# WORLD TRADE ORGANIZATION

**WT/DS282/AB/R**

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## TABLE OF ABBREVIATIONS USED IN THIS REPORT

| **Abbreviation** | **Description** |
|---|---|
| *Anti-Dumping Agreement* | *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* |
| DSB | Dispute Settlement Body |
| DSU | *Understanding on Rules and Procedures Governing the Settlement of Disputes* |
| GATT 1994 | *General Agreement on Tariffs and Trade 1994* |
| Hylsa | *Hylsa, S.A. de C.V.* |
| OCTG | oil country tubular goods |

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

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

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

AB-2005-7

Present:

Ganesan, Presiding Member
Lockhart, Member
Taniguchi, Member

## I. Introduction

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

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

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[1] WT/DS282/R, 20 June 2005.

[2] Panel Report, para. 2.1.

[3] *Ibid.*, para. 2.3.

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

2000, the USDOC initiated a sunset review of the order.[5] In its determination of the likelihood of continuation or recurrence of dumping[6], the USDOC determined that revocation of the order would be likely to lead to continuation or recurrence of dumping at the rate of 21.70 per cent for TAMSA, Hylsa, and "all other" Mexican producers.[7] In its determination of the likelihood of continuation or recurrence of injury, the United States International Trade Commission (the "USITC") determined that revocation of the anti-dumping duty orders on

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

(b)

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

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

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

## II. Arguments of the Participants and Third Participants

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

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

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

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

[17]WT/DS282/7 (attached as Annex II to this Report).

[18]Pursuant to Rule 23(3) of the *Working Procedures*.

[19]Pursuant to Rules 22(1) and 23(4) of the *Working Procedures*, respectively.

[20]Pursuant to Rule 24(1) of the *Working Procedures*.

[21]Pursuant to Rule 24(2) of the *Working Procedures*.

[22]Mexico's appellant's submission, para. 22.

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

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

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

10.

record shows that, despite Mexico's repeated explanation and elaboration, the Panel simply ignored

"a threshold finding that the subject imports would be simultaneously present in the U.S. market".[42] Mexico asks: "[i]f the imports are not in the market together and competing against each other, what possible justification could exist to evaluate the effects of the imports in a cumulative manner?"[43] Mexico contends that "nowhere in [the USITC's] analysis is there positive evidence demonstrating that imports from Mexico, Argentina, Italy, Korea, and Japan would be present in the United States market at the same time ... if the order were revoked."[44]

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

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

18. Moreover, Mexico contends that, having "decided to cumulate Mexican imports with imports from the other four countries that were cumulated in the original investigation", the USITC "was required to do so consistently with the requirements of Article 3.3"[49], regardless of whether that provision applies directly to sunset reviews. Mexico finds support for its position in the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body stated that, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4."[50]

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

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[42]Mexico's appellant's submission, p. 23, heading II.B.2.c.i.

[43]Mexico's second written-4.7(d)1uld our countries that e margins m33to f-4.7(25 secon)-SU. Mex p]TJ21.

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

3. Margins of Dumping in Sunset Reviews

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

21. Mexico submits that the Panel erred in its interpretation of Articles 2 and 11.3 of the *Anti-Dumping Agreement*. Citing the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*[53], Mexico argues that, when an investigating authority "uses a specific methodology that the Anti-Dumping Agreement does not require, the authority must not apply that methodology in a manner that otherwise conflicts with the Agreement."[54] Otherwise, 5l m9dt0.0 j10.98 0 0 uoctive.02(5GTO-.0009 Tc0

Panel found that the USDOC's likelihood-of-dumping determination was inconsistent with the United States' WTO obligations. Therefore, the United States has not fulfilled the requirements for

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

34. Mexico observes that the Panel declined to rule on Mexico's claim under Article X:3(a) of the GATT 1994. However, Mexico submits that the Panel record contains sufficient findings for the

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

38. The United States argues that Article VI of the GATT 1994 does not contemplate sunset reviews. Rather than speaking of a determination of likelihood of continuation or recurrence of injury, Article VI refers only to a determination of injury. In other words, there is no support for

consistent basis for a finding of likely dumping for *any*

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

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

45. Turning to Mexico's claims under Article 11 of the DSU, the United States agrees with the Panel that "Mexico failed to 'explain or elaborate on its bare assertion that Article 11.3 somehow establishes "inherent" obligations for cumulati

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

49.

