BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Anti-dumping Measures on Oil Country Tubular Goods from Mexico

(AB-2005-7)

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

August 29, 2005

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Anti-dumping Measures on Oil Country Tubular Goods from Mexico

(AB-2005-7)

SERVICE LIST

APPELLANT

H.E. Mr. Fernando de Mateo y Venturini, Permanent Mission of Mexico

THIRD PARTIES

H.E. Mr. Alberto Juan Dumont, Permanent Mission of Argentina
H.E. Mr. Don Stephenson, Permanent Mission of Canada
H.E. Mr. Sun Zhenyu, Permanent Mission of China
H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. Ichiro Fujisaki, Permanent Mission of Japan
Mr. Yi-fu Lin, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
H.E. Mr. Bernabé Carrero Cuberos, Permanent Mission of Venezuela

Table of Contents

Table of Reports

Short Form	Full Citation
Dominican Republic – Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted May 19, 2005
Japan – Alcohol (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November, 1996
Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000
US – 1916 Act (Panel)	Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by Japan*, WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R
US – Argentina OCTG (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – DRAMS (Panel)	Panel Report, *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea*, WT/DS99/R, adopted March 19, 1999
US – Footwear (GATT Panel)	GATT Panel Report, *United States – Countervailing Duties on Non-Rubber Footwear from Brazil*, October 4, 1989, adopted by the SCM Committee on June 13, 1995, SCM/94, 42S/205
US – German Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted 19 December 2002
US – Japan Sunset (AB)	Appellate Body Report, *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
US – Section 211 (AB)	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002

US – Steel Safeguards (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248AB/R, WT/DS249AB/R, WT/DS251AB/R, WT/DS252AB/R, WT/DS253AB/R, WT/DS254AB/R, WT/DS258AB/R, WT/DS259AB/R, adopted 10 December 2003

I. Introduction and Executive Summary

1. In its appellant submission, Mexico advances an indefensible position. Mexico first appeals the Panel's findings regarding the determination of the U.S. International Trade Commission ("USITC") in this dispute. Yet this is the identical determination that the Appellate Body already considered – and found not to be WTO-inconsistent – in *US – Argentina OCTG*. Mexico provides no explanation as to why the reasoning underpinning the findings in that dispute are not equally persuasive in this dispute. This deliberate silence is surprising in view of the fact that Mexico alleges error on the part of the Panel for *not* "apply[ing] the rulings of the Dispute Settlement Body" ("DSB") in *US – Argentina OCTG*.[1] Of course, Mexico errs in this allegation of error because, while a panel in one dispute can find persuasive the reasoning of a panel or the Appellate Body in another dispute, the panel cannot "apply" the rulings from a different dispute.[2]

2. However, even absent this error, Mexico's arguments fail. Many of Mexico's issues on appeal concern the Panel's dismissal of assertions that, according to the Panel, Mexico failed to substantiate.[3] Mexico appears to be operating on the erroneous assumption that claims, arguments, and assertions are all the same thing and that a Panel commits error when it fails to make findings concerning a party's unsubstantiated assertions – in this case, a few sentences Mexico has plucked here and there from its submissions. Mexico's position ignores its burden of proof.

---

[1] Mexico Appellant Submission, paras. 55-59.

[2] *See* Appellate Body Report, *Japan – Alcohol*, pp. 12-15.

[3] As discussed further below, the Panel described Mexico's arguments on causation, cumulation, and its request for a finding that there was no "legal basis" for the sunset review in question as mere "assertions."

3. Mexico's conditional appeals confirm the lack of substance in Mexico's position. The very nature of Mexico's "conditional" appeals is that they are "conditioned" on the Appellate Body's reversal of the Panel's findings on the Sunset Policy Bulletin ("SPB"). Yet Mexico actually cites to these findings – findings that would have been reversed for the Appellate Body to reach the conditional appeals – in support of its conditional appeals. To make matters worse, by its own admission, the only evidence *Mexico* (as opposed to the Panel) offered in support of these claims is the statistical analysis that the Appellate Body already rejected when the same claims were advanced in *US – Argentina OCTG*. This, without regard to the Appellate Body's rejection of the same statistical evidence, and, more particularly, its admonition that, in the case of a claim involving Article X:3(a) of the GATT 1994, such a claim "must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims" under that Article.[4]

4. Mexico's appeal collapses under the weight of its own contradictions, its failure to substantiate "bare" assertions, its reliance on the Panel to do Mexico's work for it, and in particular its disregard for the persuasive reasoning underpinning the recommendations and rulings of the DSB in *US – Argentina OCTG*.

