

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

*Report of the Panel*



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<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
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<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by the Appellate Body Report, W/DS/268/AB/R
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## I. INTRODUCTION

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

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

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

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

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

Chairman: Mr. Christer Manhusen

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

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

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

## II. FACTUAL ASPECTS

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

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<sup>1</sup> WT/DS282/1-G/L/605-G/ADP/D47/1.

<sup>2</sup> WT/DS268/2 (Annex F).

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

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

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

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

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

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

<sup>4</sup> *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364, 731-TA-711, and 713-716 (June 2001) (Exhibit MEX-20) (hereinafter "USITC Sunset Determination").

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

<sup>6</sup> This margin was later amended to 21.70 per cent.

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

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

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

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

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### A. MEXICO

3.1 Mexico requests the Panel to find that:

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

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<sup>7</sup> USDOC Fourth Administrative Review Determination, *supra* note 5.

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

- USDOC's consistent sunset review practice in applying the statute (19 U.S.C. § 1675a(c)(1)), the SAA (pages 889-890) and the SPB (section II.A.3) not only further demonstrates the WTO-inconsistent presumption that these instruments embody, but also itself violates as such Article 11.3 of the AD Agreement; and
- USDOC violated Article 11.3 of the AD Agreement because USDOC: (i) focused exclusively on past import volumes to the exclusion of other relevant factors; (ii) failed to apply the "likely" standard required by Article 11.3; (iii) failed to conduct a prospective analysis; and (iv) failed to make a determination of likelihood of dumping on the basis of positive evidence;
- USITC's standard for determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of injury as such violates Article 11.3 of the AD Agreement because the standard is something less than "likely" or "probable" as required by Article 11.3;
- USITC violated Article 11.3 of the AD Agreement because USITC applied a standard that was less than the "likely" or "probable" standard required by Article 11.3;
- USITC violated Article 11.3 of the AD Agreement because USITC failed to base its likelihood of injury determination on positive evidence;
- USITC violated Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement, and violated 11.3 of the Antidumping Agreement (independently of the application of Article 3) by failing to conduct an objective examination of the record and failing to base its likelihood of injury determination on positive evidence. The USITC's conclusions regarding the likely volume of imports, the likely price effects, and the likely impact of imports on the domestic industry:
  - cannot be considered objective when viewed in light of an impartial examination of the information on the record;
  - are not based on positive evidence of likely injury as required by Article 3.1 and by Article 11.3 of the AD Agreement; and
  - could not lead an objective and unbiased decision maker to the conclusion that termination of the duty would be likely to lead to continuation or recurrence of injury;
- USITC violated Article 3.4 of the AD Agreement because USITC failed to evaluate all the relevant economic factors and indices having a bearing on the state of the industry, including those enumerated in Article 3.4 of AD Agreement;
- USITC violated Article 3.4 and Article 11.3 (independently of the application of Article 3) by: (i) relying on the margin likely to prevail reported by USDOC to USITC for purposes of the USITC's likelihood determination; or (ii) alternatively, failing to consider the magnitude of the margin of dumping in determining that injury would be likely to continue or recur;
- USITC violated Article 3.5 of the AD Agreement because USITC failed to: (i) demonstrate a causal relationship between the dumped imports and likely injury to the domestic industry; (ii) separate and distinguish the effects of other factors causing the likely injury from the effects of the dumping; and (iii) base its determination on the effects of the dumping on the domestic industry;
- independent of the applicability of Article 3.5, USITC violated the causation requirements inherent in Article VI of the GATT and Article 11.1 of the AD Agreement and thereby also

