ANNEX D

ORAL STATEMENTS, FIRST AND SECOND MEETINGS OR EXECUTIVE SUMMARIES THEREOF

ANNEX D-1

ORAL STATEMENT OF MEXICO – FIRST MEETING

(25 May 2004)

I. INTRODUCTION

1. Mexico respectfully ask that the members of the Panel keep the following key elements in mind throughout this meeting:

- First, the Appellate Body has made clear that the principal obligation of Article 11.3 is termination of the measure; continuation of the measure beyond 5 years is the exception. The United States must prove that it has satisfied the requirements of Article 11.3 to justify the continuation of the anti-dumping duty beyond the five year period.

- Second, underlying the US position is the view that Articles 11.2 and 11.3 contain no substantive obligations, and that the standards relating to "dumping" and "injury" in Articles 2 and 3 simply do not apply.

- Third, the U.S review decisions at issue in this case are based on presumptions, or inferences, drawn from one observation: that Mexican import volumes are lower than the volume reached before the imposition of the anti-dumping measure in 1995.

II. US VIOLATIONS OF ARTICLE 11.2 AND 11.3

A. THE ANTI-DUMPING STATUTE, THE SAA, AND THE SPB ARE INCONSISTENT AS SUCH WITH ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT BECAUSE THEY ESTABLISH A WTO-INCONSISTENT PRESUMPTION

2. Paragraph 123 of the US First Submission reveals the presumptions that underpin US law and direct the Department's practice. The obligations in Article 11.3 cannot be satisfied by presumptions or "simply an exercise in logic." Determinations under Article 11.3 must always rest on "positive evidence" of likelihood.

3. The empirical evidence provided in MEX-62 demonstrates the operation of a WTO-inconsistent presumption.

B. US VIOLATIONS ARISING FROM THE DEPARTMENT'S ARTICLE 11.3 REVIEW

1. Import Volumes as the Only Basis for the Decision

4. The US position could not be clearer: the "depressed state of import volumes" was the only basis for Commerce's determination that dumping was likely to recur, and the US firmly believes that there is nothing wrong with this approach. There is no reason to require a Member to maintain its

export volumes to one market as a pre-condition to benefit from its rights under Article 11.3, and Article 11.3 contains no such pre-condition.

2. Lack of Positive Evidence

5. It is important for the Panel to focus on the following questions when examining the specific facts of this case:

1. does Article 11.3 allow an authority to rely, in the circumstance of this case, solely on an inference arising from lower than pre-order import volumes, and to ignore evidence provided by the parties?; and

2. is there positive evidence that dumping is "likely" on the facts of this case?

Mexico submits that the answer to both questions is "no".

6. With respect to the first question, an authority must base its likelihood decision **on positive evidence**. In this case, the Department passively relied on the presumption that lower volumes mean likely dumping (following the direction of the statute, SAA, and SPB).

7. With respect to the second question, the only positive evidence developed in the case demonstrated that dumping would not occur, and that it was certainly not "likely." Mexico demonstrates in the chart appearing as MEX-64 that the Department ignored evidence of past, present, and future behaviour by the Mexican exporters.

8. In addition, the United States argues in its First Submission that the likely margin to prevail was irrelevant to its substantive decision that dumping was likely to recur in this case. The United States attempts to avoid the consequences the *Japan Steel* appeal decision, by arguing that the dumping "margin likely to prevail," while reported, was not relied upon in determining *whether* dumping was likely to continue or recur. This ex-post rationalization by the United States is not credible. The statute, regulations, and SPB direct the Department to consider the dumping margin in rendering its "likelihood" determination, and the evidence shows that the Department unjustifiably – but clearly – relied on the historic dumping margin in this case.

C. US VIOLATIONS ARISING FROM THE COMMISSION'S ARTICLE 11.3 REVIEW

1. The "likely" standard used by the Commission violates Articles 11.3 "as such" and "as applied" in this case

9. The Commission has admitted that its interpretation of "likely" is something less than "probable," while the Appellate Body has confirmed that "likely" means "probable," and not something less.[1]

10. The United States explains in rebuttal that the only reason the Commission argued before the CIT and the NAFTA Panel examining this very same case that "likely" did not mean "probable" was because the Commission did not understand what "probable" meant and that its previous understanding was that a probable standard required "a high level of certainty" or "near certainty." Again, the argument lacks credibility given the Commission's sophisticated, technical arguments in the litigation.

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

2. The Commission's Likelihood of Injury Determination Violated US Obligations Under Article 11.3 Because it was not based on an Objective Examination of the Record, Was Not Based on Positive Evidence, and Was Tainted by the Flawed "Margin of Dumping to Prevail" Reported by the Department

11. The Commission's decision was based on mere speculation: events pulled from the past, or potential outcomes best described as "possibilities," were cobbled together by the Commission to form the basis for its inference that injury would be likely. With respect to the price, volume, and impact of the "likely" imports, the Commission combined reliance on anecdotal evidence of what possibly could occur, with findings from the original investigation several years earlier. Mexico submits that the investigating authority cannot rely to this extent on evidence from the original investigation as the basis for its Article 11.3 determination.

3. Article 3 Applies To Reviews Conducted Under Article 11.3

12. Mexico and all of the Third Parties participating in this case, are firm in their belief that the text of the Anti-dumping Agreement necessarily implies that the Article 11.3 injury determination must satisfy the substantive requirements of Article 3. This view is based on the text of the Agreement, particularly footnote 9.

13. The only way to sustain that Article 11.3 injury determinations are somehow different is to demonstrate that some other provision of the Agreement "specifies" that "injury" as used in Article 11.3 need not be interpreted in accordance with Article 3. No such provision exists.

4. The Commission's decision to conduct a cumulative injury analysis violates Article 11.3 because cumulation is not permitted by Article 11.3

14. Article 11.3 affords every WTO Member the right to termination of anti-dumping duties after five years. Cumulation nullifies that right because termination depends on the export practices of private companies of other WTO Members.

15. The United States offers no textual arguments to support its repudiation of the right created by Article 11.3. Mexico asserts that Article 11.3 – both pursuant to its terms and as interpreted in its context – expressly prohibits cumulation. Alternatively, if cumulation is permitted, it simply cannot remain unregulated. In this case, the Commission conducted a cumulative analysis even though it never defined a time frame for its likelihood determination. If an investigating authority has not even decided when the "likely" imports will be in the market and when the injury is "likely" to recur, it cannot justify a decision to cumulate the "likely" imports

D. US VIOLATIONS ARISING FROM THE DEPARTMENT'S ARTICLE 11.2 REVIEW

16. According to the United States, Article 11.2 does not create an obligation on WTO Members to allow termination of the measure with respect to individual companies, but rather obligates the Members to implement a system for "order-wide" termination. The argument is not credible for several reasons: (1) it ignores the two references in the text to Article 11.2 to "interested parties," which demonstrate an intent to require termination when individual exporters demonstrate that the measure is no longer necessary; (2) in developing this argument, the United States never once mentions the *DRAMs from Korea* case, which demonstrates that the Department's company-specific revocation proceedings are governed by Article 11.2; and (3) in this case, the only two known exporters requested termination because the measure was no longer necessary, which is expressly the circumstance covered by Article 11.2.

17. Treatment of Hylsa's request, and the specific issue of zeroing. The question for this Panel is whether the Department's practice of zeroing complies with the obligations and Articles 11.2 and 2. In

this case, zeroing creates a dumping margin, where no dumping margin exists. Consequently, the zeroing in this case violates the United States' obligation under Articles 11.2 and 2.4 to base its calculation on a "fair comparison."

18. The use of zeroing in this case also violates Article 2.4.2. As the Appellate Body explained in *Steel from Japan*, reviews under Article 11 contain both an adjudicatory and *investigatory* element. That is, "investigation phase" is properly understood in the context of Article 2.4.2 to mean the portion of the proceeding (original investigation or review) in which the authority "investigates" whether dumping has occurred.

19. Department's determination not to revoke the measure as to TAMSA. It is clear that the decision was based solely on the basis of the volume factor. For the same reasons explained above in the context of the Article 11.3 review, the excessive reliance on the volume factor violates the obligations of Article 11.2.

III. BASED ON THE PERVASIVE AND FUNDAMENTAL US VIOLATIONS, THE PANEL SHOULD SUGGEST THAT THE MEASURE BE TERMINATED

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

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES – FIRST MEETING

(7 June 2004)

Mr. Chairman, members of the Panel:

1. At the outset, we thought it would be helpful to outline the US review system. US law provides that an anti-dumping duty order may be revoked by Commerce after a completion of any of three types of reviews - sunset, changed circumstances, and administrative. The sunset review implements the US obligations of Article 11.3 of the AD Agreement and is conducted on an order-wide basis. The changed circumstance review most directly implements US obligations under Article 11.2 and can be conducted on an order-wide or a company-specific basis. The administrative review primarily provides the mechanism for the calculation of duties owed, as required by Article 9 of the AD Agreement. However, it can also provide a mechanism for an order-wide or company-specific termination; here, TAMSA and Hylsa sought company-specific terminations of the order in this dispute.

ISSUES CONCERNING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

2. With regard to Commerce's sunset determination, Mexico claims that the United States breached its obligations under Article 11.3 of the AD Agreement because US law and practice require that a "presumption of likely dumping" be applied in favour of maintaining the anti-dumping duty order. Article 11.3 does not prescribe how to determine likelihood in a sunset review, or what particular methodology a Member should use to determine likelihood. In a situation where, as is the case here, an administering authority employs a methodology that is consistent with its WTO obligations, properly establishes the facts, and evaluates those facts in an unbiased and objective manner, the authority's decision may not be overturned.

3. Mexico's entire sunset review claim is premised on the existence of an alleged "irrefutable presumption" that Commerce makes an affirmative likelihood determination in every sunset review in which a domestic interested party participates. Mexico claims that the Statement of Administrative Action, the *Sunset Policy Bulletin*, and an alleged "consistent practice" all give rise to the alleged presumption. Mexico fails to show the existence of the allegedly "WTO-inconsistent presumption" in US law because no such presumption exists.

4. With respect to the SAA, Mexico quotes a passage to demonstrate the alleged "presumption." However, the quoted passage does not demonstrate any such presumption. Likewise, Mexico cites certain passages from the *Sunset Policy Bulletin* as a potential source for the alleged "WTO-inconsistent presumption." Here we recall that the *Sunset Policy Bulletin* has no status under US law. Therefore, it is, as a factual matter, impossible to conclude that the *Sunset Policy Bulletin* creates any kind of presumption.

5. Because Mexico cannot establish that US law creates a "presumption," Mexico instead asserts that a "presumption" exists simply because Commerce has found likelihood in a particular number of sunset determinations. Previous panels have found that the mere frequency of a particular outcome does not transform that outcome into a "measure" that may be challenged independently for its alleged WTO inconsistency. Second, the statistic does not reveal the particular factual circumstances in each case or the analysis resulting from the evaluation of those factual circumstances.

6. We also wish to note that the Appellate Body in *Japan Sunset* did not affirmatively find that the *Sunset Policy Bulletin* is a measure.

7. Turning to Mexico's "as applied" sunset review claims, Mexico has based these claims either on an inaccurate understanding of the facts on the record or Mexico's disagreement with Commerce's weighing of the evidence in the sunset review of OCTG from Mexico.