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

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

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

5. Mexico's Conditional Appeals

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

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

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

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

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[97]United States' appellee's submission, para. 79.

[98]*Ibid.*, para. 76 (referring to Panel Report, para. 6.22).

[99]*Ibid.*, para. 83 (quoting Mexico's appellant's submission, paras. 157-158).

[100]*Ibid.* (referring to Panel Report, para. 6.6).

[101]*Ibid.*, para. 84.

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

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

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

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

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[105]United States' other appellant's submission, para. 3.

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

[107]*Ibid.*, para. 19.

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

interested parties' arguments regarding other factors. However, in making this determination, the USDOC relied not only on the continuation of dumping, but also on the decline in import volumes,

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

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

D. *Arguments of Mexico – Appellee*

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

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

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

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

[120]United States' other appellant's submission, para. 72.

[121]Panel Report, footnote 85 to para. 7.63 (quoted in United States' other appellant's submission, para. 73).

[122]*Ibid.*, footnote 86 to para. 7.64 (quoted in United States' other appellant's submission, para. 72).

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

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

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

86. According to Mexico, the United States challenges the Panel's statement that, in one preliminary determination[132], the USDOC said that it did not consider the interested parties' arguments regarding other factors. Responding to the United States' contention that this was not due to the SPB, Mexico argues that the USDOC relied on Section II.A.3 of the SPB in the first 043 T TD0.0(s firs)(as -1.ion )6o6 S

which the USDOC rejected argum

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

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

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

### E. *Arguments of the Third Participants*

#### 1. Argentina

91. In relation to Mexico's appeal regarding causation in sunset reviews, Argentina agrees with

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

92.

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

95. In relation to the United States' appeal concerning the SPB, China agrees with Mexico that the Panel was correct in finding that the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. First, the Panel correctly concluded that Mexico had established a *prima facie* case and discharged its burden of proof. Mexico submitted to the Panel extensive evidence and arguments regarding the meaning of Section II.A.3 of the SPB, including evidence of the USDOC's "consistent application" of Section II.A.3.[143] Secondly, the Panel properly analyzed Mexico's evidence, conducting a "qualitative assessment"[144]

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

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

4. Japan

99. Japan agrees with Mexico that an investigating authority conducting a sunset review pursuant to Article 11.3 of the *Anti-Dumping Agreement* may not determine that the expiry of the duty would be likely to lead to continuation or recurrence of injury without establishing that the likely injury would be caused by likely dumping. This flows from

(b) in relation to cumulation:

(i) whether the Panel erred in finding that the USITC's decision to conduct a cumulative assessment of imports in making its likelihood-of-injury determination was not inconsistent with Articles 3.3 and 11.3 of the *Anti-Dumping Agreement*; and

(ii) whether the Panel acted inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments in this regard;

(c) in relation to dumping margins:

(i) whether the Panel acted inconsistently with Article 11 of the DSU in not addressing Mexico's claims under Article 2 of the *Anti-Dumping Agreement*;

(ii) whether the likelihood-of-dumping determination[151] of the United States Department of Commerce (the "USDOC") was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the USDOC determined a likely dumping margin inconsistently with Article 2 of the *Anti-Dumping Agreement*; and

(iii) whether the USITC's likelihood-of-injury determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement* because the USITC relied on a likely dumping margin that was determined inconsistently with Article 2 of the *Anti-Dumping Agreement*;

(d) whether the Panel acted inconsistently with Article 11 of the DSU in declining to make a specific finding that the United States had no legal basis to continue the anti-dumping duties on oil country tubular goods ("OCTG") from Mexico beyond the five-year period established by Article 11.3 of the *Anti-Dumping Agreement*;

(e) in relation to the Sunset Policy Bulletin (the "SPB")[152]:

