of GATT 1994, in requiring an injury evaluation for purposes of an original investigation, likewise refers to the levying of an anti-dumping (or countervailing) duty. Cumulation in anti-dumping investigations was widespread among GATT contracting parties under Article VI, even prior to the adoption of Articles 3.3 and 11.3 of the AD Agreement in the Uruguay Round.⁵ Mexico has not disputed this point.

2. Nothing in the Agreement makes the provisions of Article 3 applicable to Article 11.3 sunset reviews

17. As the United States has noted, there are many examples of how Article 3 cannot be applied in a sunset review.⁶ This is a strong textual indication that Article 3 was not intended to apply to sunset reviews. Mexico has sought to counter that argument by devising scenarios in which it might be possible to apply the provisions of Article 3 to a sunset review. This argument is not persuasive. Article 11.3 must be interpreted in a way that allows it be applied to all sunset reviews in order to give it meaning and effect. "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."⁷

18. Mexico has not explained how the specific provisions of Articles 3.2, 3.4 and 3.5 of the AD Agreement could be applied to all sunset reviews. One reasonably expected reaction to the imposition of an anti-dumping order would be the exit of the subject imports from the domestic market. Yet Mexico has not demonstrated how the investigating authority could, for example, apply the requirements of Article 3.5 in such a situation.

19. Mexico's response to this obvious incongruity is to state that "WTO Members intended the sunset analysis to be difficult and rigorous" (emphasis in original). This answer is non-responsive. The fact is that the provisions simply cannot be applied – no matter how rigorous the efforts of the investigating authority.

20. Mexico may be concerned that Article 11 reviews do not contain specific disciplines such as those contained in Articles 2 and 3; but as the Appellate Body has found, Article 2 does not *per se* apply in Article 11.3 reviews, and by analogy nor does Article 3. To the extent Mexico has concerns about the absence of specific criteria in Article 11.3, those concerns are not properly raised in the context of this dispute. As the DSU makes clear, "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."⁸

21. Article 5, unlike Article 11, cross-references Article 3 in several respects. In particular, Article 5.2 requires that the application filed by the domestic industry shall include evidence of, *inter alia*, "injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement." This language echos that of Article 3.1 which refers to "a determination of injury for purposes of

⁵ See The GATT Uruguay Round, A Negotiating History (1986-1992), (T. Stewart, Ed.) at 1475-1478, 1594, and 1598 (Exhibit US-27).

⁶ See, e.g., US First Written Submission, paras. 312-313, and 319-322.

⁷ *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, Report of the Appellate Body, adopted 1 February 2002, para. 338; *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body, adopted 20 May 1996, at 21.

⁸ Article 3.2. See also Article 19.2 ("in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.")

Article VI of GATT 1994," and footnote 9 of Article 3, which instructs that the term "injury," unless otherwise specified "shall be interpreted in accordance with the terms of this Agreement." Whereas it is clear from the language of the Agreement that injury for purposes of Article 5 shall be interpreted in accordance with footnote 9, the Agreement provides no similar connection between the likely "continuation or recurrence of injury" for purposes of Article 11.3 and the injury determination contemplated by Article 3.

22. In addition, the cumulation provision contained in Article 3 cross-references Article 5 in two ways. This cross-reference in an integral provision of Article 3 indicates that Article 3 and Article 5 are linked. Article 5 sets out the procedural aspects for the original determinations of both dumping and injury.⁹ Article 3 provides the substantive requirements for original injury determinations. There simply is no similar linkage between Article 11.3 and Article 3.

23. Mexico suggests that there are two types of injury "investigations" – a so-called "Article 5 injury investigation" and a so-called "Article 11.3 injury investigation." This argument conflicts with the Appellate Body's report in *German Sunset*, notwithstanding Mexico's assertion that its views are "completely consistent" with the Appellate Body's statements.

24. The Appellate Body's observation that "original investigations and sunset reviews are distinct processes with different purposes,"¹⁰ is not, as Mexico suggests, less applicable to injury determinations than to dumping determinations. Article 11.3 of the AD Agreement (and Article 21.3 of the SCM Agreement) make no mention or reference to an investigation of either dumping or injury. With respect to both the dumping and injury determinations, the Agreement distinguishes between original investigations and reviews that may follow imposition of an anti-dumping duty order.