ISSUES CONCERNING THE FOURTH ADMINISTRATIVE REVIEW

8. Mexico's second principal claim is that Commerce's determinations in the fourth review were inconsistent with Article 11.2 and Article 2 of the AD Agreement and GATT 1994. Mexico is attempting to read obligations into Article 11.2 that do not exist.

Company-specific terminations under US Law

9. Although a company-specific examination of the necessity for the continuation of a duty is not required by Article 11.2 or any other provision of the AD Agreement, the United States, nevertheless, provides such a procedure under its domestic law in a manner that is entirely WTO consistent. The United States points out that it has procedures, separate and apart from those challenged here, that provide for the possibility of termination of the order on a company-specific basis.

10. Mexico has argued that the commercial quantities requirement is inconsistent with Article 11.2. Nothing in Article 11.2, however, prohibits a commercial quantities requirement.

Commerce did not conduct a termination analysis

11. Mexico claims that Commerce applied a standard that was inconsistent with Article 11.2 of the AD Agreement in determining whether the continued imposition of the anti-dumping duty order on OCTG from Mexico was necessary to offset dumping in the fourth review. In fact, Commerce did not undertake a substantive analysis of whether the OCTG order was necessary in the fourth review, because Commerce determined that a termination review was not necessary.

The margin calculation methodology in the fourth review

12. Mexico also claimed that the United States calculated Hylsa's overall dumping margin in violation of Article 2.4 of the AD Agreement. Mexico concludes that this violation also led to a violation of Article 11.2 because, if the overall dumping margin had been calculated as Mexico suggests is required, the order would have been revoked as to Hylsa. This claim fails because Mexico adopts an interpretation that would expand the obligations in Article 2.4.2 and Article 11.2 beyond their express terms.

ISSUES CONCERNING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

13. Mexico has raised a number of issues regarding the ITC's determination of likelihood of continuation or recurrence of injury in the OCTG sunset review. We will focus on three of those issues.

The Likely Standard

14. Mexico argues that the ITC misinterpreted the term "likely" in Article 11.3. Essentially, Mexico maintains that "likely" can only mean "probable," and that the ITC disregarded this meaning and interpreted "likely" to mean "possible." The ITC did not interpret "likely" to mean "possible," as demonstrated by the determination itself.

Article 3

15. Mexico claims that Article 3 of the AD Agreement applies in its entirety to sunset reviews. But there are numerous textual indications that this is not the case. For example, there are no cross-references in Article 3 to Article 11, or in Article 11 to Article 3.

16. Moreover, a determination of injury, or threat of injury, under Article 3 and a determination of likely continuation or recurrence of injury under Article 11.3 are entirely different concepts.

The Time Frame

17. Mexico claims that the provisions of US law regarding the time frame within which injury would be likely to continue or recur are inconsistent with Articles 3 and 11.3 of the AD Agreement. Mexico misconstrues Article 11.3, which does not specify the time frame relevant to a sunset inquiry.

CONCLUSION

18. Mr. Chairman, that concludes the opening statement of the United States. We would be pleased to answer any questions the Panel may have.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF ARGENTINA

(26 May 2004)

I. INTRODUCTION

1. Argentina welcomes this opportunity to present its views to the panel in *United States – Anti-Dumping Measures on OCTG from Mexico* (DS 282). Argentina's comments today will focus on the US violations of Article 11.3 arising from US law and practice, the Department's determination of likely dumping, and the Commission's determination of likely injury. Argentina will also offer its views as why Article 11.2 contains company-specific obligations, and why the United States violated Article 11.2.

II. US ARTICLE 11.3 REVIEWS

A. THE UNITED STATES EMPLOYS A WTO-INCONSISTENT PRESUMPTION THAT DUMPING IS LIKELY

2. The US statute, the Statement of Administrative Action, and the Sunset Policy Bulletin, as such, as well as the Department's consistent practice in sunset review cases, establish a WTO-inconsistent presumption that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping. Under US law, declines in import volume and/or the existence of historic dumping margins are given decisive weight. The empirical evidence developed by Mexico in Exhibit MEX-62 in this case demonstrates that every time the Department finds that at least one of the three criteria contained in section II.A.3 of the SPB is satisfied (continuation of dumping, cessation of imports, and no-dumping with a significant decline of imports), the Department makes an affirmative finding of likely dumping, without considering additional factors. There are no exceptions.

3. The Appellate Body emphasized in *Japan Sunset* that the likelihood determination under Article 11.3 could not be based "solely on the mechanistic application of presumptions" but instead must be grounded on a "firm evidentiary foundation."[1] The Department's likelihood determinations operate exclusively on the "mechanistic application of presumption." In all (227 out of 227) of the full and expedited sunset reviews, the Department determined that dumping was likely to continue or recur.

B. THE DEPARTMENT'S DETERMINATION OF LIKELIHOOD OF DUMPING WAS FLAWED

4. The Department's likelihood of dumping determination in the sunset review of OCTG from Mexico was inconsistent with Article 11.3. The Department rejected positive evidence that demonstrated that dumping would not be likely and instead it relied on post-order import volume in

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

determining that dumping was likely to recur. The prospective analysis required by Article 11.3, as confirmed by the Appellate Body, was completely absent.

5. The evidence in this case demonstrated that the market and economic circumstances prevailing at the time of the original investigation (Mexican peso devaluation and high dollar indebtedness of Mexican exporters) no longer existed and were not likely to exist in the future.[2] In addition, neither of the Mexican exporters had ever been found to be dumping based on a review of their own data. The Mexican exporters provided evidence of these facts, and the Department ignored the evidence. The Department's actions are completely unjustified in this case, and violate Article 11.3. As the European Communities has highlighted, the Mexican case is a particularly glaring and egregious example indicative that the United States anti-dumping system is skewed toward findings of likelihood in sunset review investigations.[3]

C. THE DETERMINATION OF LIKELIHOOD OF INJURY WAS FLAWED

1. Determining Likely Injury Under Article 11.3

6. In order to impose anti-dumping measures, a domestic industry must be injured, and the cause of that injury must be dumping. This bedrock principle has applied to the international regulation of dumping and dumping measures since its inclusion in Article VI of GATT 47. The requirements of dumping, and injury caused by dumping, continue through the life of the measure; without these elements, the measure must be terminated. This is made clear by Article 11.1 of the Anti-Dumping Agreement, which states that: "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

7. "Dumping," "Injury," and "Causation." What do all these terms mean? There is no mystery here because the WTO Members defined the terms. Article 2 defines dumping "for the purposes of this Agreement." Article 3, footnote 9 defines injury "under this agreement," and requires that the term "injury" "shall be interpreted in accordance with the provisions of this Article." Article 3.5 explains that there must be a causal link between the dumping and the injury, and describes the nature and type of evidence necessary to establish the necessary causal link. There is no ambiguity in these terms.

8. But the United States' First Submission claims that the requirements are not clear, and that Article 3 does not apply to the injury determination required by Article 11.3. Argentina respectfully asks that the Panel to focus on this issue. For Argentina, and for the other Third Parties, the US argument conflicts directly with the text of the Agreement, and therefore changes the balance of rights and obligations agreed by the WTO Members.

9. While confident that the Panel will agree with Mexico and all the Third Parties in this dispute regarding the application of Article 3 to Article 11.3 determinations, Argentina notes that Mexico's claims are not dependent upon the application of Article 3. Mexico claims that the United States violated Article 11.3 because: (1) the Commission did not apply a "likely" standard in this case (as it admitted to a NAFTA Panel reviewing the very same injury determination) [4]; (2) the Commission did not properly establish and objectively evaluate evidence that could support a finding that injury was likely to continue or recur; and (3) the improper finding of likely dumping necessarily taints the Commission's analysis of likely injury, and necessarily negates the possibility of proving a causal link between the dumping and injury. Each of these claims relate to the substance of the Article 11.3 obligation.

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[2] See Mexico's First Submission, paras. 129-144.
[3] See European Communities, Third Party Submission, page 16 para. 68.
[4] *See* Mexico's First Submission, para. 171 and (MEX-47).

10. Argentina notes that the injury portion of the Article 11.3 review of Mexican OCTG imports is identical to the injury portion of the Article 11.3 review of Argentine OCTG, which is the subject of a separate WTO dispute settlement proceeding (DS 268). Argentina endorses all of Mexico's "as applied" arguments related to the injury portion of the review. The Commission's decision is based on speculation, and, at best, events that can be considered to be "possible."

2. Cumulative Injury Analysis Prohibited in Article 11.3 Reviews

11. Argentina considers that the application of a cumulative injury analysis is not consistent with the rights granted to individual WTO Members by Article 11.3.[5] The purpose of Article 11.3 is to provide each WTO Member with the right to have an anti-dumping measure affecting its exports terminated after five years, unless its exports are likely to be dumped within the meaning of Article 2 and the dumping is likely to cause injury within the meaning of Article 3. A cumulative injury analysis violates the object and purpose of Article 11.3, because it conditions each Member's right to termination of an anti-dumping measure covering its imports on the commercial practices of exporters from other countries.

12. Argentina shares Mexico's view that the text of the Anti-Dumping Agreement is not silent on the issue of cumulation.[6] Article 11.3 refers to anti-dumping "duty" in the singular, not plural. Thus, on its face, Article 11.3 requires the authority to determine whether the revocation of a *single* anti-dumping measure – rather than the revocation of multiple anti-dumping measures – would be likely to lead to the continuation or recurrence of injury. Article 11.3 thus does not permit cumulation.

13. Argentina notes that WTO Members in the Uruguay Round achieved, for the first time, disciplines on the practice of cumulation. The use of a cumulative analysis was authorized for "investigations," and even then only where certain conditions are met. The fact that Article 3.3 provides for the conditioned use of cumulation in "investigations" but not in "reviews" indicates that a cumulative injury analysis is not permitted in the likelihood of injury determination made in an Article 11.3 review. The failure of Article 3.3 and Article 11.3 to cross-reference each other corroborates this reading. Article 11.3 contains explicit cross-references to other articles of the Anti-Dumping Agreement (such as Articles 6 and 8), and other articles in the agreement explicitly cross-reference Article 11 (such as the cross reference in Article 12.3). Thus, it is evident that "when the negotiators . . . intended that the disciplines set forth in one provision be applied in another context, they did so expressly."[7] Accordingly, the lack of cross-references between Articles 11.3 and 3.3 indicates that the drafters of the Anti-Dumping Agreement did not intend for the *limited use* of a cumulative injury analysis permitted in an *investigation* to be extended to the likelihood of injury determination in a *review* under Article 11.3.

3. Defining the Timeframe for the Likelihood of Injury Determination

14. A fundamental flaw with the Commission's injury analysis in this case was its failure to specify any timeframe for the likelihood of injury. As Argentina has argued in DS 268, the statutory provisions (19 U.S.C. §§ 1675a(a)(1) and (5)), are inconsistent as such with Articles 11.3 and 3.[8] Article 11.3 requires the authority to determine whether termination of an anti-dumping measure would be likely to lead to the continuation or recurrence of injury. The authority's likelihood of injury determination must not be based on speculation about possible market conditions several years into the future, but rather must be based upon the likelihood of injury upon "expiry" of the measure.

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[5] See Mexico's First Submission, sec. VIII.E.
[6] See Mexico's First Submission, para. 254.
[7] Appellate Body Report, *Steel from Germany*, para. 69.
[8] *See* First Submission of Argentina in DS 268, Sec. VIII.C.1.