II. The Panel Did Not Err in its Assessment of Likelihood of Injury

5. Mexico asserts that, in its consideration of issues concerning the likelihood of injury, the Panel failed to make an objective assessment of the matter as required by Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Mexico also asserts that the Panel made certain substantive legal errors in its interpretation of

[4] Appellate Body Report, *US – Argentina OCTG*, para. 217.

applicable provisions of the *Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade 1994* ("Antidumping Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). It is not always clear from Mexico's submission which allegation of error it makes with respect to a particular argument; nevertheless, the United States will address Mexico's arguments, to the extent possible, in terms of the apparent error alleged.

A. Article 11 of the DSU

6. Mexico contends that the Panel failed to make an objective assessment of the matter before it by dismissing some of Mexico's arguments relating to causation[5] and cumulation.[6]

1. Causation

7. Mexico generally asserts that the Panel lacked objectivity in not finding a requirement for a "causal link" between likely dumping and likely injury. Mexico does not explain what constituted the alleged lack of objectivity. It appears that this claim concerns the Panel's decision not to make findings on Mexico's "claims" regarding the ITC's alleged failure to establish a causal link between likely dumping and likely injury.[7]

8. First, Mexico's claims in the underlying proceeding concerned Article 3.5 and, derivatively, Article 11.3. The Panel found that Article 3.5 did not apply in sunset reviews and that Mexico had not demonstrated that Article 11.3 contained inherent causation requirements, *i.e.*, causation requirements applicable even if Article 3.5 itself did not apply.[8] Therefore, the

---

[5] Mexico Appellant Submission, para. 39.
[6] Mexico Appellant Submission, para. 104.
[7] Mexico Appellant Submission, para. 40.
[8] Panel Report, para. 6.12.

Panel *did* rule on Mexico's *claims*. Mexico takes issue with the Panel's conclusion that Mexico's *arguments* as to whether Article VI of the GATT 1994 and Article 11.1 of the Antidumping Agreement establish "inherent causation requirements" in Article 11.3 of the Antidumping Agreement were simply unsubstantiated assertions. Mexico's position disregards the Appellate Body's stated views that "there is no obligation upon a panel to consider each and every argument put forward by 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."[9] In other words, Mexico must show that the Panel's findings that Mexico had failed to substantiate its assertions were in error and prevented the Panel from making an objective assessment of the matter.

9. Mexico cannot do so. The Panel found that Mexico had failed to make more than a bare assertion about its arguments. On appeal, Mexico has not demonstrated that this was error, let alone that it was an error of such a nature and magnitude as to mean the Panel failed to make an objective assessment.

10. Mexico appears to attempt to demonstrate that the Panel's views were not objective by citing to submissions that purportedly reflect the "developed" argument. Mexico begins by citing to its first submission. That submission does not contain a single reference to Article VI of the GATT 1994 or Article 11.1 of the Antidumping Agreement. Therefore, Mexico's first submission does not support Mexico's assertion that the "record of the Panel proceeding flatly contradicts"[10] the Panel's conclusion that Mexico did not substantiate its bare assertion.

---

[9] *See, e.g.*, Appellate Body Report, *Dominican Republic – Cigarettes*, para. 125.
[10] Mexico Appellant Submission, para. 41.

11. Mexico next cites its closing statement at the first meeting of the parties.[11] In this instance, Mexico actually mentions Article VI of the GATT 1994 and Article 11.1 of the Antidumping Agreement, but Mexico simply asserts that they establish a causation requirement generally. Mexico provides no explanation as to how these general provisions – which never mention sunset reviews – are applicable in sunset reviews . Therefore, Mexico's closing statement provides no support for the proposition that the Panel failed to make an objective assessment.

12. Mexico next quotes its second submission. Mexico argued in that submission that "the causation requirement exists for Article 11.3 injury determinations even if Article 3 does not apply to Article 11.3 reviews. A causal link is always required between the dumped imports and the injury . . . . This is explicit in Article VI of GATT 1994 and Article 11.1 of the Agreement."[12] Nowhere does Mexico explain how a causation requirement paralleling that contained in Article 3.5 applies to the issue of *likelihood* of dumping and *likelihood* of injury, which may be examined in the context of conditions that do not necessarily even involve existing dumped imports or existing injury.[13] The same is true of Mexico's quotation from its comments on the Appellate Body report in *US – Argentina OCTG*, which contains a simple assertion without more.[14]

---

[11] Mexico Appellant Submission, para. 43.

[12] Mexico Appellant Submission, para. 44, quoting Mexico Second Submission, para. 161.

[13] At the time of a sunset review, there may be no imports at all, let alone dumped imports, and there may be no injury at all, hence the fact that Article 11.3 provides for a determination of continuation *or recurrence* of injury.

[14] Mexico Appellant Submission, para. 46.