(i) whether, in assessing the consistency of the SPB, "as such", with Article 11.3 of the *Anti-Dumping Agreement*, the Panel failed to make an objective

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[151]In our discussion, we refer at times to the USDOC's determination of the likelihood of continuation or recurrence of dumping as the "likelihood-of-d-a5( o)4.8tion

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

(ii) whether the Panel erred in finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(iii) whether the Panel erred in stating that Mexico had established a *prima facie* case that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(f) if the Appellate Body reverses the Panel's finding that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*:

(i) whether the Tariff Act of 1930 (the "Tariff Act"), the Statement of Administrative Action (the "SAA")[153], and the SPB, "collectively and independently"[154], establish a standard that is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(ii) whether the USDOC administers United States laws and regulations on sunset reviews in a uniform, impartial, and reasonable manner in accordance with Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

## IV. Causation in Sunset Reviews

### A. *Introduction*

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

104. The Panel also concluded that:

> While Mexico did make arguments concerning alleged failure to establish a causal link between likely dumping and likely injury, these were, in our view, based on Article 3.5, which we found did not apply in sunset reviews. Mexico did not explain or elaborate on its bare assertion that Article 11.1 of the AD Agreement and Article VI of GATT 1994 establish "inherent" causation requirements, parallel to but independent of those in Article 3.5. In the absence of any basis for such findings, we did not consider it necessary to address this aspect of Mexico's argument.[156]

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

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

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[156]Panel Report, para. 6.12.

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

[158]United States' appellee's submission, para. 42.

[159]*Ibid.* (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 359).

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

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

> Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition … unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. ... (footnote omitted)

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

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

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

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

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

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

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

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

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

115. We now turn to the provisions of the *Anti-Dumping Agreement* that deal with the "review" of anti-dumping duties that have been levied after an original investigation. Article 11.1 of the Agreement establishes an overarching principle for "duration" and "review" of anti-dumping duties in force.[162] It provides that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." This principle applies during the entire life of an anti-dumping duty. If, at any point in time, it is demonstrated that no injury is being caused to the domestic industry by the dumped imports, the rationale for the continuation of the duty would cease.[163]

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

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

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

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

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

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

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

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

[168]See *supra*, para. 108.

[169]See, for example, Appellate Body Report,

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

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

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

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

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

[170]Mexico's appellant's submission, para. 52.

[171]*Ibid.*, para. 54.

[172]*Ibid.*

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

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

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

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

## C. *Claims under Article 11 of the DSU*

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

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[173]Mexico's appellant's submission, para. 57. (original emphasis)

[174]United States' appellee's submission, para. 32.

[175]See Mexico's appellant's submission, table at para. 57.

[176]*Ibid.*, para. 54.

[177]*Ibid.*, para. 66.

[178]*Ibid.*, para. 67.

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

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

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

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

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

## V. Cumulation in Sunset Reviews

### A. *Introduction*

137. In its likelihood-of-injury determination, the USITC found that revocation of the anti-dumping duty orders on OCTG from Argentina, Italy, Japan, Korea, and Mexico would be likely to danes5.4(OCTG

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

146. We observe, first, that the Panel did not "simply assume" that, "because ... Article 3.3 does not apply to sunset reviews, the USITC's cumulative injury determination could not be inconsistent with Article 11.3."[203] Rather, the Panel found that the text of Article 11.3 of the *Anti-Dumping Agreement* does not speak to whether cumulation is permitted beyond the context of original investigations and noted that other provisions of the *Anti-Dumping Agreement* contain no "direct guidance" on this matter.[204] The Panel then disagreed with Mexico's view that "to allow cumulation in sunset reviews ... would be inconsistent with the plain meaning and object and purpose of Article 11.3."[205] The Panel further emphasized that "the silence of the AD Agreement on the question of cumulation in sunset reviews is properly understood to mean that cumulation is permitted in sunset reviews."[206] In its analysis of Article 11.3 of the *Anti-Dumping Agreement*, the Panel also addressed and rejected Mexico's argument that the reference in that provision to "*any* anti-dumping duty", in the singular, indicates an intent not to authorize cumulation in sunset reviews. In the Panel's view, the reference in Article 11.3 to "*any* anti-dumping duty" has "both singular and plural meanings", and it could therefore apply to an anti-dumping measure covering more than one country.[207] The Panel also found no support for Mexico's assertion that the object and purpose of "the sunset provisions, or the AD Agreement as a whole, suggests that cumulation is prohibited."[208] The Panel stated that, "[e]ven assuming Mexico were correct in asserting that the object and purpose of Article 11.3 is to 'ensure that anti-dumping measures would not continue in perpetuity', amo gsgsg" ht(22.7(aning)4.2(uha)-3.38n4t6.7(4)-0.1(ed ha