15. Argentina does not see how the obligations of Article 11.3 can be implemented without defining the period in which injury is likely to continue or recur. Simply put, to determine whether something would be likely or probable, the administering authority must have some timeframe in mind because time affects the probability of occurrence. US law violates Article 11.3 because it strongly suggests that injury need not be imminent upon the expiry of the measure. Also, the Commission's decision in this case violates Article 11.3 because the Commission did not even bother to define a time period when injury was likely to recur. It simply cannot be – as in this case – that a Member can conduct the Article 11.3 injury analysis without any parameters at all for the timeframe within which injury would be likely to continue or recur.

III. US ARTICLE 11.2 REVIEWS

16. Argentina is puzzled by US arguments regarding the nature of the Article 11.2 obligation. For Argentina, it is clear that Article 11.2 creates an obligation to terminate the measure upon the presentation of positive evidence by individual exporters that the measure is no longer necessary to offset dumping.

17. First, the US position is inconsistent with the text of Article 11.2, which refers to "any interested party" and "interested parties." With these references, the text is explicit that the Article 11.2 obligations to conduct a review and/or to terminate an anti-dumping duty are company-specific. The Appellate Body confirmed this reading in the context of its analysis of whether Article 11.3 creates company-specific obligations.[9]

18. Further, the US position is inconsistent with the position recently taken by the United States in DS268. There, the United States asserted that sunset reviews are conducted on an "order-wide" basis. Based on this approach, the United States considered the relevance of the individual exporter participation to be limited.[10] The result of such an approach is that continuation of an anti-dumping order can be based on circumstances wholly unrelated to any one individual company. At the same time, the United States repeatedly emphasized throughout that proceeding that US procedures were consistent with the Anti-Dumping Agreement because they enabled a company to have an order revoked as it pertains to that company by obtaining zero margins in three consecutive administrative reviews.[11]

19. Once the Panel arrives to the substance of the 11.2 claims, it is clear to Argentina that the United States did not have a proper basis to deny the requests for termination and to continue the measure to TAMSA, Hylsa, and "all others." With respect to TAMSA, the Department once again placed decisive weight on the volume factor, even to the extent of explicitly calling it a "threshold" factor that was imposed after TAMSA had begun the process of reviews required by US law. With respect to Hylsa, the evidence provided by Mexico is crystal clear: the so-called evidence of dumping was a margin calculated on the basis of zeroing, which violates the "fair comparison" requirement of Article 2.4. The US decision to ignore the evidence that the measure was no longer necessary to offset dumping violates the requirements of Article 11.2.

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[9] Appellate Body Report, Japan Sunset, para. 149.

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

[11] US Oral Response to Panel Question During First Substantive Meeting of the Panel with the Parties; *see also* US Second Written Submission, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268 (8 Jan. 2004), paras. 13-15.

IV. CONCLUSION

20. Argentina believes that Mexico has presented a compelling case of violations. If the panel agrees and recommends that the United States bring itself into compliance with its obligations, Argentina agrees that termination of the anti-dumping measure on OCTG from Mexico would be the appropriate suggestion from the panel. Argentina and Mexico are both of the view that a suggestion is appropriate in the case of violations of Articles 11.2 and 11.3, both of which create affirmative obligations to terminate an anti-dumping measure, unless certain findings are made by the Member seeking to continue the measure. If the findings are improper, the Panel should suggest termination in order to restore the rights of the exporting Member.

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

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF CHINA

(26 May 2004)

1. Thank you, Mr. Chairman, and members of the Panel. China appreciates this opportunity to present its views on the issues raised in this Panel proceeding. In this statement, I will summarize China's major view of points in our written submission.

2. The first issue is whether the US Department of Commerce ("DOC") acted inconsistently with Article 2 and Article 11.3 of the Anti-Dumping Agreement regarding DOC's likelihood of continuation or recurrence of dumping decision.

3. China agrees with Mexico that a determination solely based on the decrease of import volume to decide that the expiry of the duty would be likely to lead to continuation or recurrence of dumping is not consistent with Article 11.3 of the Anti-Dumping Agreement.

4. The three criteria DOC adopted to determine dumping continuation or recurrence, i.e., continued dumping margins, the cessation of imports and/or declining import volumes accompanied by the elimination of dumping margin do not adhere to the "dumping" definition in Article 2 of the Anti-Dumping Agreement.

5. Article 11.3 of the Anti-Dumping Agreement requires the investigation authorities to determine that the expiry of the duty would be likely, i.e., probable to lead to continuation or recurrence of dumping before they decide not to terminate the anti-dumping measure. "To determine" means the investigation authorities to conduct a rigorous examination in a sunset review to continue the anti-dumping measures based on evidences that show "probability" rather than simple "possibility".

6. The second issue is whether the US International Trade Commission ("ITC") acted inconsistently with Article 3 and Article 11.3 of the Anti-Dumping Agreement regarding ITC's likelihood of continuation or recurrence of injury decision.

7. As we mentioned above, same as dumping decision, the investigation authorities are required to determine that the expiry of the duty would be likely, i.e., probable, to lead to continuation or recurrence of injury before they decide not to terminate the anti-dumping measure.

8. China agrees with Mexico that provisions of Article 3 of the Anti-Dumping Agreement apply to Article 11.3.

9. Article 3.1 of the Anti-Dumping Agreement provides that the investigation authorities must base their injury determination on positive evidence and objective examination of the consequent impact of these imports on domestic producers of such products.

Article 3.4 of the Anti-Dumping Agreement requires the investigation authorities to evaluate all 15 economic factors and indices. China agrees with Mexico that in sunset review, the authorities must follow Article 3.4 as well.

10. Article 3.5 provides that injury within the meaning of this Agreement must be caused by dumped imports through effect of dumping set forth in paragraphs 2 and 4. This means the investigation authority must prove causal link between dumping and injury. If the Panel finds that the ITC failed to make causation analysis, the ITC acted inconsistently with Article 3.5 and 11.3 of the Anti-Dumping Agreement.

11. China shares the view of Mexico that 19 U.S.C. § 1675a(a)(1) and 19 U.S.C. § 1675a(a)(5) are inconsistent with Article 11.3 and Article 3 of the Anti-Dumping Agreement. The US legislation empowers the ITC to determine whether injury would be likely to continue or recur "within a reasonable foreseeable time" and to consider the effects of revocation or termination over a longer period of time". It thus gives the ITC discretion to investigate into the long indefinite future, which is inconsistent with the Article 11.3 of the Anti-Dumping Agreement that requires the determination to be based on injury upon expiry of the order.

12. The last issue China would like to address is "zeroing" methodology.

13. China agrees with Mexico that the dumping margin calculated using the "zeroing" methodology in the DOC 4th administrative review is inconsistent with Article 2.1 and 2.4 of the Anti-Dumping Agreement.

14. The practice of "zeroing" selectively calculates margins only for those sales of a product with positive margins, setting negative margins produced from sales of product to zero. This methodology creates an artificially inflated dumping margin.

15. If the Panel, based on the evidence submitted by Mexico, finds that DOC applied zeroing methodology to find positive dumping margin for Hylsa in the 4th administrative review, the DOC determination was inconsistent with Article 2.1 and Article 2.4 of the Anti-Dumping Agreement.

16. We thank you again for this opportunity to express our views.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(26 May 2004)

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Chairman, Members of the Panel.

I. INTRODUCTION

1. The European Communities makes this third party oral statement because of its systemic interest in the correct interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*").

2. In this oral statement, in addition to the observations set out in its written observations, and reacting to certain statements made by the other parties, the European Communities will comment on the following points :

- the precise nature of the findings made by USDOC in the sunset review;
- the categorisation of United States periodic reviews of the amount of duty under the *Anti-Dumping Agreement*; and
- the inherent unfairness of the simple zeroing methodology used by the United States in periodic reviews of the amount of duty.

II. SUNSET REVIEW "AS APPLIED"

3. The European Communities would draw the Panel's attention to the fact that all of the third parties - Argentina, China, the European Communities, Japan and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu – agree that the conduct of sunset reviews in the United States, generally, or in this specific case, is not consistent with the provisions of the *Anti-Dumping Agreement.*

A. LIKELY RECURRENCE OF DUMPING

4. The European Communities interest in this case is systemic. However, the distinction between the general and the specific is not always an easy one. In order to understand what is wrong with the United States system of sunset reviews in general terms it is helpful, even necessary, to understand what is wrong with this, and other, specific determinations. That requires clarity on the facts of the specific case. The European Communities would therefore like to draw the Panel's attention to certain facts which are not entirely consistent with the United States presentation of the facts in its first written submission.

5. The United States asserts that it found likely *continuation* or recurrence[1], referring in general terms to all of the Issues and Decisions Memorandum relating to the preliminary sunset determination.[2] In fact, the specific determination was likely *recurrence*.[3] Even if, in other parts of the Issues and Decisions Memorandum, reference is made in general terms to "continuation or recurrence", these are just general references to the relevant legal test. The Panel must look to the specific determination made by USDOC, that being recurrence.

6. It is important to be precise about what USDOC actually determined on this point. Being precise, by using the word "recurrence" rather than "continuation", makes it clear that USDOC made a determination in relation to a phenomenon that had ceased, that phenomenon being the dumping

[1] United States first written submission, para 46.
[2] United States first written submission, footnote 73 (referring to Exhibit US-14).
[3] Issues and Decisions Memorandum relating to the preliminary sunset determination, Exhibit US-14, page 9, para 2.

determination made in respect of the original period of investigation. Using the word "continuation" is factually inaccurate and would serve only to obfuscate the analysis – that is, to cover-up serious weakness in the position of the United States in this case on this point.

7. The United States cannot, before this Panel, retroactively add to the measure determinations that the measure does not contain. Nor can the United States retroactively change the determination in the measure.

8. The United States further suggests or asserts that it relied for its determination on *dumping throughout the history of the order*[4], referring to pages 5 to 8 of the Issues and Decisions Memorandum relating to the preliminary sunset determination.[5] In fact, the United States relied on the *original dumping margin and imports*[6] to find that "recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked". The preliminary results of the fourth periodic review (1.47 per cent for Hylsa) are described in the factual section of the Issues and Decisions Memorandum, entitled "History of the Order". They are not, however, relied on by USDOC for the purposes of its preliminary sunset determination.

9. These facts are confirmed by the Issues and Decisions Memorandum relating to the *final* sunset determination, which is drafted in the same terms.[7]

10. It is equally important to be precise about what USDOC actually relied on to make its recurrence determination, for the same reasons. Also in relation to this matter, the United States cannot retroactively seek to re-write history, by denying what is written in the measure before this Panel. Its attempts to do so nicely flag the weakness of its case on this point.

11. The European Communities refers to its written submission, in which it has explained why it considers USDOC's determination in this case to be inconsistent with various provisions of the *Anti-Dumping Agreement*.

III. FOURTH PERIODIC REVIEW OF AMOUNT OF DUTY

A. CATEGORISATION OF UNITED STATES PERIODIC REVIEWS OF THE AMOUNT OF DUTY UNDER THE ANTI-DUMPING AGREEMENT

12. In its written observations the European Communities drew the Panel's attention to the fact that United States periodic reviews of the amount of duty correspond very closely, entirely or almost entirely, to the provisions of Article 9.3.1 of the *Anti-Dumping Agreement*, rather than Article 11.2 of the *Anti-Dumping Agreement*. The European Communities explained, in this respect, that the United States changed circumstances review corresponded more closely to the provisions of Article 11.2 of the *Anti-Dumping Agreement*. The consequence of this is that the investigation or assessment made during a United States periodic review must be conducted in a manner that is consistent with Articles 9 and 2 of the *Anti-Dumping Agreement*.