25. That Article 11.3 contemplates basic evaluation and objectivity standards – the "investigatory" aspect – does not translate into a wholesale incorporation of the step-by-step Article 3 analysis required for purposes of an original investigation. Just as the Appellate Body declined to equate obligations of an investigatory nature with a wholesale incorporation of Article 2, there is likewise no incorporation of Article 3.

III. ISSUES RELATING TO THE FOURTH ADMINISTRATIVE REVIEW

26. Mexico believes that TAMSAs and Hylsas requests for reviews trigger obligations under Article 11.2. Mexico has also advanced various arguments regarding the application of the commercial quantities requirement in this particular review. These arguments fail.

A. OVERVIEW OF REVOCATION OPTIONS

27. US law provides for three separate revocation procedures. A company seeking revocation for itself ("revocation in part") during an annual assessment review will make a revocation request pursuant to section 351.222(b)(2) of the regulations. TAMSA and Hylsa requested revocation reviews under this procedure. If the company in question seeks revocation of the entire order during its annual assessment review, then the company needs to request a review under section 351.222(b)(1). TAMSA and Hylsa did not request revocation reviews under this procedure. The United States also provides respondents the opportunity to seek revocation, either in whole or in part, through a "changed circumstances" review. Commerce may revoke the order in whole (*i.e.*, order-wide) or in part (company-specific). Neither TAMSA nor Hylsa requested a "changed circumstances" review.

⁹ See *German Sunset*, para. 67.

¹⁰ *German Sunset*, para. 87.

28. In practice, a foreign producer or exporter in a country with multiple exporters normally does not request revocation of the order as a whole. A company requesting revocation has a business incentive to request revocation with respect only to itself, rather than the entire order, because revocation in part would put that company at a competitive advantage vis-à-vis other producers and exporters that remain subject to the order.¹¹

29. In this light, Mexico's argument that TAMSA and Hylsa were the only known Mexican producers when Commerce conducted the fourth review, and that the company-specific revocation review in this proceeding was really the same as an order-wide review under Article 11.2, rings hollow. First, there were several indications throughout the duration of this proceeding indicating that TAMSA and Hylsa were not the only known producers of OCTG in Mexico.¹² Second, each company had reason to seek revocation for itself alone and not for its competitor or competitors.

30. In any event, the company-specific revocation procedure is of benefit to foreign exporters and producers. If this revocation procedure were not available to respondents, the United States would still meet its Article 11.2 obligations through order-wide review procedures. The fact that the United States provides additional procedures, which benefit foreign producers, does not mean those procedures are subject to Article 11.2. To conclude as much would create a disincentive for Members to provide procedures beyond those required to fulfil specific obligations.

B. ARTICLE 11.2 REQUIRES ONLY ORDER-WIDE REVOCATION REVIEWS

31. Mexico has argued that Article 11.2 requires company-specific revocation procedures. The text of Article 11.2 does not support Mexico's view. First, the text of Article 11.2 requires a review of the continuing need for "the duty." As the Appellate Body found in connection with a similar phrase in Article 11.3, "the duty" refers to the anti-dumping duty order as a whole, not as applied to individual companies.¹³ Second, the text of Article 11.2 states that "any interested party," domestic or respondent, may request a review by submitting positive information to substantiate the need for the review. This simply means that the request of one interested party is sufficient to trigger the review; interested parties need not collectively request the review.

32. Mexico has argued that the fact that the United States amended its company-specific revocation regulations after *DRAMs from Korea* demonstrates that company-specific revocation reviews are subject to Article 11.2.¹⁴ However, the question of whether company-specific revocation reviews are required by Article 11.2 was not directly before the panel in *DRAMs from Korea*. More importantly, whether company-specific reviews are subject to Article 11.2 is a question of treaty interpretation, not whether a Member emphasized a particular argument in previous proceedings or how that Member later amended its regulations.