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

- USITC violated Articles 3.7 and 3.8 of the AD Agreement because USITC based its likelihood of injury determination on conjecture and remote possibility and failed to satisfy the special requirements of Articles 3.7 and 3.8 for making prospective injury determinations;
- USITC violated Articles 11.3 and 3.3 because these provisions preclude cumulation in Article 11.3 reviews, and USITC cumulatively assessed the effects of OCTG imports from Argentina, Italy, Japan, Korea, and Mexico to determine whether termination of the anti-dumping duty on Mexican OCTG imports would be likely to lead to continuation or recurrence of injury; and
- in the alternative, *assuming arguendo*, that a cumulative injury analysis is permitted in sunset reviews, USITC violated Articles 11.3 and 3.3 because USITC failed to apply the requirements of Article 3.3 in this case;
- irrespective of the applicability of Article 3.3 to Article 11.3, the USITC failed to satisfy the requirements inherent in the conduct of any cumulative injury assessment; specifically, the USITC failed to ensure that cumulation was appropriate in light of the conditions of competition between imported OCTG, and between imported OCTG and the domestic like product, which findings required a threshold finding that the imports would be simultaneously present in the US market;
- 19 U.S.C. §§ 1675a(a)(1) and (5) as such violate Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the AD Agreement because they require that USITC determine whether injury would be likely to continue or recur "within a reasonably foreseeable time" and that USITC "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time"; and
- USITC violated Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 11.1, and 11.3 of the AD Agreement by applying 19 U.S.C. §§ 1675a(a)(1) and (5) in the sunset review of OCTG from Mexico;
- USDOC violated Article 11.2 of the AD Agreement because USDOC did not terminate the anti-dumping duty immediately upon a showing that the continued application of the duty was not "necessary to offset dumping";
- USDOC violated Articles 11.2, 2.4, and 2.4.2 of the AD Agreement because USDOC "zeroed" Hylsa's negative margins and relied on the positive margin that resulted from this unlawful methodology as justification for not revoking the anti-dumping duty on OCTG from Mexico with respect to Hylsa;
- USDOC violated Article 11.2 of the AD Agreement because USDOC: (i) applied a standard which required a demonstration that dumping was "not likely" in the future; (ii) arbitrarily imposed a "commercial quantities" threshold test which has no basis in Article 11.2; and (iii) it ignored positive evidence that demonstrated that the measure was no longer necessary to offset dumping;
- USDOC violated Article X:2 of the GATT 1994 because USDOC imposed conditions on TAMSAs for the termination of the anti-dumping duty in advance of the official publication of such conditions; and

- assuming *arguendo* that the Panel finds that the statute, the SAA and the Sunset Policy Bulletin do not establish a WTO-inconsistent presumption that violates Article 11.3 of the AD Agreement, then USDOC violated Article X:3(a) of the GATT 1994 by failing to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to USDOC's conduct of sunset reviews of anti-dumping duty orders;
- the United States violated the provisions of Article VI of the GATT 1994, Articles 1 and 18 of the AD Agreement, and Article XVI:4 of the WTO Agreement because the United States violated its obligations under the AD Agreement;
- the United States violated Article 18.4 of the AD Agreement by failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations; and
- the United States violated Article XVI:4 of the WTO Agreement by failing to ensure the conformity with the above noted laws, regulations and administrative procedures with its WTO obligations.

3.2 Mexico also requests the Panel to:

- recommend the United States to bring its measures into conformity with the covered agreements (AD Agreement, GATT 1994, WTO);
- suggest that the United States implement its recommendation by immediately revoking the anti-dumping duty on OCTG imports from Mexico.

B. THE UNITED STATES

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

#### **IV. ARGUMENTS OF THE PARTIES**

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

#### **V. ARGUMENTS OF THE THIRD PARTIES**

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

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<sup>9</sup> The English and Spanish versions of Mexico's executive summaries are reproduced as submitted by Mexico in their original language.

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

## VI. INTERIM REVIEW

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

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

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

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

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

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

<sup>11</sup> The English and Spanish versions of Argentina's executive summaries are reproduced as submitted by Argentina in their original language.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>13</sup> In Spanish, "la referencia en el texto del artículo 11.3 a "un derecho antidumping" esta hecha en singular y no en plural...".

<sup>14</sup> Mexico's answers to the Panel's questions following the second meeting, para. 21.

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

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

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

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

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

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

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

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

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

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

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

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<sup>15</sup> Appellate Body Report, *United States- Oil Country Tubular Goods Sunset Reviews*, para. 188.

<sup>16</sup> *Ibid.*, at para. 212.

<sup>17</sup> Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling)*, WTO/DS285/AB/R, circulated 7 April 2005, para. 141.

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

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

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

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

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

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<sup>18</sup> Exhibit MEX-62, Tab 13.

<sup>19</sup> Exhibit MEX-62, Tab 165.

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

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

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

## **VII. FINDINGS**

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

#### **1. Standard of review**

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

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

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

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<sup>20</sup> Exhibit MEX-62, Tab 261.

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

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

## 2. Relevant principles of treaty interpretation

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

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

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

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

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

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<sup>21</sup> (1969) 8 *International Legal Materials* 679.

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

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

<sup>24</sup> *Ibid.*, para. 46.