13. This is a point that the European Communities would like to re-iterate and emphasize. If a systematic comparison is made between the texts of the various provisions, paying close attention to the purpose, temporal character, outcome, time limits, evidentiary and other procedural rules, it is an observation of fact that is incontrovertible.

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[4] United States first written submission, para 46.
[5] United States first written submission, footnote 74 (referring to Exhibit US-14).
[6] Issues and Decisions Memorandum relating to the preliminary sunset determination, Exhibit US-14, page 9, para 2.
[7] Exhibit Mex-19, page 4, para 4.

14. The European Communities finds further confirmation of this analysis in the fact that, during the relevant period, the United States also conducted a changed circumstances review.[8] This confirms the fact that periodic reviews of the amount of duty and changed circumstances reviews are quite different, one relating essentially to Article 9.3.1 of the *Anti-Dumping Agreement*, and the other to Article 11.2.

B. ZEROING

15. The European Communities would like to emphasise that what it presents in its written observations is an interpretation of the relevant provisions of the *Anti-Dumping Agreement* that reflects the general principle and overarching obligation to make a fair comparison between export price and normal value. The relevant provisions of Article 2 of the *Agreement*, which define dumping, must be interpreted in a systematic and logical manner, in order to give the *Agreement* its true meaning.

16. In particular, the European Communities would like to emphasise that the United States practice of simple zeroing in periodic reviews of the amount of duty is inconsistent with the basic rule in Article 2.4 that a fair comparison must be made, notably insofar as it cuts across the logic established by USDOC itself when USDOC itself fixes the parameters of its investigation or assessment. A dumping determination that is internally logically self-contradictory cannot be based on a permissible interpretation of the *Anti-Dumping Agreement*. It cannot reflect an objective assessment based on positive evidence. Just as the Appellate Body has ruled that this is so in respect of the definition of the subject product and model zeroing, so it is equally true for any other parameter that is used by the investigating authority more than once in its determination. That parameter must be consistently established and used throughout the assessment. It cannot be arbitrarily changed, according to the outcome sought by the investigating authority.

17. In the context of zeroing, these observations have particular force with regard to the parameters mentioned in the second sentence of Article 2.4.2 of the *Anti-Dumping Agreement*, namely: purchasers; regions and time. Absent targeted dumping by reference to one of these parameters, an investigating authority must use a symmetrical method of comparing normal value and export price without zeroing. The investigating authority is bound by its own definition of the scope of its analysis and must therefore duly reflect all the export transactions falling within that scope. The simple zeroing method used by the United States is, at least potentially, offensive to any one of these parameters, because it is performed at the most disaggregated level, that is, at the level of individual transactions. In other words, instead of treating all the relevant export transactions as a whole, the United States methodology results in treating each export transaction individually in the same manner as model zeroing results in treating each model separately.

18. The recent dissenting opinion in the *US-Softwood Lumber* case is just that – a dissenting and minority opinion. It is wrong. And that may be demonstrated with ease. It fails to mention at any point, let alone grasp, the kernel of the reasoning of the Appellate Body in the *EC-Bed Linen* case : the requirement that determinations be objective and based on positive evidence means that they must be internally logically consistent. Once an investigating authority has adopted a certain logic, of its own choice, it is bound to apply the same logic in a consistent manner throughout its determination. That is particularly true when it comes to identifying the category of transactions, in terms of subject product, geography and time, that will be the subject of an anti-dumping proceeding. Whether or not there is such a thing as a perfect market definition, once the parameters for the analysis have been fixed, they must be applied consistently by the investigating authority in order to ensure that a fair comparison is made. Thus, the essential point is not whether or not the choice between the two "schools of thought" to which the dissenter refers can be made on the basis of the text, context and

[8] Exhibit US-12.

purpose of the *Anti-Dumping Agreement*. The point is rather that once the investigating authority has itself made that choice, it is bound by its own logic.

19. In the face of the text and the overwhelming logic of the meaning of the provisions in Article 2 of the *Anti-Dumping Agreement* which define dumping, the United States advances essentially one brief and purely textual argument – the phrase "during the investigation phase". The United States entire defence on this point is therefore premised on the assertion that this means "not during the review phase"; that the *Anti-Dumping Agreement* defines the terms investigation and review; and that these terms are mutually exclusive. Even if, for the sake of argument, the United States were correct, that would not render "zeroing" permissible in reviews - quite the contrary, it would in fact mean that the asymmetrical method of comparison that Article 2.4.2 introduces as an exception to the norm is not available in reviews. In any event, these textual assertions made by the United States are simply wrong. In textual terms, the European Communities has explained in its written observations that the matter before this Panel is essentially an investigation or assessment within the meaning of Article 9.3.1 of the *Anti-Dumping Agreement* (whatever term is used by the United States). The European Communities has also explained that the *Agreement* contains no definition of the terms "review" and "investigation"; and that in fact these terms are used in different senses in the *Agreement* – the meaning or meanings in any case being derived from the context and purpose of the provisions in question. In particular, the European Communities has explained that the text "investigation" in Article 2.4.2 of the *Agreement* must have the same general and unqualified meaning as the word "investigation" in Article 6 of the *Agreement*. The European Communities has thus demonstrated, in equally textual terms, the basic fallacy in the United States textual argument. The United States is actually asking the Panel to read into Article 2.4.2 words such as "initial" or "original" or "Article 5" – words that are simply not there in the text. Add to this the overwhelming arguments of context and purpose put forward by the European Communities – arguments that the United States has neither responded to nor matched with any context or purpose based arguments *of any kind*, and the only permissible and true interpretation of the *Agreement* becomes clear.

20. The European Communities holds the firm conviction that the reason why the United States has offered no contextual or purpose based argument in support of its (erroneous) textual assertion is that there are no such arguments to be made. Why should the overarching principle of "fair comparison" for which Article 2.4 stands actually count for nothing when it comes to finally assessing and paying anti-dumping duty? Why should a method of comparison that gives more weight to dumped transactions than to non-dumped transactions be considered "fair"? Why should the methodology for calculating dumping margins change from one moment to another? Why should the results of an original investigation be totally eclipsed and set at naught by the results of a first assessment exercise? Why should two exporters, exporting the identical product from the same country during the same period, in an identical series of transactions (in terms of amount, price and timing) be subjected to two completely different methodologies and anti-dumping duties? If model zeroing is unfair, how can simple zeroing, which produces an even worse result, be fair? Why should exporters who eliminate the margin by which they have been found to be dumping, nevertheless be subject to a dumping duty? Why should dumping be found to exist or not, and its magnitude determined, according to the arbitrary distribution of transactions over time? Why should Members using a prospective collection system be penalised compared to Members using a retrospective system? The United States offers no answers to these questions because it has none. The silence is deafening.

Thank you for your attention.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF JAPAN

(26 May 2004)

TABLE OF CONTENTS

I. INTRODUCTION

1. Mr. Chairman and distinguished Members of the panel, on behalf of the Government of Japan, I thank you for your attention to this important matter. This morning, we will not repeat our arguments in our written submission. Rather, we would like to focus on certain arguments presented by parties that we did not address in detail in our written submission.

II. ARGUMENTS

A. THE THREE SCENARIOS IN THE *SUNSET POLICY BULLETIN* ARE INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT AS SUCH

2. The United States insists that the Appellate Body in *US – Corrosion-Resistant-Carbon Steel Frat Products from Japan Sunset Review* case[1] found in favour of the DOC's affirmative likelihood finding, which was based solely on dumping margins and depressed import volumes.[2] We disagree.

3. The United States appears to have misunderstood the Appellate Body's statements. As the United States should be fully aware, Japan narrowed its as-applied claims regarding the DOC's likelihood determination in the CRS sunset review case, focusing on other issues, such as the zeroing and the as-such claim of *Sunset Policy Bulletin*, in its appeal. With respect to the as-applied claims, Japan asked the Appellate Body to review whether DOC's reliance on the automatic review mechanism provided for in *Sunset Policy Bulletin* was justified. Japan also asked the Appellate Body to review whether DOC's reliance on the dumping margins, which DOC calculated in previous administrative reviews using the zeroing method, was justified. The Appellate Body, however, was unable to rule on either of these issues because "the Panel did not examine the nature and meaning of Section II.A.3 of the *Sunset Policy Bulletin*,"[3] and because of "the lack of factual finding by the Panel regarding the methodology used by USDOC in the administrative reviews."[4] Japan did not ask the Appellate Body to review the DOC's reliance on the import volume[5], nor did Japan ask the Appellate Body to review whether DOC's reliance on dumping margins and import volumes alone would constitute sufficient evidence in the *CRS sunset review* case.[6] Absent of these factual findings by the panel, the Appellate Body had no choice to disturb the DOC's conclusion that dumping margins and import volume "pointed in the same direction, that is, toward likely future dumping."[7] Therefore, the Appellate Body has never stated that dumping margins and import volumes alone constitute a sufficient basis to determine the likelihood of dumping in sunset review.

4. The United States also argues that the *Sunset Policy Bulletin* is not a "measure," which is actionable under the WTO dispute settlement proceedings, because it is not "an instrument with a functional life of its own" and not "mandatory."[8] This argument has been rejected by the Appellate Body in *US – CRS Sunset Review* case.

5. The Appellate Body in *US – CRS Sunset Review* case expressly stated, "allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is

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

[2] First Submission of the United States, para. 104.

[3] *See* Appellate Body Report, *US – CRS Sunset Review*, para. 184.

[4] *See id*., para 138. *See also id*., paras. 203, and 253.

[5] *See id*., para. 203.

[6] See *id*., paras. 192-198.

[7] *Id*., para. 205.

[8] First Submission of the United States, paras. 110-114.

consistent with the comprehensive nature of the right of Members to resort to dispute settlement."[9] In fact, the Appellate Body in *US – CRS Sunset Review* case and other cases has not required a measure to be "an instrument with a functional life of its own." The issue of mandatory "is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations."[10]

6. The only question that this Panel has to consider, therefore, is whether the *Sunset Policy Bulletin* is inconsistent with Article 11.3 of the AD Agreement as such. The Appellate Body in *US – CRS Sunset Review* case pointed out that the following factors would be relevant in examining whether the *Sunset Policy Bulletin* is inconsistent with Article 11.3 as such: the nature and meaning and consistent application of Section II.A.3 of the *Sunset Policy Bulletin* and the nature and meaning of the "good cause" standard in Section II.C.[11] Japan believes that Mexico has established that the *Sunset Policy Bulletin* is inconsistent with Article 11.3.

7. In sum, the Panel should reject the argument made by the United States.

B. THE ITC'S DETERMINATION OF LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY WOULD BE INCONSISTENT WITH ARTICLES 3.1, 3.4, 3.5 AND 11.3 OF THE AD AGREEMENT

8. The US arguments on the applicability of Article 3 of the AD Agreement to sunset reviews are not based on the interpretation of the ordinary meaning of footnote 9 of the AD Agreement, and thus must be rejected. As discussed in our submission, the first phrase of footnote 9 "[u]nder this Agreement" clarifies that the term "injury" throughout the whole AD Agreement, including the term in Article 11.3 shall be understood in accordance with footnote 9.