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

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

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

149. The United States argues that Mexico "fails to identify where Mexico requested such a finding, or where the Panel declined to make such a finding."[215] In any event, the Panel found that the *Anti-Dumping Agreement* "simply does not prescribe a methodology for cumulation in sunset reviews".[216] Hence, according to the United States, "Mexico's contention that the Panel erred in failing to determine whether a sunset review under Article 11.3 requires a threshold finding of any kind is just wrong."[217] According to the United States, "[t]he Panel implicitly found that no such thresholdsedg TTj/TT2 1 Tf10.6284052 Tw[( eo m)8.6d 1 T268 TD0.8Tf88 TDm4j08 04 em03.10012.6284(plicitlySe

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

> ... Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood

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

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

4. The Standard Applied by the USITC

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

> Nothing in the record of these reviews suggests that if the orders are revoked subject imports and the domestic like product *would not be simultaneously* present in the domestic market.
>
> *Therefore*, *we conclude that there likely would be a reasonable overlap of competition* between the subject imports and the domestic like product, and among the subject imports themselves, if the orders are revoked.[236] (emphasis added by Mexico; footnote omitted)

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

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[232] Mexico's appellant's submission, para. 87.

[233] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 299. (footnote omitted)

[234] Mexico's appellant's submission, para. 91.

[235] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 299. (original emphasis)

[236] Mexico's appellant's submission, para. 93 (quoting USITC's Sunset Determination, p. 14).

[237] *Ibid.*, para. 94.

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

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

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

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[238]Mexico's appellant's submission, para. 94.

[239]*Ibid.* (footnote omitted)

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

[241]*Ibid.*

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

[243]Mexico's appellant's submission, para. 94.

[244]*Ibid.*

[245]USITC's Sunset Determination, p. 13.

[246]*Ibid.*

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

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

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

166. On its face, Article 11.3 does not establish a requirement for an investigating authority to specify the time-frame within which the "simultaneous presence" of subject imports and the

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

167. We now return to the merits of the "third cumulation argument" of Mexico.[253] Mexico argues that, having "decided to cumulate Mexican imports with imports from the other four countries that were cumulated in the original investigation", the USITC "was required to do so consistently with the requirements of Article 3.3", regardless of whether that provision "appl[ies] directly to sunset reviews".[254] Mexico purports to find support for its position in the Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, where the Appellate Body stated that, "should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4."[255] We understand Mexico to suggest that what is relevant for calculation of dumping margins is also relevant for determination of injury.

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

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

> Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that ... a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

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

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[253]See *supra*, footnote 194.

[254]Mexico's appellant's submission, para. 103 (quoting Panel Report, para. 7.150).

[255]*Ibid.*, para. 101 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127).

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

[257]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 294. (emphasis added)

investigations"[258]; and that "the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews."[259] Moreover, the Appellate Body has observed that "original investigations and sunset reviews are distinct processes with different purposes. The disciplines

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

## VI. Margins of Dumping in Sunset Reviews

174. Having found that the USDOC's likelihood-of-dumping determination was inconsistent with Article 11.3 of the *Anti-Dumping Agreement*[265], the Panel exercised judicial economy with regard to Mexico's claims against that determination under Article 2 of that Agreement. The Panel added that, "in any event, as it is clear that USDOC did not rely on historical dumping margins in this case, but

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

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

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

179. In any event, we note that Mexico's arguments are premised on the assumption that the United States "used" a dumping margin in the context of the sunset review at issue.[275] Thus, Mexico submits, for instance, that the USDOC's "reliance on a flawed margin for purposes of its likelihood of dumping determination, and its reporting of a flawed margin of dumping likely to prevail to the [USITC],

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[269]Mexico's appellant's submission, para. 132.