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

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

### **3. Burden of proof**

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

#### **B. ALLEGED INCONSISTENCIES IN THE USDOC SUNSET DETERMINATION**

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

###### **(a) Arguments of Mexico**

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

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

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

<sup>27</sup> *Ibid.*

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

(b) Arguments of the United States

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

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

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

(c) Findings

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

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

This claim is set forth explicitly in section VII.B of Mexico's First Submission, paras. 110-120. Mexico's claim is set out in section A.1 of the Panel Request:

The Department's 'likely' standard for determining whether termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping, the Department's determination in this regard, and the Department's calculation of the 'likely' margin of dumping reported to the USITC, are inconsistent,

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<sup>28</sup> Panel's question 12 to Mexico following the first meeting.

both as such and as applied, with Articles 11.1, 11.3, 2.1, 2.2, 2.4, 6.1, 6.2, 6.4, 6.6, and 6.9 of the Anti-Dumping Agreement.<sup>29</sup>

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

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

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

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

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

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

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

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

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

<sup>30</sup> *Ibid.*

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

<sup>32</sup> Mexico's opening statement at the second meeting of the Panel, para. 16.

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

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<sup>34</sup>Appellate Body Report, *United States – 1916 Act*, *supra*, footnote 32, para. 54.<sup>33</sup>

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

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

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

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

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

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

<sup>34</sup> *Ibid.*, para. 64.

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

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

<sup>37</sup> Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ("US – Corrosion-Resistant Steel Sunset Review")*, WT/DS244/AB/R, adopted 9 January 2004, para. 81.

<sup>38</sup> *Ibid.*, para. 82.

that effect in *US – Oil Country Tubular Goods Sunset Reviews*.<sup>39</sup> The Appellate Body stated in this regard:

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

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

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

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

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

[A] firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions. We therefore consider that the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin with Article 11.3 of the *Anti-Dumping Agreement* hinges upon whether those provisions instruct USDOC to treat dumping margins and/or import volumes as **determinative or conclusive**, on the one hand, or **merely indicative or probative**, on the other hand, of the likelihood of future dumping.

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As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that create 'irrebuttable' presumptions, or 'predetermine' a

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

<sup>40</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 187.

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

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

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

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

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

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<sup>41</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 178, 191.

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

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

<sup>43</sup> Mexico's first submission, para. 375.

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

<sup>45</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, at para. 7.157.

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

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

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

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

shall consider—

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order or acceptance of the suspension agreement.

(2) Consideration of other factors

If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.<sup>47</sup>

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

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

<sup>47</sup> 19 U.S.C. § 1675a(c) (Exhibit MEX-24).

and import volumes have determinative or conclusive weight, since if that threshold is passed, other factors **must** be considered.<sup>48</sup>

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

Under section 752(c)(1), Commerce will examine the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order or the acceptance of a suspension agreement. For example, declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent the order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. In contrast, declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.

The Administration believes that the existence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of the order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to re-enter the US market, they would have to resume dumping.

New section 752(c)(2) provides that, for good cause shown, Commerce also will consider other information regarding, price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilisation; any history of sales below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets. In practice, this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis.<sup>50</sup> (emphasis added)

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

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

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

<sup>50</sup> SAA (Exhibit MEX-26) at 4213-4214.

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

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

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

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

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

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

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

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

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

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<sup>51</sup> SPB (Exhibit MEX -32) at 18871.

- (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
- (b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or
- (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>52</sup> SPB (Exhibit MEX-32) at 18872-18874.

<sup>53</sup> *Ibid.*, at 18872-18874.

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

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

The fact that affirmative determinations were made in reliance on one of the three scenarios in all the sunset reviews of anti-dumping duty orders where domestic interested parties took part strongly suggests that these scenarios are mechanistically applied. However, without a qualitative examination of the reasons leading to such determinations, it is not possible to conclude definitively that these determinations were based exclusively on these scenarios in disregard of other factors.<sup>59</sup>

While the Appellate Body recognized the importance of the two factors, historical dumping margins and import volumes, it stated: "our concern here is with the possible mechanistic application of the three scenarios based on these factors, such that other factors that may be of equal importance are disregarded."<sup>60</sup> Finally, the Appellate Body emphasized that it had not concluded that Section II.A.3 of the SPB is consistent with Article 11.3 of the AD Agreement. Thus, the Appellate Body stated that its reasoning "does not exclude the possibility that it could be properly concluded that the three scenarios in section II.A.3 of the SPB are regarded as determinative/conclusive of the likelihood of continuation or recurrence of dumping. However, such a conclusion would need to be supported by a rigorous analysis of the evidence regarding the manner in which section II.A.3 of the SPB is applied by the USDOC."<sup>61</sup>

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

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

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<sup>54</sup> Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 7.165.