C. MEXICO'S CHARACTERIZATION OF THE COMMERCIAL QUANTITIES ELEMENT OF THE "THREE YEARS WITHOUT DUMPING" REQUIREMENT IS ERRONEOUS

33. Mexico has argued that Commerce's application in OCTG from Mexico of the requirement that sales have been made in commercial quantities during the three sequential years of no dumping is inconsistent with Article 11.2. As discussed above, Article 11.2 does not apply to company-specific

¹¹ US Answers to Panel Questions, para. 2.

¹² US Answers to Mexico's Questions, para. 33.

¹³ *Japan Sunset AB*, para. 150.

¹⁴ 19 C.F.R. § 351.222(b) (Exhibit US-4). This regulation was amended to include the phrase "otherwise necessary to offset dumping" pursuant to implementation of the recommendations and rulings adopted by the DSB in *DRAMs from Korea*.

revocation procedures; nevertheless, Commerce's application of the commercial quantities requirement was not inconsistent with Article 11.2.

34. Article 11.2 states that a Member is obligated to review the continuing need for an anti-dumping duty upon request by an interested party "which submits positive information substantiating the need for a review." It also states that a Member shall terminate the duty if, as a result of the review, the authorities determine that the duty is "no longer warranted."

35. Under section 351.222(b), in determining whether the duty is "warranted," the United States evaluates whether the exporter or producer in question has been able to maintain a meaningful presence in the US market after imposition of the order. Failure to do so is evidence that the exporter or producer needs to dump in order to meaningfully participate in the US market and that, absent the order, dumping will continue or recur. Requiring the exporter or producer under section 351.222(e) to provide evidence that it has met the commercial quantities requirement is thus in harmony with the provision of Article 11.2 requiring a Member to conduct a review thereunder only if the exporter or producer provides "positive information" sufficient to warrant the review.

36. The commercial quantities element of Commerce's requirements for revocation review does not mandate that an importer maintain the same pre- and post-order import volumes. Both Mexico and the Panel have noted that it is natural that, following the imposition of an anti-dumping measure, the volumes sold by the affected exporters would decline. The United States agrees that this is often the case, although some exporters have been able to raise their prices to avoid dumping and sell at well above pre-order volumes.

37. More importantly, Mexico's claim that the commercial quantities requirement "arises from a presumption that volume declines means [*sic*] that the order is necessary" is simply wrong. A drop in volumes does not necessarily result in a finding that the commercial quantities threshold has not been met. Indeed, Commerce has considered sales of 32 per cent of annualized POI sales to have been made in commercial quantities and revoked on that basis.

D. COMMERCE'S APPLICATION OF THE COMMERCIAL QUANTITIES REQUIREMENT IN OCTG FROM MEXICO WAS UNBIASED, OBJECTIVE, AND BASED ON THE RECORD EVIDENCE

38. As discussed above, Commerce's commercial quantities determinations are based on the facts of each case. The information presented by TAMSA in support of its commercial quantities claim, however, was not persuasive. First, TAMSA sold OCTG to the United States, when it sold at all, in only token volumes after the order was issued. Specifically, TAMSA's year-long volumes for the three basis years were only 0.5 per cent, 0.6 per cent, and 0.2 per cent of the annualized sales volumes present in the period of investigation.¹⁵

39. TAMSA made two arguments, each of which Commerce considered and addressed in the final determination, finding them insufficient to provide a basis for finding that TAMSA's extremely small sales were probative of its ability to maintain normal market participation without dumping.¹⁶

40. Mexico bears the burden of proving that, in fulfilling its obligations under Article 11.2, Commerce did not properly establish the facts or did not evaluate those facts in an unbiased and objective manner. Mexico has simply demonstrated that TAMSA and Hylsa presented facts and

¹⁵ See *Fourth Review Issues and Decision Memorandum*, at Comment 1 (Exhibit MEX-9).