9. The phrase in the footnote – "shall be interpreted in accordance with the provisions of this Article"[12] – further clarifies the application of the substantive rules of Article 3 to Article 11.3. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury." To find a "recurrence" of injury, for example, the authorities must find that injury, which does not exist through the effects of dumping at the time of the review, will recur at a point in the future. These analyses do not affect the substantive requirement that the authorities must find injury based on positive evidence and on objective examination of the effect of dumped imports on prices and of the volume of dumped imports. In the same vein, the requirement for evaluating economic factors listed in Article 3.4 as well as the causation and non-attribution requirements under Article 3.5 must be satisfied under the sunset review proceedings.

10. The United States argues that likelihood of injury as defined in Article 11.3 requires "decidedly different analysis"[13] from that for the injury analysis in the original investigation. Contrary to the US argument, Article 3 contemplates prospective analysis even in original investigations. Footnote 9 and the provisions of Article 3 clarify that all the provisions of Article 3 apply to the determination of the threat of material injury. Article 3.7 then requires that the authorities examine a situation at a point in the future, at which the effects of dumping will cause material injury to the domestic industry. In a threat case, therefore, the examination of economic factors and causations under Articles 3.4 and 3.5 also must be made at the point in the future. The analysis of "injury" in sunset reviews is analogous to the analysis required in Article 3 for the threat of material injury. As such, Article 3 contemplates the prospective injury analysis, as Article 11.3 requires. The US argument thus has no merits.

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[9] Appellate Body Report, *US – CRS Sunset Review*, para. 89.
[10] *Id*.
[11] *Id*., paras. 169, 184 and 189.
[12] Footnote 9 of the AD Agreement. (emphasis added).
[13] The US First Submission, para. 301.

11. In this case, the ITC appears to have failed to evaluate individual factors as listed in Article 3.4. The ITC also appears to have failed to separate and distinguish the effects of factors other than the dumped imports, which the ITC knew at the time of the sunset review, from effects of dumping. The ITC's injury determination in the sunset review, therefore, appears to be inconsistent with Articles 3.4 and 3.5.

C. THE DOC'S DETERMINATION BASED ON THE DUMPING MARGINS CALCULATED WITH ZEROING METHODOLOGY

12. The United States argues that the Appellate Body reports in *EC-Bed Linen*[14] and in *US – CRS Sunset Review* case are not relevant to this case. The United States alleges that the finding in *EC – Bed Linen* case was limited to the investigation phase and that it examined a calculation methodology distinct from that in this case.[15] The United States also asserts that the Appellate Body found that it was unable to confirm the inconsistency of the zeroing method with the AD Agreement.[16] We disagree.

13. The Appellate Body in *Japan-Taxes on Alcoholic Beverages*[17] stated that panel reports constitute legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.[18]

14. As discussed in our submission, the Appellate Body in *EC-Bed Linen* case clarified that zeroing is inconsistent with Article 2.4 and 2.4.2 because "the *Anti-Dumping Agreement* concerns the dumping of a *product*,"[19] and because "[w]hatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole".[20] It further clarified "[t]he comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2".[21] In these aspects, there is no difference between the calculation methods used in *EC-Bed Linen* and the calculation methods in this case as discussed in our submission.

15. The Appellate Body in *US – CRS Sunset Review* case has clarified that the differences of the types of AD proceedings are irrelevant to the zeroing issue. In particular, the Appellate Body has explicitly stated with respect to the sunset review, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4"[22], and "[i]f these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*."[23] The Appellate Body has further stated, "the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping."[24]

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

[15] First Submission of the United States, para. 212.

[16] *Id.*, para. 213.

[17] Appellate Body Report, *Japan-Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R (adopted 1 November 1996).

[18] *Id*., page 14.

[19] Appellate Body Report, *EC – Bed Linen*, para. 51.

[20] *Id*., para. 53.

[21] *Id*.

[22] Appellate Body Report, *US – CRS Sunset Review*, para. 127.

[23] *Id*.

[24] *Id*., para. 135.

16. Therefore, contrary to the argument by the United States, the rulings and findings in both *EC-Bed Linen* case and *US – CRS Sunset Review* case are fully relevant to this case. Thus, they constitute "legitimate expectation" among WTO Members. This Panel, therefore, should follow the findings in *EC-Bed Linen* case and *US – CRS Sunset Review* case.

17. The United States also argues that the Appellate Body in *US – CRS Sunset Review* case made no finding and undertook no serious legal analysis on the issue of zeroing.[25] This is incorrect. The Appellate Body in *US – CRS Sunset Review* case could not conclude that the calculation method adopted by the United States is inconsistent with Article 2.4 only because of the lack of factual finding by the Panel.[26] As discussed, the Appellate Body clearly found that the determination in sunset reviews based upon dumping margins calculated with zeroing methodology is inconsistent with Article 2.4.[27]

III. CONCLUSION

18. For the foregoing reasons, Japan respectfully requests the Panel to find that the United States acted inconsistently with Articles 2.4, 3.1, 3.4, 3.5, 11.2 and 11.3 of the AD Agreement.

[25] First Submission of the United States, para. 212.
[26] *See* Appellate Body Report, *US – CRS Sunset Review*, para. 138.
[27] *See id*., para. 127.

ANNEX D-7

OPENING ORAL STATEMENT OF MEXICO – SECOND MEETING

(17 August 2004)

I. INTRODUCTION

1. Article 11 contains specific obligations related to the termination of anti-dumping duties. If a Member wants to continue a measure beyond the five-year period prescribed in Article 11.3, or to continue a measure after a review requested by an interested party pursuant to Article 11.2, the Member must satisfy the obligations of Article 11.[1] The determinations of the Department of Commerce ("the Department") and the International Trade Commission ("Commission") in this case fail to satisfy these obligations, as the decisions were based on presumptions and the use of legal standards that violate Article 11. Because the US authorities did not satisfy the requirements for continuing the measure, the measure must be immediately terminated.

2. Mexico notes its disagreement with the US statements regarding the burden of proof. Mexico has presented a *prima facie* case and the United States has invoked what the Appellate Body has reaffirmed to be the limited exception of Article 11.3 to extend the measure beyond the temporal limitation contained therein.

II. THE DEPARTMENT'S SUNSET DETERMINATION

A. WTO-INCONSISTENT PRESUMPTION OF LIKELY DUMPING

3. The US statute (19 U.S.C. § 1675a(c)(1)), the US Statement of Administrative Action ("SAA") (pages 889-890), and the Sunset Policy Bulletin ("SPB") (Section II.A.3), operating independently and together, establish a presumption that dumping would be likely to continue or recur.[2] This presumption is inconsistent with Article 11.3.

4. The US has failed to rebut the following facts: First, the Department has never issued a determination in any full or expedited sunset review that dumping would not be likely; out of 232 full and expedited sunset reviews, the DOC rendered 232 likely dumping determinations. Second, MEX-62 and MEX-65 confirm that the Statute, the SAA, and the SPB establish a WTO-Inconsistent presumption of likely dumping in every case by requiring the Department to give decisive weight to historical dumping margins or declines in import volume. Third, the "good cause" provision impermissibly reverses the burden and has never resulted in a not likely determination.

5. Mexico has highlighted and documented the Department's consistent practice for three different reasons. First, the Department's consistent practice provides evidence of the meaning of the statute, the SAA, and the SPB. Second, the Department's consistent practice itself is a measure that violates Article 11.3. And third, the Department's consistent practice demonstrates that the

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[1] *See* Appellate Body Report, Sunset Review of Steel from Japan, para. 113.
[2] See Mexico's First Submission, paras. 87-109; Mexico's Second Submission, paras. 8-47.

United States has not administered its law in a reasonable and impartial manner, as required by GATT Article X:3(a).

B. THE DEPARTMENT'S LIKELIHOOD DETERMINATION

6. In its Second Submission, the US did not even attempt to rebut Mexico's "as applied" claims regarding the Department's determination of likely dumping in this case. The positive evidence submitted by the Mexican respondents showed that the margin of dumping from the original investigation was not in any way indicative of the likelihood of dumping. Also before the Department were the no dumping determinations (zero margins) of the recently conducted administrative review – probative that dumping would not be likely. [3]

7. The Department cited reduced import volume, ignored the positive evidence submitted by the Mexican respondents, and then relied on the only remaining information before the Department (the original dumping margin and the decline in volume) as the basis for the likely dumping determination. The Department did not conduct a case-specific analysis to determine the basis for the decline, as the Appellate Body indicated was necessary. The Department then exaggerated its error by inferring that the volume decrease must mean that the Mexican exporters could not compete in the US market without dumping, and then extending the inference further to mean that the Mexican exporters would be likely to dump upon revocation. The Department also violated Article 11.3 by relying on the original margin in determining whether revocation of the duty would be likely to lead to continuation or recurrence of dumping.

III. THE COMMISSION'S SUNSET DETERMINATION

A. FAILURE TO APPLY A "LIKELY" STANDARD AND MISINTERPRETATION OF "INJURY"

8. The US arguments regarding the injury determination are firmly anchored to the flawed misinterpretations of "likely" and "injury" in Article 11.3. The failure to apply a "likely" standard and to interpret "injury" correctly affected everything that the Commission did in its review. Having misinterpreted what it needed to find, it failed to properly establish and objectively evaluate facts that constituted positive evidence of likely injury.

9. It is beyond doubt that "likely" means "probable;" the Appellate Body has said so. Mexico demonstrated that the Commission argued vigorously in the NAFTA dispute involving this same sunset review that the SAA precludes the Commission from applying a "probable" standard. The Commission's admission that it did not apply a probable standard is conclusive of the issue. If the authority is applying the wrong standard, then, by definition, it cannot properly establish the facts necessary to support the correct standard, and it cannot objectively examine the facts to reach the correct standard. Exhibit MEX-68 provides examples of the Commission failures to comply with the standards for Article 11.3 reviews. In numerous instances, the Commission relied on assumptions and unsupported inferences. In other relevant parts of the determination, the Commission based its conclusions on findings made during the original investigation as decisive, or even the "tie-breaker." Findings from pre-WTO investigations are not consistent with any post-WTO Anti-Dumping Agreement provision because by definition they cannot be the result of the Anti-Dumping Agreement, as required by Article 18.3.

10. The United States contends that "injury" in Article 11.3 is "conceptually different" than "injury" in Article 3. [4] The argument is remarkable from a textual point of view, and is inconsistent with the approach taken by the Appellate Body. [5] The Appellate Body did not find that the phrase

[3] *See, e.g.*, MEX-64 (Evidence Chart from Mexico's First Oral Statement).
[4] US Answers to Questions from the Panel, para. 26; US First Submission, paras. 259-263.
[5] Appellate Body Report, *Sunset Review of Steel from Japan*, paras. 108-109 (emphasis removed).

"continuation or recurrence of" changes the meaning of "dumping." This Panel cannot find that this same phrase changes the meaning of "injury." "Injury" in Article 11.3 is "injury" that is defined in, and subject to, footnote 9 of the Anti-Dumping Agreement.

B. US STATUTORY REQUIREMENTS GOVERNING THE TIME FRAME FOR LIKELY INJURY

11. The United States argues that Article 11.3 does not specify the time frame relevant to a sunset inquiry, and thus, the relevant time period is within each Member's discretion.[6] An undefined time frame is not consistent with the "likely" standard of Article 11.3. Without a time frame, how can one determine if the time frame used in a review was "reasonable"? Without a time frame, how can one know when the injury will be likely to occur? Without a time frame how can one know if cumulated imports are likely to be simultaneously present in the market?