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

<sup>56</sup> *Ibid.*, para. 7.166.

<sup>57</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, at para. 215.

<sup>58</sup> *Ibid.*, para. 210.

<sup>59</sup> *Ibid.*, para. 212 (footnote omitted).

<sup>60</sup> *Ibid.*, para. 208.

<sup>61</sup> *Ibid.*, para. 215.

<sup>62</sup> *Ibid.*, para. para. 212.

The Appellate Body went on to explain that;

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

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

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

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

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

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<sup>63</sup> *Ibid.*, para. 209 (footnote omitted).

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

<sup>65</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 212.

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

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

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

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

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

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

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

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

<sup>68</sup> Exhibit MEX-62 Tabs 13, 19, 25, 35, 62, 75, 78, 84, 89, 124, 146, 159, 163, 194, and 272.

<sup>69</sup> Exhibit MEX-62 Tabs 13, 19, 146, 159, 163, 194, and 272.

<sup>70</sup> Exhibit MEX-62 Tabs 25, 35, 62, 75, and 89.

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

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

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

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

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

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<sup>71</sup> Exhibit MEX-62 Tab 89.

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

<sup>73</sup> We note that the respondent foreign parties did not submit any further arguments in response to the preliminary determination.

<sup>74</sup> Exhibit MEX-62 Tabs 78, 84 and 124.

<sup>75</sup> Exhibit MEX-62 Tab 78.

<sup>76</sup> Exhibit MEX-62 Tabs 42, 165, 179 and 201.

<sup>77</sup> Exhibit MEX-62 Tabs 165 and 201.

<sup>78</sup> Exhibit MEX-62 Tab 201 Issues and Decision Memorandum, Preliminary Results at pp. 6-7.

<sup>79</sup> Exhibit MEX-62 Tab 165.

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

<sup>81</sup> Exhibit MEX-62 Tabs 32 and 261.

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

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

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

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<sup>82</sup> Exhibit MEX-62 Tab 32.

<sup>83</sup> Exhibit MEX-62 Tab 261.

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

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

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

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

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

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

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

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

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

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

### **(a) Arguments of Mexico**

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

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

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<sup>87</sup> SPB (Exhibit MEX -32) at 18871.

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

(b) Arguments of the United States

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

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

(c) Findings

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

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

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

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

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<sup>88</sup> The New Shorter Oxford English Dictionary, Oxford University Press, p. 651.

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

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

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

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

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

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

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

<sup>90</sup> USDOC Decision Memorandum (Exhibit MEX -19) page 4.

<sup>91</sup> USDOC Decision Memorandum (Exhibit MEX -19) p. 4.

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

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

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

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

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

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<sup>92</sup> Exhibit MEX-16, at 5.

<sup>93</sup> US first submission, para. 132.

<sup>94</sup> *Ibid.*, para. 123.

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

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

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

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

**1. Arguments of Mexico**

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

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

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

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<sup>95</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para. 127.

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

## 2. Arguments of the United States

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

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

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

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

## 3. Findings

### (a) Introduction

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

### (b) Challenges to US law "as such"

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

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<sup>96</sup> USITC Sunset Determination, supra note 4, (Exhibit MEX -20) p. 14.

<sup>97</sup> *Ibid.*, pp. 16-17.

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

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

In general

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

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

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

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

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

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

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<sup>98</sup> Exhibit MEX-24.

<sup>99</sup> USITC Sunset Determination, *supra* note 4, (Exhibit MEX -20 at 1).

<sup>100</sup> Mexico's second submission, para. 88.

<sup>101</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para. 111

<sup>102</sup> We note that the Appellate Body has stated that it was "not unreasonable" for the Panel in *US – Oil Country Tubular Goods Sunset Reviews*, to reach the same conclusion. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para.312.

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

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

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

(5) Basis for determination

The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur **within a reasonably foreseeable time** if the order is revoked or the suspended investigation is terminated. In making that determination, the Commission shall consider that the effects of revocation or termination **may not be imminent**, but may **manifest themselves only over a longer period of time**.<sup>105</sup> (emphasis added)

With reference to this provision the SAA provides:

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

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

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

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

<sup>105</sup> Exhibit MEX-24.

<sup>106</sup> SAA (Exhibit MEX-26) 4211.

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

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

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

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

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

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<sup>107</sup> Mexico's second submission, para.163, Mexico's first submission, para. 266.