¹⁶ See *Fourth Review Issues and Decision Memorandum*, at Comment 1 (Exhibit MEX-9).

arguments; there is no evidence that Commerce did not evaluate those facts in an unbiased and objective manner. Mexico's claim fails.¹⁷

E. THE MARGIN CALCULATION METHODOLOGY FOR HYLSA IN THE FOURTH REVIEW WAS CONSISTENT WITH THE AD AGREEMENT

41. Mexico's allegations that the United States calculated the dumping margin for respondent Hylsa in a manner inconsistent with Article 11.2 and 2 of the AD Agreement are without foundation and should be rejected by this Panel.

42. First, Mexico has failed to advance any claim that the United States acted in a manner inconsistent with Article 11.2 in its establishment of the margins of dumping in the fourth administrative review. The calculation of margins of dumping in an administrative review under the United States' system is performed pursuant to Article 9.3.1 of the AD Agreement. Mexico did not reference Article 9.3.1 in its request for panel establishment.

43. Second, with respect to Mexico's Article 2 claims, the analysis of each export transaction in the fourth administrative review was based on a comparison with a normal value for identical or similar home market transactions. In each case, due allowance was made for any differences affecting price comparability, consistent with Article 2.4. Mexico has offered no textual support for a finding that, once an anti-dumping measure is in place, Members may not impose anti-dumping duties based on the amount by which sales have been dumped. Similarly, Mexico has offered no textual basis for finding that Members must offset or reduce that amount of dumping based on the extent to which distinct comparisons have involved export prices which were greater than normal value.

44. In addition, Mexico has failed to establish that the AD Agreement contains any obligations as to how an administering authority is to determine an overall rate of dumping, or even *whether* an administering authority must determine an overall rate of dumping in a review.

45. Third, to the extent that Mexico seeks to rely on Article 2.4.2 for its offset claim, Mexico is pursuing contradictory legal arguments. Mexico suggests that the term "investigation phase" in

¹⁷ Mexico has also tried to argue that the United States conducted a full revocation review for TAMSA and Hylsa, rather than an evaluation of the revocation requests. This argument is unavailing. US regulations make clear that the commercial quantities requirement is a prerequisite for a request to conduct a revocation review. Section 351.222(e)(i) of the regulations provides that a company may only request revocation if it certifies, *inter alia*, that it has sold the subject merchandise in commercial quantities for three consecutive years. In verifying that certification, Commerce concluded that TAMSA had not sold the subject merchandise in commercial quantities and therefore did not qualify for a revocation review. With respect to Hylsa, Commerce noted that Hylsa had failed to obtain a *de minimis* margin in the fourth review. It stands to reason that if a company does not meet the threshold requirement for seeking revocation, then revocation will not occur. Mexico's reference to the title of the notice as providing evidence that a full revocation review in fact occurred is sophistic. (See, e.g., Mexico's Written Answers to Panel Questions, para. 11.)

Moreover, Mexico's quotation of the *Issues and Decision Memorandum* is misleading. (Mexico's Written Answers to Panel Questions, paras. 12-13.) In arguing that it met the commercial quantities requirement, TAMSA tried to justify the significant drop in sales. The passage quoted from the *Issues and Decision Memorandum* simply represents Commerce's response to TAMSA's argument that it met the commercial quantities requirement. This is confirmed by the paragraph following that which Mexico has quoted, in which Commerce stated that the "commercial quantities standard is evaluated on a case-by-case basis." (Issues and Decision Memorandum at 8 (Exhibit MEX-9)).

Finally, the United States notes that Mexico includes a quotation from the Issues and Decision Memorandum as "evidence" that the United States conducted a substantive review: "[W]e find that TAMSA does not qualify for revocation of the order on OCTG under 351.222(e)(1)(ii)" Section 351.222(e) of the regulations is the commercial quantities certification requirement and thus expressly refers to a procedural, rather than a substantive decision.

Article 2.4.2 means any time an administering authority undertakes a process that is *investigative* in nature. Mexico also interprets the term "investigations" in Article 3.3 as limited to only original investigations. Not only does Mexico fail to offer any textual support for its disparate use of these terms, Mexico also fails to recognize that its interpretation of the phrase "investigation phase" in Article 2.4.2 would deprive that term of any meaning.