13. Rather than explain its assertion, Mexico noted that "[t]he United States has offered no explanation at all as to why the requirement of causation . . . would not apply to Article 11.3 injury determinations, irrespective of the application of Article 3.5."[15] Given that Mexico never made a *prima facie* case that specific causation criteria apply to Article 11.3 sunset reviews, there was no basis or reason for the United States to explain why such criteria do not apply.

14. In further support of its contention that the Panel lacked objectivity, Mexico argues that the Panel recognized that Mexico made the argument.[16] Mexico misses the point. The question is not whether Mexico *made* the argument; it is whether Mexico *developed* the argument. [17] Indeed, the fact that the Panel recognized Mexico as having made the argument undermines Mexico's contention that the Panel lacked objectivity. The Panel noted Mexico's "argument" and considered it insufficient. Nothing in Mexico's Appellant Submission even suggests, let alone demonstrates, that the Panel's conclusion was wrong, never mind whether it lacked objectivity.

15. Mexico also argues that "[i]nexplicably, the Panel stated in the final version of its report only that Mexico's claim was "based on Article 3.5, which we found did not apply in sunset reviews."[18] Mexico cites as evidence of the alleged "inexplicability" the "Appellate Body's analysis in *US – Carbon Steel"*[19] which "confirms that there must be a causal link to a determination of likely injury in a sunset review."[20] Mexico provides no citation to any of its

---

[15] Mexico Appellant Submission, para. 44, *quoting* Second Submission of Mexico, para. 198 (8th bullet point).

[16] Mexico Appellant Submission, para. 48.

[17] Panel Report, para. 6.12.

[18] Mexico Appellant Submission, para. 50.

[19] *I.e.*, Appellate Body Report, *US – German Steel.*

[20] Mexico Appellant Submission, para. 50.

submissions to reflect the fact that Mexico even made this argument about *US – German Steel*. It is difficult to consider the Panel's conclusion "inexplicable" in the context of an argument not made.[21] Moreover, as discussed below, the United States disagrees with the assertion that the Appellate Body's analysis in *US – German Steel* even stands for the proposition put forth by Mexico.

16. The Panel objectively concluded that Mexico did no more than make assertions about the relevance of Article VI of the GATT 1994 and Article 11.1 of the Antidumping Agreement. Mexico's citations to its submissions only confirm that such was the case.

2. Cumulation

17. In the OCTG sunset review, the USITC determined that it was appropriate to analyze likely imports from the five countries involved (Argentina, Brazil, Italy, Korea, and Mexico, hereinafter the "subject countries") on a cumulative basis. Mexico makes a variety of arguments about cumulation and does not specify, with a few exceptions, where its arguments pertain to an alleged lack of objectivity. Nevertheless, in an effort to facilitate the Appellate Body's consideration of the issue, the United States attempts to address whatever DSU Article 11 claims Mexico appears to be making.[22]

---

[21] Mexico also asserts that the text of Article VI of the GATT 1994 and Article 11.1 render the Panel's conclusion "erroneous." Mexico Appellant Submission, para. 50. Yet a review of Mexico's submissions reveal that Mexico's arguments about Article VI of the GATT 1994 and Article 11.1 were merely offered in support of the argument that the requirements of Article 3.5 apply in sunset reviews. *See, e.g.*, Mexico Second Submission, p. 47 (section containing discussion of Article VI of the GATT 1994 and Article 11.1 of the Antidumping Agreement entitled "The Commission's Sunset Determination Was Inconsistent with Articles 11.3 and 3.5"). Mexico has provided no evidence at all that the Panel's conclusion was anything other than reasonable.

[22] Mexico's argument that the Panel disregarded certain arguments cannot be anything other than a DSU Article 11 claim. In the remainder of Mexico's discussion of cumulation,

18. Mexico asserts that the Panel erred by dismissing Mexico's "argument" that Article 11.3 somehow establishes inherent cumulation obligations. The Panel concluded that Mexico failed to substantiate that argument.[23] The Panel found that "Mexico did not explain or elaborate on its bare assertion that Article 11.3 somehow establishes 'inherent obligations' for cumulation independent of those in Article 3.3," and that it was thus not necessary to address this aspect of Mexico's argument."[24] It was unclear to the Panel just what Mexico meant by this "inherent" cumulation argument. However, now that Mexico has articulated (to some degree) in its Appellant Submission what it meant, it becomes clear that the Panel in fact disposed of this argument. The Panel's analysis also exposes the error in Mexico's assertion that the Panel based its conclusion that Article 11.3 does not prohibit cumulation solely on the inapplicability of Article 3. Mexico's argument to the contrary is wrong.

