ANNEX D

ORAL STATEMENTS, FIRST AND SECOND MEETINGS OR EXECUTIVE SUMMARIES THEREOF

ANNEX D-1

ORAL STATEMENT OF MEXICO – FIRST MEETING

(25 May 2004)

I. INTRODUCTION

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

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

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

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

II. US VIOLATIONS OF ARTIC387a1.2 anAND2 Tj 4.5 0 TDA ( ) T0 Tc 0.1875 Tw ( ) Tj 30.75 0 TD.75 e UU6a0Me lower 6a0Me lowe13.HEe rticle 11.3 to justify the continu Tw (e UU6a050VIOLAT(NTI

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

2. Lack of Positive Evidence

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

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

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

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

6. With respect to the first question, an authority must base its likelihood decision **on positive evidence**. In this case, the Department passively relied on the presumption that lower volumes mean likely dumping (following e prrLely dumping (fol6

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

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

3. Article 3 Applies To Reviews Conducted Under Article 11.3

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

"

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

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

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

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

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

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

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

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

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

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES – FIRST MEETING

(7 June 2004)

Mr. Chairman, members of the Panel:

1. At the outset, we thought it would be helpful to outline the US review system. US law provides that an anti-dumping duty order may be revoked by Commerce after a completion of any of three types of reviews - sunset, changed circumstances, and administrative. The sunset review implements the US obligations of Article 11.3 of the AD Agreement and is conducted on an order-wide basis. The changed circumstance review most directly implements US obligations under

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

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

C. THE DETERMINATION OF LIK Tv.5 0 TDn found to be dumpi F L

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

2. Cumulative Injury Analysis Prohibited in Article 11.3 Reviews

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

15. Argentina does not see how the obligations of Article 11.3 can be implemented without defining the period in which injury is likely to continue or recur. Simply put, to determine whether something would be likely or probable, the administering authority must have some timeframe in mind because time affects the probability of occurrence. US law violates Article 11.3 because it

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

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

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

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

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

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

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

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

Chairman, Members of the Panel.

I. INTRODUCTION

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

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

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

II. SUNSET REVIEW "AS APPLIED"

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

A. LIKELY RECURRENCE OF DUMPING

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

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

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

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

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

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

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

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

10. It is equally important to be precise about what USDOC actually relied on to make its recurrence determination, for the same reasons. Also in relation to this matter, the United States cannot retroactively seek to re-

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I t i s e q u a l l y i m p o r t a n t t o b e

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

B. ZEROING

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

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

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

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

[8] Exhibit US-12.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF JAPAN

(26 May 2004)

TABLE OF CONTENTS

I. INTRODUCTION

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

II. AR

consistent with the comprehensive nature of the right of Members to resort to dispute settlement."[9] In fact, the Appellate Body in *US – CRS Sunset Review* case and other cases has not required a measure to be "an instrument with a functional life of its own." The issue of mandatory "

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

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

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

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

14. As discussed in our submission, the Appellate Body in *EC-Bed Linen* case clarified that zeroing is inconsistent with Article 2.4 and 2.4.2 because "the *Anti-Dumping Agreement* concerns the dumping of a *product*,"[19] and because "[w]hatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole".[20] It further clarified "[t]he comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the

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

17. The United States also argues that the Appellate Body in *US – CRS Sunset Review* case made no finding and undertook no serious legal analysis on the issue of zeroing.[25] This is incorrect. The Appellate Body in *US – CRS Sunset Review* case could not conclude that the calculation method adopted

ANNEX D-7

OPENING ORAL STATEMENT OF MEXICO – SECOND MEETING

(17 August 2004)

I. INTRODUCTION

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

2. Mexico notes its disagreement with the US statements regarding the burden of proof. Mexico has presented a *prima facie*

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

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

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

C. THE COMMISSION'S CUMULATIVE INJURY ANALYSIS

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

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

IV. THE DEPARTMENT'S DETERMINATION NOT TO REVOKE

A. THE ARTICLE 11.2 OBLIGATION IS NOT LIMITED TO T

ANNEX D - 8

CLOSING ORAL STATEMENT OF MEXICO – SECOND MEETING

(18 August 2004)

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

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

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

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

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

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

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

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

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

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

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

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

11. "Dumping": The United States offers two arguments in paragraph 31 regarding its notion of dumping: (1) that the Anti-Dumping Agreement does not contain any obligations as to how to determine an overall rate of dumping, and (2) that there is no requirement to calculate an overall rate of dumping in a review. Whatever the broader implications of these questions, there can be no doubt that the Department calculated a margin in its fourth review of Hylsa, the dumping finding was based

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

ANNEX D-9

OPENING ORAL STATEMENT OF THE UNITED STATES – SECOND MEETING

(27 August 2004)

Mr. Chairman, members of the Panel:

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

ISSUES REGARDING SUNSET REVIEW

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

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

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

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

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

ISSUES CONCERNING THE FOURTH ADMINISTRATIVE REVIEW

Article 11.2 Does Not Impose Company-Specific Termination Obligations

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

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

13. Mexico further claims that, because Article 11.2 permits a request by any interested party and Article 11.3 provides for a request only by a domestic industrb29Rrested pTc 0.305-172r7 for a reques -0.1437

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

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

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

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

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

Mexico's Remaining Commercial Quantities Complaints Lack Merit

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

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

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

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

ANNEX D-10

The Statistics in Argentina OCTG and this Dispute

6.

Remedy

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

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

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

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

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

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