<sup>108</sup> Mexico's first submission, para. 270

<sup>109</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 114-115.

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

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

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

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

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

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

<sup>112</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 106-107.

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

7.108 On the basis of the above considerations, we find that 19 U.S.C. §§ 1675a(a)(1) and (5) are not inconsistent with Articles 3.1, 3.2, 3.4, 3.7, 3.8, 11.1, and 11.3 of the AD Agreement.<sup>114115</sup>

(c) Challenges to US law "as applied"

(i) *Time-frame*

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

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

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

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

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

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

<sup>116</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 360.

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

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

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

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

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

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

In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the *SCM Agreement*, that:

... original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.<sup>116</sup>

This observation applies also to original investigations and sunset reviews under the Anti-Dumping Agreement. In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*.

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<sup>116</sup> Appellate Body Report, *US – Carbon Steel*, para. 106.<sup>118</sup>

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

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

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

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

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<sup>118</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, paras. 106-107.

<sup>119</sup> *Ibid.*, para. 123.

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

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

<sup>122</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 278.

Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the 'review' of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.<sup>123</sup> (emphasis in the original)

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

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

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

7.122 However, the crux of Mexico's arguments is that the USITC either did not establish facts properly or did not evaluate them objectively or did not base them on a sufficient factual basis. The USITC's conclusion that there was a likelihood of continuation or recurrence of injury was based on its consideration of the likely volume, price effects, and impact of imports. We must therefore consider these aspects of the USITC determination under the standard of review applicable in this dispute. If we find that the USITC's establishment of facts was proper and its evaluation of those facts was unbiased and objective, we will find no violation of Article 11.3, even if we might have reached a different conclusion on the basis of the same facts.

#### Likely volume of imports

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<sup>123</sup> *Ibid.*, para. 280.

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

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

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

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

7.124 The USITC determination reads, in pertinent part:

The recent \*\*\* capacity utilization rates represent a potentially important constraint on the ability of these subject producers to increase shipments of casing and tubing to the United States. Nevertheless, the record indicates that these producers have incentives to devote more of their productive capacity to producing and shipping more casing and tubing to the US market.

First, Tenaris is the dominant supplier of OCTG products and related services to all of the world's major oil and gas drilling regions except the United States. Tenaris states that it is the only entity that can serve oil and gas companies on a global basis, and that it seeks worldwide contracts with such companies. Many of Tenaris existing customers are global oil and gas companies with operations in the United States. While the Tenaris companies seek to downplay the importance of the US market relative to the rest of the world, they acknowledge that it is the largest market for seamless casing and tubing in the world. Given Tenaris' global focus, it likely would have a strong incentive to have a significant presence in the US market, including the supply of its global customers' OCTG requirements in the US market.

Second, casing and tubing are among the highest valued pipe and tube products, generating among the highest profit margins. Thus, producers generally have an incentive, where possible, to shift production in favor of these products from other pipe and tube products that are manufactured on the same production lines.

Third, the record in these reviews indicates that prices for casing and tubing on the world market are significantly lower than prices in the United States. Virtually all purchasers report that, notwithstanding the discipline imposed by the orders, subject imports are nevermore expensive than the domestic like product and often less expensive. One purchaser reported that if the orders are revoked, \*\*\*. We have considered respondents' arguments that the domestic industry's claims of price differences are exaggerated, but nevertheless conclude that there is on average a

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

difference sufficient to create an incentive for subject producers to seek to increase their sales of casing and tubing to the United States.

Fourth, subject country producers also face import barriers in other countries, or on related products. Argentine, Japanese, and Mexican producers are subject to antidumping duty orders in the United States on seamless standard, line, and pressure pipe, which are produced in the same production facilities as OCTG. Korean producers are subject to import quotas on welded line pipe shipped to the United States and US antidumping duty orders on circular, welded, non-alloy steel pipe. Canada currently imposes 67 per cent antidumping duty margins on casing from Korea.

Finally, we find that industries in \*\*\* of the subject countries are dependent on exports for the majority of their sales. Japan and Korea in particular have very small home markets and depend nearly exclusively on exports. The export orientation of the industries in the subject countries indicates that they would seek to re-enter the US market in significant quantities, as they did during the original investigations, if the orders were revoked.

We therefore find that, in the absence of the orders, the likely volume of cumulated subject imports, both in absolute terms and as a share of the US market, would be significant.<sup>128</sup> (footnotes omitted)

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

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

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

<sup>129</sup> USITC hearing transcript, paras. 200 and 205 (Exhibit US-24).