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

[271]Panel Report, para. 7.82 (quoted in United States' appellee's submission, para. 70).

[272]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133. (original emphasis; footnote omitted)

[273]See Appellate Body Report, *Australia – Salmon*, para. 223.

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

[275]Mexico's response to questioning at the oral hearing. See also Mexico's appellant's submission, para. 120.

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

180. Moreover, the Panel's finding that the USDOC did *not*

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

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

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

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

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

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[281] Mexico's appellant's submission, para. 134 (referring to Panel Report, para. 6.22).

[282] *Ibid.*, para. 146.

[283] *Ibid.*, para. 139.

[284] *Ibid.*, para. 142.

[285] *Ibid.*, para. 145.

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

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

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

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

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

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

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[291] Article 19.1 of the DSU provides:

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

[292] Panel Report, paras. 7.80 and 8.2.

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

(a)

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

B.

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

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

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

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

[298]Mexico's appellee's submission, paras. 48-54 and 59-63.

[299]Appellate Body Report, *EC – Hormones*, para. 116.

[300]Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 209 and 212.

recurrence of dumping is not sufficient in itself to

In seven of these cases, the Panel stated that "there *appears*

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

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

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

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[312] Panel Report, para. 7.60. (emphasis added)

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

[314] *Ibid.* (footnote omitted)

[315] *Ibid.*, para. 7.62.

[316] *Ibid.* (emphasis added)

[317] *Ibid.* (referring to Tab 261 of Exhibit MEX-62 submitted by Mexico to the Panel).

[318] *Ibid.*, para. 7.63. (footnote omitted)

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

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

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

## IX. Mexico's Conditional Appeals

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

212. As we have reversed the Panel's finding that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, we consider Mexico's request that we

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

213. The Panel found that Section 752(c)(1) of the Tariff Act, by itself, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.[325] Mexico does not appeal this finding *per se*. The Panel regarded the SAA as confirming its reading of the Tariff Act.[326] The Panel did not address the WTO-consistency of the SAA "standing alone", because Mexico "made no independent claims concerning the SAA", and it did not present "arguments regarding violation of any provision of the AD Agreement by the SAA, separate from the arguments regarding the overall alleged inconsistency of US law."[327]

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

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

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

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

## X. Findings and Conclusions

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

(a) in relation to causation:

(i) finds that there is no requirement to establish the existence of a causal link between likely dumping and likely injury, as a matter of legal obligation, in a sunset review determination under Article 11.3 of the *Anti-Dumping Agreement* and that, therefore, the USITC was not required to demonstrate such a link in making its likelihood-of-injury determination in the sunset review at issue in this dispute; and

(ii) finds that the Panel did not act inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments in this regard;

(b) in relation to cumulation:

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

(ii) finds that the Panel did not act inconsistently with Article 11 of the DSU in its assessment of Mexico's arguments in this regard;

(c) in relation to dumping margins:

(i) finds that the Panel did not act inconsistently with Article 11 of the DSU in not addressing Mexico's claim under Article 2 of the *Anti-Dumping Agreement*; and

(ii) finds it unnecessary to rule on Mexico's claim relating to Article 2 of the *Anti-Dumping Agreement*;

(d) finds that the Panel did not act inconsistently with Article 11 of the DSU in declining to make a specific finding that the United States had no legal basis to continue the anti-dumping duties on OCTG from Mexico beyond the five-year period established by Article 11.3 of the *Anti-Dumping Agreement*;

(e) in relation to the SPB:

(i) finds that, in assessing the consistency of the SPB, as such, with Article 11.3 of the *Anti-Dumping Agreement*, the Panel failed to make an objective assessment of the matter, including an objective assessment of the facts of the case, as required by Article 11 of the DSU;

