ANNEX C-1

SECOND WRITTEN SUBMISSION OF MEXICO

(19 July 2004)

I. INTRODUCTION

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

2. The US determinations in this case to maintain duties under Articles 11.2 and 11.3 are based on presumptions, inferences, speculation and conjecture and not on positive evidence. For this

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

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

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

III. THE COMMISSION'S SUNSET DETERMINATION

A. THE COMMISSION'

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

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

20. In evaluating "injury" in this case, the Commission did not develop "positive evidence" necessary to determine that injury would likely follow from expiry. The information gathered regarding volume, price, and impact did not rise to the level of positive evidence, and an objective decision maker could not have concluded that injury was "likely" based on this information. [13] AND

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

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

30. According to the United States, "Article 11.2 does not address, and does not require, termination on a company

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

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

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

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

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

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

V. MEXICO'S REQUEST UNDER DSU ARTICLE 19.1

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

VI. CONCLUSION

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

ANNEX C-2

SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(19 July 2004)

I. INTRODUCTION

1. Mexico has proffered, but not substantiated, a variety of claims regarding the sunset review of OCTG, as well as the fourth administrative review of TAMSA and Hylsa. The United States more fully rebutted these claims in its first written submission, the first meeting, and answers to questions.

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

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

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

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

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

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

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

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

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

- in almost a quarter of the reviews found in Exhibit MEX-62, the order was revoked;

- in over 80 per cent of the remaining reviews , domestic interested parties placed evidence on the record indicating that dumping was likely to continue or recur, but respondents placed no evidence on the record at all;

- in all of these reviews, and the remaining ones, Commerce evaluated all the evidence on the record and presented a reasoned conclusion that dumping was likely to continue or recur.

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

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

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

14. [illegible] any event, Mexico's clai[illegible]gh beyond the terms of ref[illegible]ce – is also [illegible]ut merit. Com[illegible]e "practice" is not a measure[illegible] than short-hand[illegible]efer to rec[illegible]ommerce prece[illegible] As the panel in *India Steel Plate* co[illegible]merce "pr[illegible]e" is not w[illegible] the scope of m[illegible]es that may be challenged under Article 18.4 [illegible] AD Ag[illegible]ment, and r[illegible] repetition cannot turn such a "practice" into a procedure and thus a measure.[3] In particular, repetition does not mean that Commerce's past applications of a law are binding; something called "prac[illegible]

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

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

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

17. As the United States has noted, there are many examples of how Article 3 cannot be applied A0.1588 Tc 1.3 Tc 1are 0 epredthe y exythe ws

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

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

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

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

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

III. ISSUES RELATING TO THE FOURTH ADMINISTRATIVE REVIEW

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

A. OVERVIEW OF REVOCATION OPTIONS

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

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[9] *See German Sunset*, para. 67.
[10] *German Sunset*, para. 87.

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

29. In this light, Mexico's argument that TAMSA and Hylsa were the only known Mexican respect

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

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

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

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

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

Article 2.4.2 means any time an administering authority undertakes a process that is *investigative* in nature. Mexico also interprets the term "investigations" in Article 3.3 as limited to only original