C. THE COMMISSION'S CUMULATIVE INJURY ANALYSIS

12. The United States misconstrues Mexico's primary cumulation argument. Mexico does not argue that Article 11.3 is silent with respect to cumulation. Mexico asserts that Article 11.3 – both pursuant to its terms ("duty" in the singular) and as interpreted in its context – expressly prohibits cumulation. Article 3.3 also demonstrates that cumulation is limited to investigations.

13. Assuming *arguendo* that Articles 11.3 and 3.3 do not preclude cumulation in Article 11.3 reviews, then following the Appellate Body's logic, the Panel should find that the United States failed to respect the substantive standards for cumulation in this case. When an authority decides to rely on findings related to cumulation from the original investigation, the authority must ensure that the findings are consistent with Article 3.[7] Irrespective of whether or not Article 3 directly or indirectly applies to sunset reviews, a basic condition to cumulate imports in assessing injury is that the imports from the cumulated countries must be simultaneously present in the US market. The Commission's determination shows that the Commission analysis failed in this respect.

IV. THE DEPARTMENT'S DETERMINATION NOT TO REVOKE

A. THE ARTICLE 11.2 OBLIGATION IS NOT LIMITED TO TERMINATION OF AN ANTI-DUMPING DUTY ON AN ORDER-WIDE BASIS

14. MEX-66 demonstrates that the United States has never revoked an anti-dumping duty under Section 351.222(g) based on a substantive analysis of whether the continued imposition of the duty was necessary to offset dumping. Section 351.222(g) is chiefly a mechanism for revocation where the US industry is no longer interested in the continuation of the anti-dumping order.

15. The United States' implementation of the adverse ruling of the Panel in *DRAMS from Korea* should eliminate any lingering doubt as to whether Article 11.2 creates company-specific obligations. The United States explained to its trading partners that the United States had "implemented the recommendations and rulings of the DSB" to bring its measures into conformity with its Article 11.2 obligations.

[6] US First Submission, paras. 330-331.
[7] Cf. Appellate Body Report, *Sunset Review of Steel from Japan*, para. 127.

B. THE DEPARTMENT'S DETERMINATION NOT TO REVOKE IN THIS CASE

16. The Department violated Article 11.2 because the Department did not terminate the anti-dumping duty on OCTG from Mexico immediately upon the demonstration that the continued imposition of the duty was not necessary to offset dumping. In the case of Hylsa, the Department claimed that revocation was not appropriate because Hylsa was found to have a dumping margin of 0.79 per cent in the fourth review. But that margin was calculated using the practice of "zeroing." The decisions by the Appellate Body in *EC Bed Linen*, *Japan Sunset* and, most recently, *Softwood Lumber* establish beyond dispute that the practice of zeroing is not consistent with the requirement of Article 2.4 or with the requirement of Article 2.4.2. With respect to TAMSA, the Department's determination not to revoke violated Article 11.2 because the Department: (i) applied a standard which required a demonstration that dumping was "not likely" in the future; (ii) arbitrarily imposed a "commercial quantities" requirement; and (iii) ignored positive evidence that demonstrated that the volume was reasonable in the context of the historically-low market conditions for oil and OCTG, and the positive evidence that the measure was no longer necessary to offset dumping. The Department also violated GATTT Article X:2.

V. CONCLUSION

17. Because strict compliance with the requirements of Article 11.3 is required in order for a Member to extend the anti-dumping duties beyond five years, a finding that the United States did not comply with these rules requires a finding that the US impermissibly extended the anti-dumping measure in this case beyond 5 years, and therefore must immediately terminate the measure.

ANNEX D - 8

CLOSING ORAL STATEMENT OF MEXICO – SECOND MEETING

(18 August 2004)

1. Mexico would like to begin by addressing the issue discussed at the end of yesterday's session. Mexico believes that a possible appeal of *OCTG from Argentina* (DS 268) should not affect this proceeding. Mexico did not present written arguments in that case, was not a complaining or disputing party, and the Panel's ruling in that case cannot diminish Mexico's rights. Mexico has presented a prima facie case on all its claims, and the United States has responded to those claims. The Panel should make findings on all of the claims presented.

2. Also, while there is some overlap of issues and measures, there are also important differences. For example, *OCTG from Argentina* did not involve any claims related to the obligations of Article 11.2. With respect to the injury determination, the Panel in *OCTG from Argentina* interpreted Argentina not to be challenging the likely standard, whereas Mexico has made specific arguments related to the application of the likely standard, and how this standard affected the Commission's determination. Also, the Panel in *OCTG from Argentina* used "judicial economy" to avoid addressing many of the claims made by Argentina, whereas Mexico has specifically asked this Panel to make findings on all claims presented. For these reasons, Mexico respectfully requests that in case of a possible appeal in OCTG from Argentina, this case should not be delayed, and that Mexico's case be analyzed on its own merits and in accordance with the procedures contained in the DSU.

3. Turning now to the substance of the issues, the United States returned to a familiar theme yesterday. According to the US, Mexico is "grafting onto" Article 11.3 detailed substantive requirements that are not there, and in the process is creating obligation for the United States that do no exist. (paragraphs 15, 30, 31, 34, 41, 44). But, Mexico is doing no such thing. Instead, Mexico's claims are based firmly on the words that the WTO Members incorporated into the text of Article 11.3 and in the Anti-Dumping Agreement. The difference in our positions is that Mexico believes that the words are meaningful and create substantive obligations, while the US looks at these words and sees no substantive obligations.

4. That US position makes sense only if you accept that the United States never meant to be bound by the text of Articles 11.1, 11.2 and 11.3. The United States wants the Panel to rule that it is permissible to keep anti-dumping duties in place forever, as the US did before the WTO Anti-Dumping Agreement, as long as the US goes through the motions of reviewing the measures every five years, and revoking orders whenever the US industry supports their removal. That notion cannot be reconciled with the affirmative obligations in Articles 11.1, 11.2 and 11.3 to terminate anti-dumping duties immediately once they are no longer warranted.

5. The words in Article 11 do impose substantive obligations. Let me briefly mention these in light of some of the statements made by the United States yesterday:

6. "Likely": The word "likely" is central to Mexico's claims arising from the sunset reviews by both the Department and Commission. On the Department side, the US showed in paragraph 11 of its comments yesterday that it is very comfortable telling the Panel that it relied only on an inference that

lower volumes meant that dumping was "likely." To the US, that is enough, and the word "likely" requires nothing more. Mexico is confident that this is not consistent with the substantive obligation to terminate the measure unless the authority develops and objectively examines positive evidence that dumping is "likely." Likely means probable, and relying solely on presumptions and an inference drawn from lower volumes does not establish what is probable. This is especially true in a case such as this where the exporters have provided positive evidence demonstrating that dumping is not probable. The Mexican exporters provided positive evidence that the only dumping margin calculated in the case – 21.7 per cent - could not be repeated short of some miracle, yet the Department considered that dumping would be "likely" to recur, and that 21.7 per cent would be the "likely" margin to prevail.

7. On the Commission side, the US tries to downplay the importance of the Commission's admission that it did not apply a "probable" standard in this same sunset determination, and that the SAA precluded it from applying such a standard. We heard yesterday that this admission is not relevant because it occurred at the "beginning of the dialogue" with the US courts related to the Commission's likely standard. It is important for the Panel to recognize that the entire "dialogue" alluded to by the United States related to a single question: did the Commission correctly interpret the word "likely." In the rest of the "dialogue," the court told the Commission that "likely" does, in fact, mean "probable," and it required the Commission to re-do its decisions in the cases under review. The US cannot refute this. At the WTO, the only question for the Panel is whether the Commission applied a likely standard, and the Commission's admission answers the question. If the Panel concludes that the Commission did not give "likely" its ordinary meaning of "probable," then the United States violated its Article 11.3 obligations because it improperly continued the measure beyond 5 years.

8. "Injury": First, Mexico would like to emphasize that it has presented claims related exclusively to Article 11.3 that are not dependent upon the application of other articles of the Anti-Dumping Agreement. In addition, the US did not mention yesterday its earlier position that "continuation or recurrence of injury" is different than "injury" defined in footnote 9, or that Article 11.3 is a specific exception to the definition of injury in footnote 9. In paragraph 42, the US takes the position that the "case does not turn on whether the term 'injury' referred to in Article 11 has the same meaning as the term referenced in footnote 9." For Mexico, if "injury" in Article 11.3 is "injury" in footnote 9, then it "shall be interpreted in accordance with" Article 3. So, the proper interpretation of the word "injury" in Article 11.3 is important to this case precisely because the WTO Members agreed that "injury" had to be interpreted in a very specific manner; that is, "in accordance with" Article 3. While Mexico has given several examples of how the Commission's decision is not made in accordance with Article 3, perhaps the most striking example is the US assertion in paragraph 36 of its oral statement that there is no requirement of a causal link between the likely dumping and likely injury. This is unprecedented in the history of anti-dumping regulation, and is contrary to the basic requirements of Article VI of GATT1994 and the WTO Anti-Dumping Agreement. Also, the US has never rebutted Mexico's arguments with simultaneity, which is essential to any decision to cumulate imports.

9. Mexico has explained in its various submissions that the proper interpretation of the words "likely" and "injury" necessarily affect the Commission's determination. Without a proper interpretation of these words, the Commission does not know what it is looking for, and it can hardly be expected to establish the facts properly, evaluate the facts objectively, and base the determination on positive evidence of "likely" "injury." Mexico summarized some of this evidence in MEX-68, which accompanied yesterday's oral statement.

10. Mexico is surprised by the US objection to Exhibit MEX-68. As Mexico has explained, there is no new evidence in MEX-68. Rather the exhibit is simply a compilation of evidence and arguments already before the Panel. MEX-68 is comprised of three columns. The first quotes findings in the Commission's Sunset Determination (MEX-20) that are already in the record, the second column

summarizes the flaws with the Commission's analysis as have already been argued by Mexico, and the third column identifies where in its first and second written submissions Mexico made these arguments. No element of the Exhibit is new, and it is hard to understand how the US could seriously take the position that the Exhibit as a whole cannot be offered by Mexico to complement its oral statement.

11. "Dumping": The United States offers two arguments in paragraph 31 regarding its notion of dumping: (1) that the Anti-Dumping Agreement does not contain any obligations as to how to determine an overall rate of dumping, and (2) that there is no requirement to calculate an overall rate of dumping in a review. Whatever the broader implications of these questions, there can be no doubt that the Department calculated a margin in its fourth review of Hylsa, the dumping finding was based on prohibited "zeroing," and the resulting dumping finding was used by the Department as the justification to continue the anti-dumping measure despite its Article 11.2 obligations. On the issue of "zeroing" — which the United States now refers to as "Offset" —the Appellate Body's recent decision in *Softwood Lumber* is dispositive. The Anti-Dumping Agreement requires the calculation of a single overall dumping margin for the product under investigation, even if the dumping comparisons are made at the level of sub-categories. In *Japanese Steel Sunset*, the Appellate Body held that authorities are not required to calculate dumping margins in Article 11.3 reviews, but if they choose to do so, their calculations must comply with the requirements of Article 2. The logic of these decisions is compelling, and applies with equal force to the Article 11.2 review under consideration in this case. The failure of the United States even to acknowledge these decisions is disappointing, to say the least.