<sup>130</sup> Post-Hearing Brief of TAMSA at 8 (Exhibit US-25).

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

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

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

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

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

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

<sup>132</sup> USITC Sunset Determination, *supra* note 4, (Exhibit MEX-20) p. 21, footnote 128, Mexico's first submission, para. 207.

### Likely price effects of dumped imports

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

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

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

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

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

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

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

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<sup>133</sup> USITC Sunset Determination, *supra* note 4, (Exhibit MEX-20, at 21).

<sup>134</sup> *Ibid.*, p. 21.

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

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

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

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

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

#### Likely impact of dumped imports on the US industry

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

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<sup>136</sup> Mexico's first submission, para. 213.

<sup>137</sup> USITC Sunset Determination, *supra* note 4, (Exhibit MEX-20) p. 21.

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

<sup>139</sup> Staff Report to USITC Sunset Determination, *supra* note 4, (Exhibit MEX-20 at II-19).

<sup>140</sup> *Ibid.*, p. II-17.

On balance, we find that the domestic industry's condition has improved since the orders went into effect as reflected in most indicators over the period reviewed, and we do not find the industry to be currently vulnerable.

We find, however, as discussed above, that revocation of the orders likely would lead to a significant increase in the volume of subject imports which likely would undersell the domestic like product and significantly depress or suppress the domestic industry's prices. Moreover, in the original investigations, subject imports captured market share and caused price effects despite a significant increase in apparent consumption in 1993 and 1994 as compared to 1992. In these reviews, we find that a significant increase in subject imports is likely to have negative effects on both the price and volume of the domestic producers' shipments despite strong demand conditions in the near term. We find that these developments likely would have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the domestic industry's production, shipments, sales, market share, and revenues would result in erosion of the domestic industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments.<sup>141</sup>

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

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

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

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

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<sup>141</sup> USITC Sunset Determination, *supra* note 4, (Exhibit MEX-20, at 22-23).

<sup>142</sup> Mexico's first submission, para. 218.

<sup>143</sup> *Ibid.*, para. 219.

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

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

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

(iv) *Cumulation*

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

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

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

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

from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

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

Article 3.3 of the AD Agreement provides:

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

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

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

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

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<sup>145</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, *supra* note 39, para. 294.

<sup>146</sup> *Ibid.*, para. 294.

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

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

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

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

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

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

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

(a) Arguments of Mexico

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

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

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

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

(i) applied a standard which required a demonstration that dumping was "not likely" in the future; (ii) arbitrarily imposed a "commercial quantities" requirement test which is inconsistent with, and has no basis in, Article 11.2; and (iii) ignored positive evidence that demonstrated that the measure was no longer necessary to offset dumping.

(b) Arguments of the United States

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

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

(c) Findings

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

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.<sup>21</sup> Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

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

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

immediate termination of an anti-dumping duty merely because there is no dumping found at the time of such a review.<sup>149</sup>

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

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

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

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

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

<sup>150</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra* note 37, para.150.

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

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

<sup>153</sup> 19 C.F.R. § 351.222(e)(1).

warrant revocation. A review may be requested by any interested party, including individual companies, under each of these provisions.<sup>154</sup>

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

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

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

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

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<sup>154</sup> Exhibit US-28

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

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

<sup>157</sup> USDOC Fourth Administrative Review Determination, *supra* note 5, Decision Memorandum, pp. 9 and 21.

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

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

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

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

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

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

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

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

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

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

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

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<sup>158</sup> *US – DRAMS*, *supra* note 149, para. 6.34.

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

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

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

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

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

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

## 2. Claim under Article X:2 of GATT 1994

### (a) Arguments of Mexico

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

### (b) Arguments of the United States

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

### (c) Findings

7.180 Article X:2 of GATT 1994 provides:

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

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

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

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

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

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<sup>161</sup> 62 Fed. Reg. 27296, 27416-27417, 19 May 1997, (Exhibit US-1).

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

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

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

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

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

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

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

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

<sup>163</sup> Exhibit US-19.

## VIII. CONCLUSIONS AND RECOMMENDATIONS

### A. CONCLUSIONS

#### (a) Claims regarding USDOC's sunset review

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

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

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

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

#### (b) Claims regarding USITC's sunset review

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

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

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

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

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

#### (c) Claims regarding USDOC's fourth administrative review

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

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

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

(d) Other claims

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

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

#### B. RECOMMENDATION AND REQUEST FOR SUGGESTION

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

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

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

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

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

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