(ii) reverses the Panel's finding, in paragraphs 7.64 and 8.1 of the Panel Report, that Section II.A.3 of the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(iii) finds that the Panel's statement, in paragraph 6.28 of the Panel Report, that Mexico had established a *prima facie* case that the SPB, as such, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, is moot and of no legal effect; and

(f) having reversed the Panel's finding that Section II.A.3 of the SPB is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*:

(i) finds no merit in the argument that the Tariff Act, the SAA, and the SPB, "collectively and independently", establish a standard that is inconsistent with Article 11.3 of the *Anti-Dumping Agreement*; and

(ii) finds that it is not in a position to rule on Mexico's claim that the USDOC does not administer United States laws and regulations on sunset reviews in a

Annex I

**WORLD TRADE ORGANIZATION**

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

(05-3559)

Original: Spanish

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

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

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

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Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Mexico notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282/R) (the "Panel Report") and certain legal30605 Teview

Report

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

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

2. Mexico seeks review by the Appellate Body of the Panel's failure to find that the Sunset Review Determination of the USITC was WTO-inconsistent because the USITC failed to comply with the conditions for a WTO-consistent likelihood of injury analysis.[9]

a. The Panel erroneously concluded that the USITC's analysis of the cumulated imports for purposes of its likelihood of injury determination was consistent with Article 11.3 exclusively because it determined that Article 3.3 of the Anti-Dumping Agreement does not apply to Article 11.3 reviews.[13]

b. The Panel failed to find that the USITC's Sunset Review Determination was inconsistent with US obligations under the Anti-Dumping Agreement because:

(i) The likelihood of injury determination lacked a sufficient factual basis and could not result in an objective examination of whether the subject imports were likely to be simultaneously present in the domestic market for purposes of determining the likelihood of injury;

(ii) The USITC failed to ensure that cumulation was appropriate in light of the conditions of competition between imported OCTG, and between imported OCTG and the domestic like product, which findings required a threshold finding that the subject imports would be simultaneously present in the US market;

(iii) The USITC employed a WTO-inconsistent standard in the cumulative likelihood of injury analysis[14]; and

(iv) The USITC's determination did not identify any time-frame within which the subject imports would be simultaneously present in the US market during which time the corresponding likely injury would occur.

c. The Panel erroneously disregarded certain of Mexico's arguments supporting its claim regarding the WTO-inconsistency of the USITC's sunset review determination based on an erroneous finding that Mexico had failed to develop and elaborate its arguments.[15]

d. The Panel also erroneously disregarded Mexico's separate claim that even assuming *arguendo* that the USITC was neither prohibited from, nor required to, conduct a cumulative injury assessment, because it decided to undertake cumulative analysis, then the USITC was obliged to make sure that the inherent conditions necessary to cumulate were satisfied.[16]

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

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

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[13]Panel Report, paragraphs. 7.150, 7.151, 8.8.

[14]Panel Report, paragraph. 8.5.

[15]Panel Report, paragraph. 6.19.

[16]*See* Panel Report, paragraphs. 7.150, 7.151, 8.8; *see also* Panel Report, paragraph. 3.1 (15th bullet) ("in the alternative, *assuming arguendo*, that a cumulative injury analysis is permitted in sunset reviews, USITC violated Articles 11.3 and 3.3 because USITC failed to apply the requirements of Article 3.3 in this case").

[17]Panel Report, paragraphs. 6.10, 6.11, 7.78, 7.81, 7.83, 8.3.

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

b. The Panel failed to find that the "margin likely to prevail" determined by the USDOC was a pre-WTO margin that was not the result of the application of the provisions of the Anti-Dumping Agreement and was therefore inconsistent with Articles 1, 2, 11.3, and 18.3 of the Agreement; and

c. The Panel failed to find that the USITC's u

Annex II

**WORLD TRADE ORGANIZATION**

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

(05-3686)

Original: English

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

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

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

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

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

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

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[1] *See*, *e.g.*

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

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

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