12. "Necessary": The panel in *DRAMS from Korea* held that the "need for the continued imposition of the duty must be demonstrable on the basis of [positive] evidence ... " (para. 6.42). In its oral statement yesterday, the US continued its strategy of avoiding references to the case, which says a lot about the US position. As we have explained previously, the United States admitted at that time that it was modifying its regulations for company-specific revocation in order to bring its procedures into compliance with the obligations of Article 11.2. The United States has not attempted to square its statements in *Korean DRAMs* with its current position for the obvious reason that they are not reconcilable.

13. The statements that the US did make yesterday about its Article 11.2 obligation are not credible in light of the Department's practice. Despite its explanation that it primarily implements its Article 11.2 obligation through the "changed circumstances" provision of its regulations (Section 351.222(g)), the simple fact is that the United States has never used the 351.222(g) procedure in that manner. The provision does not even mention the substantive standard. Yesterday, the US told the Panel that it should not be concerned with whether phrase containing the substantive standard of Article 11.2 "was explicity invoked." (paragraph 18). Mexico disagrees. The absence of the substantive standard casts substantial doubt on the US explanation that this provision is the implementation of the Article 11.2 obligation. Combined with the US statements to the WTO in *Korean DRAMs*, and the practice highlighted in MEX-66, the US position is untenable.

14. In summary, Mexico asks that the Panel consider the arguments made by the parties, without losing sight of the systemic implications of the case.. TAMSA and Hylsa, the exporters, provided positive evidence demonstrating that the anti-dumping order should have been terminated after the fourth administrative review and again after the sunset review. For the last three and a half years, they have been subjected to anti-dumping duties that are not permitted by the Anti-Dumping Agreement.

16. Mexico has requested that this proceeding result in the immediate termination of the anti-dumping measure applicable to OCTG. This request is based on the impossibility of retroactively complying with the prescribed time limit in Article 11.3. As the Appellate Body has established, Article 11.3 imposes temporal limitations which, if not met, require the removal of the anti-dumping measure. Mexico has made this request based on the time-bound nature of the obligation since its

first submission, and the United States has not offered any rebuttal yet. Mexico asks, as a matter of law, that the Panel affirm that the only manner in which the US can bring its measure into conformity with the Agreement is through the immediate termination of the anti-dumping order. Mexico looks forward to the opportunity to respond to any questions that the Panel may have regarding this request.

ANNEX D-9

OPENING ORAL STATEMENT OF THE UNITED STATES – SECOND MEETING

(27 August 2004)

Mr. Chairman, members of the Panel:

1. I would like to thank you for this opportunity to further clarify certain issues raised by Mexico's second submission. We will focus on issues raised by Mexico's second submission.

ISSUES REGARDING SUNSET REVIEW

2. Mexico's claims focus on the obligations in Article 11.3 of the AD Agreement. Mexico's second submission presents nothing new, and Mexico fails to establish a *prima facie* case.

3. Citing the Appellate Body report in *Japan Sunset*, Mexico argues that the *Sunset Policy Bulletin* is a "measure." The Appellate Body in *Japan Sunset* did not find that the *Sunset Policy Bulletin* is a "measure." Instead, the Appellate Body simply reversed the panel's finding that the *Sunset Policy Bulletin* was not a measure because the panel's analysis was flawed.

4. Mexico incorrectly claims that the Appellate Body "evaluated" whether "'the type of instrument itself, be it a law, regulation, *procedure, practice,* or something else'" could be subject to dispute settlement. Mexico misquotes the Appellate Body, which made no such statement but instead asked whether the type of instrument should determine whether it is subject to dispute settlement. Moreover, Mexico claims that the United States has failed to address Mexico's comments in this regard. However, the United States has addressed Mexico's claim in both our first written submission at paragraph 114 and in our second submission in footnote 21. Mexico has provided neither evidence nor argument to establish its claim regarding the legal significance of the *Sunset Policy Bulletin* in the context of the US legal regime.

5. While the Appellate Body did state that "legal instruments" could be challenged as measures, Mexico has not demonstrated that the *Sunset Policy Bulletin* is a "legal instrument." The *Sunset Policy Bulletin* is not a law or a regulation, and it does not have the status of a law or regulation under the US legal regime. Mexico's response has been to state that the Panel is not required to take as "'fact' any Member's explanation" regarding the meaning of its own law. However, Mexico has not established that the US explanation of the meaning of the *Sunset Policy Bulletin* in the context of its municipal law is incorrect.

6. Mexico also claims that, notwithstanding the failure of respondent interested parties to respond to the notice of initiation in 173 sunset reviews, Commerce has failed in its "duty to seek out information." In failing to respond, respondents also fail to rebut the positive evidence placed on the record by the domestic interested parties.

7. Mexico argues that the "good cause" provision in US law restricts the evidence Commerce may consider in a sunset review. The "good cause" provision, however, is nothing more than a

requirement for the submitting party to provide a legally sufficient reason for the information to be considered in the sunset review. In practice, very few interested parties have submitted or attempted to submit "other factors" information in sunset reviews.

8. In support of this claim, Mexico has mischaracterized both *Canada-Sugar* and *Brass Sheet & Strip-Netherlands*. Mexico's grievance is not with the application of the "good cause" and "other factors" provisions in those reviews, but with Commerce's analysis of the information in those reviews.

9. With regard to the sunset review of OCTG from Mexico, Mexico claims both that Commerce impermissibly relied upon the margin of dumping calculated in the original investigation in making the affirmative dumping determination, and that Commerce impermissibly relied on depressed import volumes because import volume data alone cannot support an affirmative dumping determination.

10. In addition, Mexico alleges that Commerce referred to Hylsa's 0.79 per cent margin of dumping in the fourth administrative review to support the affirmative likelihood determination in the sunset review. This is incorrect.

ISSUES CONCERNING THE FOURTH ADMINISTRATIVE REVIEW

Article 11.2 Does Not Impose Company-Specific Termination Obligations

11. The text of Article 11.2 does not impose company-specific termination obligations, but refers to the termination of "the duty" as a whole.

12. Mexico argues that because Article 11.2 permits "any interested party" to request termination of "the duty," it also compels investigating authorities to conduct termination reviews at the company-specific level. This goes beyond the obligations agreed to in the text of the Agreement. Mexico also relies upon section 351.222(e) for its assertion that an individual company can only request revocation for itself. However, section 351.222(e) simply means that when an individual exporter requests revocation for itself (either as part of a request for revocation as a whole or in part), that exporter must submit the information in that section.

13. Mexico further claims that, because Article 11.2 permits a request by any interested party and Article 11.3 provides for a request only by a domestic industry, this means that the scope of the termination review must be different under Article 11.2. There is, however, no need for a provision in Article 11.3 for an individual respondent to request a termination review because that Article provides that, absent such a review, the duty shall be terminated.

14. Second, Article 11.2 refers not just to respondents, but to "any interested party." The United States wishes to make clear, however, that respondent interested parties, as well as domestic interested parties, have requested and received order-wide revocation reviews.

15. Mexico claims that section 351.222(g) reviews do not fulfil Article 11.2 obligations because that provision does not contain the language "determine whether the continued imposition of the duty is necessary to offset dumping." The issue, however, is not whether that phrase was explicitly invoked, but whether the relevant obligation has been met. Based on section 351.222(g) reviews, Commerce has terminated numerous measures which no longer remained necessary to offset dumping.

16. Mexico asserts that section 351.222(g) is not a vehicle for assessing whether the continued imposition of the duty is necessary to offset dumping because it is chiefly a mechanism for revocation where the US industry is no longer interested in the continuing the order is incorrect. This is a false dichotomy. So-called "no interest" revocations are an important means of revocation when the duty is

no longer necessary; most foreign exporters and producers prefer to seek company-specific revocation to maintain an advantage over home-country competitors.

17. The number of cases relevant to the issue before this Panel is, moreover, much smaller than that suggested by Mexico's new exhibit. Section 351.222(g) deals with various types of "changed circumstances," including requests for narrowing the scope of the products covered by the order. Termination of "the duty" when it was no longer necessary accounted for 18 of the cases, and led to revocation of the order in all but one of those cases.

Neither TAMSA nor Hylsa presented Positive Information Sufficient to Warrant an 11.2 Review

18. Mexico has not demonstrated why TAMSA's ability to make a single token sale to or through its US affiliate in each of the three review periods without dumping constitutes evidence sufficient to substantiate the need for a review of the necessity of the order. The same is true of Hylsa's token sales, which Commerce did not further evaluate because Hylsa was found to have dumped in the fourth review period.

19. The United States has previously shown why the commercial quantities requirement accords with the requirement in Article 11.2 for the interested party to substantiate that such a review is needed. Mexico has seized upon the theory that Commerce did not apply a threshold requirement at all, asserting, instead, that Commerce conducted a substantive review of the merits of the future necessity of the order. However, these claims are baseless.

Mexico's Remaining Commercial Quantities Complaints Lack Merit

20. Mexico continues to repeat unavailing arguments regarding commercial quantities – without explaining how they constitute breaches of US obligations. Mexico has also argued that if there were sufficient quantities to conduct an administrative review for purposes of calculating the final margin, then there were sufficient quantities to conduct a revocation review. However, the purpose of the administrative review under US law is to calculate the final margin for imports, regardless of the quantity involved. On the other hand, a revocation review requires an evaluation as to whether dumping is likely to continue or recur. Unless zero margins are based on sales in commercial quantities, those margins cannot "warrant" an Article 11.2 review.

21. Mexico also argues that footnote 22 of the AD Agreement implies that any zero margin is sufficient "positive evidence" to trigger obligations under Article 11.2. However, if the drafters intended an Article 11.2 review to be compelled by the existence of a zero margin, they would have so stated. Such decisions are thus at the discretion of each Member.

Mexico Has Not Met its Burden of Proof with Respect to the Revocation Issue

22. The review obligation contained in Article 11.2 is only triggered when there is a request for a review of the duty by an interested party which submits positive information substantiating the need for the review. Neither TAMSA nor Hylsa ever requested a review of "the duty" and neither submitted information sufficient to "substantiate" the need for such a review. Mexico's claim that Commerce has not demonstrated that the order did remain necessary is irrelevant and seeks to turn the burden of proof in this proceeding on its head. Mexico's claims regarding the US commercial quantities requirement also rely upon unsupportable claims of inflexible "presumptions" regarding declines in import volumes after the imposition of an order.

Mexico's Arguments Regarding "*Offset*" Are Also Inapposite

23. Mexico alleges that Hylsa's margin calculation is WTO-inconsistent based on Articles 2 and 11.2 of the AD Agreement. However, the calculation of dumping margins in an administrative review under the United States' system is performed pursuant to Article 9.3.1 of the AD Agreement and Mexico has failed to raise any claims pursuant to this provision.

24. Regarding its Article 2 claims, Mexico argues that a "fair analysis" of Hylsa's sales would have found "negative dumping margins." The analysis of each export transaction in the fourth administrative review was based on a comparison with a normal value for identical or similar home market transactions, with due allowance made for any differences affecting price comparability. Thus, a fair comparison was made. Second, Mexico has failed to establish that the AD Agreement contains any obligations as to how to determine an overall rate of dumping or even whether such an overall rate of dumping must be determined in a review.

25. Finally, Mexico not only pursues contradictory legal arguments of the interpretation of the term "investigation," but now asserts that the United States' non-application of an offset is inconsistent with two separate Article 2 provisions of the AD Agreement. Mexico's claims for an offset for non-dumped transactions should be rejected by the Panel.

ISSUES CONCERNING THE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

Standard of Review

26. The United States agrees that the Panel should review the ITC's determination to ascertain whether that determination was based on a proper establishment of the facts based on Article 17.6(i) of the Agreement, rather than Article 3.

Inapplicability of Article 3 Requirements to an Article 11.3 Sunset Review

27. Mexico has not shown that the Commission's evaluation was anything other than objective and unbiased and based on a proper establishment of the facts.

28. While Mexico and the third parties may believe that Article 11 should specify particular criteria that must be addressed in making an Article 11.3 evaluation, it remains that the Agreement as written does not so specify.

29. Mexico's discussion of the requirements of Article 3.5 provides a good example of how Mexico is attempting to expand improperly the obligations of Members in sunset reviews. According to Mexico, Article 3.5 requires authorities to demonstrate that expiry of the duty would lead to dumped imports, and that the dumped imports are likely to cause injury. Nothing in Article 3.5 imposes these requirements, which instead are captured in Article 11.3.

30. Mexico has failed to explain how the volume and price effects analyses mandated by Articles 3.1 and 3.2 would be applied in a sunset review. Instead, Mexico states that the absence of imports would require the investigating authorities to determine why the imports are absent and whether they are likely to return to the market. These are relevant inquiries in a sunset review, but they are not required by Article 3.2.

31. Mexico's own arguments concerning the application of Articles 3.4 and 3.7 further illustrate why those Articles are not applicable to sunset reviews. As the panel in *ITC Lumber* explained, even in the context of an original threat determination, Article 3.4 serves to establish the background

against which the impact of future dumped imports must be assessed. It does not require an evaluation of what the industry would look like based on future dumped imports.

32. Mexico's emphasis on the Article 3.4 mention of the magnitude of the margin of dumping serves to illustrate that the Article does not apply to sunset reviews. Article 3.4 does not mention the magnitude of the dumping margin that is likely to prevail if an order is revoked.

33. Mexico points to the US statute as proof that it is practical to apply those requirements to sunset reviews. Just because the US statute requires consideration of some of the same elements in both original investigations and sunset reviews does not indicate that the analytical framework for the two types of determinations is the same.

34. Moreover, this case does not turn on whether the term "injury" referred to in Article 11 has the same meaning as the term referenced in footnote 9. The determination required under an Article 11.3 review differs from the determination required under an Article 3 investigation.

The "Reasonably Foreseeable Future"

35. Mexico incorrectly insists that the US statute allows an "undefined time frame" within which injury may continue or recur after expiry of the duty. The US statute restricts the period for the injury review to what is likely to occur within "the reasonably foreseeable future."

36. Nothing in the Agreement spells out any set period of time that should be examined. Mexico's reliance on Article 11.1 and on the last sentence of Article 11.3 to show otherwise is misplaced. Neither refers to the length of the future period that should be examined to ascertain whether revocation of the order is likely to lead to continuation or recurrence of injury.

The *Likely* Standard

37. Mexico raises two questions raised concerning the *likely* injury standard. First, is the standard set out in the US statute consistent with Article 11.3? Second, in the OCTG review, did the Commission apply the *likely* standard in a manner consistent with Article 11.3?

38. The answer to both of these questions is an emphatic *yes*. With respect to the first issue, the statute on its face plainly uses the exact same term – *likely* – as the term used in the Agreement. Thus, Mexico's as such claim fails. Regarding the ITC's application of the *likely* standard in the OCTG review, we have rebutted in our written submissions Mexico's claim that the ITC did not apply the standard in a WTO-consistent manner.

39. Mexico's arguments regarding the *likely* standard and the ITC's interpretation of it are semantic. It is more useful to examine the details of the ITC's analysis. Notably, the ITC, using the *likely* standard, has made negative determinations as to the likelihood of continuation or recurrence of injury, leading to the revocation of anti-dumping measures, in over one-third of the transition sunset reviews it conducted.

40. Turning to Mexico's challenges to the factual aspects of the ITC's determination, Mexico consistently fails to address the collective weight of the evidence relied on by the ITC, instead arguing that a particular fact is not itself sufficient to support a finding. The application of the standard of review to the facts in this case should lead this Panel to the same conclusion that the Argentina *OCTG* panel reached in finding that the *identical* ITC determination was based on a proper establishment of the facts.

41. For example, Mexico argues as though the ITC identified only one fact that supported its finding that foreign producers would have the incentive to increase their exports of casing and tubing

to the United States if the orders were revoked. Mexico simply fails to acknowledge the other findings showing the incentive to increase imports of casing and tubing.

42. Mexico has not demonstrated any flaw in the ITC's likely price effects or likely impact findings. With respect to likely impact, Mexico in its second submission merely repeats arguments that we have already rebutted. As to likely price effects, Mexico takes a new approach to its repetitious argument that underselling was the key to the ITC's price effects findings, arguing now that US law requires the ITC to consider likely underselling. US law requires the ITC to consider likely underselling, but not to rely on it.

ANNEX D-10

CLOSING ORAL STATEMENT OF THE UNITED STATES – SECOND MEETING

(27 August 2004)

Mr. Chairman, members of the Panel:

1. We will confine ourselves now to commenting on the few issues that remain outstanding, including new issues raised by Mexico in its second opening statement yesterday.

Volume Requirements

2. We want to address the issue of whether the commercial quantities threshold for revocation reviews should be defined. It is important to recall the context in which the commercial quantities requirement is applicable: Companies have established zero dumping margins and thus request a review seeking revocation of the order. Absent a commercial quantities requirement, companies could simply obtain review by making one token sale to the United States each year in order to establish zero margins, after which they could then resume dumping. The requirement is thus necessary in order to establish whether the zero margins that were achieved can provide a realistic picture of the likely future behavior of the exporters.

3. No number is set up to be a bright-line threshold for determining whether companies meet the requirement, nor does Article 11.2 require the United States to establish this threshold in its order-wide reviews. Furthermore, such a threshold would not benefit respondents. Respondents are currently able to argue that they have satisfied the requirement even when they have shipped a low percentage of pre-order exports. A fixed threshold would deprive respondents of that opportunity. Moreover, Mexico has not demonstrated that the United States uses the requirement to deny revocation reviews where warranted. Instead, the United States has demonstrated that relatively low post-order import volumes can satisfy the requirement.

4. Creating a bright-line threshold for commercial quantities would have no basis in the text of Article 11.2. Moreover, in the present dispute, TAMSA's volumes dropped to 0.2 per cent of pre-order levels. Assuming *arguendo* that Article 11.2 applies to the review in question, this is not a close call.

5. The same logic applies to the sunset review analysis, which requires a Member to draw informed conclusions about what might happen in the future. If import volumes have dropped significantly, then it is reasonable to question whether it is the existence of the order – and not reformed behavior of the respondents – that led to the decrease in imports. The Anti-Dumping Agreement affords Members great discretion with respect to the details of conducting Article 11.2 and Article 11.3 reviews, both of which require counterfactual determinations about which petitioners and respondents will always be able to disagree.

The Statistics in Argentina OCTG and this Dispute

6. Mexico proffers a new and erroneous argument regarding the statistics it submitted in support of its claim that the *Sunset Policy Bulletin* is a measure. Mexico states that the United States has departed from its position in the Argentina OCTG dispute and that the United States did not challenge the statistics in that dispute but does so now by providing "alternative statistics." Mexico is wrong on all counts. First, the United States challenged the relevance of the statistics in Argentina OCTG, as it has here. Second, the United States has not offered "alternative statistics" but has analyzed Mexico's statistics and revealed their lack of probative value. The United States has not "departed" from its position in Argentina OCTG.

The Argentina OCTG Panel's Evaluation of the Likely Standard

7. Mexico incorrectly states that the Argentina OCTG panel failed to evaluate whether the Commission applied the right standard. The Argentina panel in fact did evaluate whether the ITC met the likelihood standard of Article 11.3 and concluded that it did.

Other Issues Relating to Injury

8. Mexico states that a likely injury determination without a dumping margin is inconsistent with Article 11.3. Yet the Appellate Body has already concluded that Article 11.3 does not require a Member to calculate a margin. Mexico quotes from *German Steel* to imply that in a countervailing duty case, the level of subsidization is determinative for purposes of determining injury. Mexico ignores the Appellate Body's primary conclusion: Injury is not defined in the SCM Agreement in relation to any specific level of subsidization. Likewise, injury in the Anti-Dumping Agreement is not defined in relation to any specific magnitude of dumping.

9. Mexico's arguments relating to the cumulation analysis are not persuasive. Mexico implies that the ITC did not properly evaluate whether subject imports are likely to compete with each other and with the domestic like product. However, Mexico fails to note that the US statute at issue provides for such an evaluation in sunset reviews and that, in this review, the ITC did thoroughly evaluate the competition issue. Mexico also argues that if imports are not in the market together, there is no justification for cumulation, ignoring the fact that there were imports in the market together, albeit at lower levels than those prior to the entry of the order.

10. In addition, in paragraph 34 of its opening statement yesterday, Mexico attempts to discredit the ITC's likely injury determination, which took into consideration findings in the original investigation, by arguing that Article 18.3 provides that pre-WTO findings are not consistent with the Anti-Dumping Agreement. However, Article 18.3 simply says that the Anti-Dumping Agreement applies to investigations and review of existing measures initiated after the entry into force of the Agreement.

Procedural Concerns

Mexico's Claim Regarding Consistent Practice is Beyond the Panel's Terms of Reference

11. Mexico continues to argue that its claim regarding the US "consistent practice" in sunset reviews is within the Panel's terms of reference. It is not. Mexico relies on the fact that the United States addressed Mexico's arguments regarding the consistent practice. Yet it is not whether arguments were made and rebutted that establishes whether a claim is properly within a panels terms of reference. Rather, it is the panel request that establishes the terms of reference. Mexico's panel request does not include a claim regarding "consistent practice" and a violation of Article 11.3.

Remedy

12. Mexico's request that the Panel make suggestions regarding the appropriate remedy, should the Panel find in Mexico's favour, is also troubling. Members retain flexibility on how to implement DSB recommendations and rulings.

13. Second, the United States strongly objects to Mexico's statements that imply that the United States will somehow act in bad faith should the Panel find the existence of WTO inconsistencies. There is no basis for such an allegation, as the United States hopes that there was no basis for such an allegation in, for example, the *Mexico HFCS* dispute where the DSB found that Mexico had failed to comply with the DSB recommendations and rulings.

14. It follows then that it is inappropriate for Mexico to request that the Panel dictate precisely how the United States should implement any recommendation or ruling, in anticipation of such bad faith.

15. Also troubling is Mexico's argument in paragraph 72 of its oral statement that the Panel should suggest termination because to do otherwise will permit the United States to correct "retroactively" a violation of Article 11.3. Article 19.1 is clear as to the recommendation required of panels and the Appellate Body.

16. Mexico's request asks the Panel to prejudge the question of continuation or recurrence of dumping and injury. That is not something that panels are authorized to do under the DSU.

Consideration of a Possible Appeal in Argentina OCTG

17. Finally, with regard to the relevance of an Appellate Body report in *Argentina OCTG* to this dispute, should the former dispute be appealed, the United States has noted that prior panel and Appellate Body reports are not binding on future WTO disputes. That said, the United States would not object to delaying the current proceedings to take into account any such Appellate Body report. However, the United States would respectfully request that the Panel provide each party with the opportunity to comment on any such Appellate Body report as it may pertain to this dispute, and then to comment on the comments of the other party, prior to the Panel issuing its interim report in this dispute.