19. The Panel analyzed whether Article 11.3, Article 3 in general, and Article 3.3 in particular address cumulation. The Panel began its analysis with the text of the Agreement. The Panel stated that:

> the text of Article 11.3 does not mention cumulation at all. Thus, it does not resolve the issue of whether the methodology may be used in sunset reviews. Nor is there any direct guidance on this matter in other provisions of the Agreement – there are no cross-references between Article 11 and Article 3.3, or any other provision of Article 3. Mexico acknowledges these facts, but argues that they demonstrate that cumulation is not permitted in sunset reviews . . . . We do not

---

Mexico does not identify which of its arguments address an alleged lack of objectivity. Mexico simply inserts a statement in the concluding paragraph to the cumulation section that the Panel "failed to comply with its obligation under Article 11 of the DSU . . . ." Mexico Appellant Submission, para. 104. To the extent Mexico's DSU Article 11 claim extends beyond the Panel's alleged failure to address certain arguments, Mexico has not met the burden of proving its claim.

[23] Mexico Appellant Submission, para. 72.

[24] Mexico Panel Report, para. 6.19.

> agree. In our view, the silence of the AD Agreement on the question of cumulation in sunset reviews is properly understood to mean that cumulation is permitted in sunset reviews.[25]

The Panel went on to explain that the Appellate Body had reached similar conclusions; the Panel went still further and noted that "Article 11.3 contains almost no guidance on questions of methodology" in sunset reviews, whereas Article 3 prescribes a methodology for injury determinations. "Thus, we consider it unsurprising that Article 11.3 does not specifically provide for cumulative analysis."[26] Mexico's assertion that the Panel's conclusions regarding Article 11.3 were based solely on its assessment of Article 3.3 is unsustainable in view of the fact that the Panel drew those conclusions based on a textual analysis done prior to its consideration of Article 3.3.

20. Moreover, notwithstanding that the Panel had already concluded that Article 3 did not apply to sunset reviews, the Panel nevertheless analyzed Article 3.3 independently, noting that the article "on its face establishes conditions for the use of cumulative analysis which apply only in original anti-dumping investigations. Therefore, the USITC's use of cumulation in the instant sunset review cannot be found to be inconsistent with Article 3.3 of the AD Agreement."[27]

21. As a result, the Panel concluded that neither Article 11.3, Article 3 as a whole, nor Article 3.3 individually, prohibited cumulation in a sunset review. Inasmuch as Mexico has identified no other provision relevant to cumulation in sunset reviews, Mexico cannot demonstrate that the Panel's consideration of the issue lacked objectivity.

---

[25] Panel Report, paras. 7.147-7.148.
[26] Panel Report, para. 7.149.
[27] Panel Report, para. 7.150.

22. Regardless, Mexico contends that the Panel erred in not addressing more fully its argument as to the existence of "inherent obligations" governing cumulation.[28] Mexico now contends that it "further elaborated this argument throughout the proceeding," and that it "fully explained the legal and factual basis to support its position."[29] Not only do the submissions to which Mexico cites[30] not support its argument, they confirm that the Panel reasonably found that Mexico simply made the bare assertion that "inherent obligations" governing cumulation in sunset reviews exist, without textual support. Mexico argued that Article 11.3 itself prohibited cumulation, or, alternatively, that Article 3.3 was applicable in sunset reviews. The Panel expressly rejected both of those arguments, as the Appellate Body had done before it. To the extent that Mexico is arguing that the conditions in Article 3.3 apply anyway, the United States would simply note that the Appellate Body addressed the very same argument in *US – Argentina OCTG* and rejected it for the same reason – if Article 3.3 does not apply, then neither do its conditions.[31]

23. The Panel was correct in concluding that Mexico had failed to "explain or elaborate on its bare assertion that Article 11.3 somehow establishes 'inherent' obligations for cumulation independent of those in Article 3.3."[32] As discussed below, Mexico's appellant submission fails to explain why conditions exist "irrespective of the applicability of Article 3.3 to Article 11.3;"[33] Mexico's submissions to the Panel are even more threadbare. Moreover, to the extent the Panel

---

[28] Appellant's Submission of Mexico, paras. 72-75.
[29] Appellant's Submission of Mexico, para. 73.
[30] Appellant's Submission of Mexico, para. 73 n.52.
[31] Appellate Body Report, *US – Argentina OCTG*, para. 301. *See* Argentina's argument at para. 74.
[32] Mexico Panel Report, para. 6.19.
[33] Mexico Appellant Submission, para. 83.

was correct in assuming that Mexico was asserting that these "obligations" are somehow found in Article 11.3, the Panel dispensed with that assertion with its thorough analysis of Article 11.3, which resulted in the Panel's correct and reasonable conclusion that Article 11.3 does not prescribe a methodology for cumulation in sunset reviews.[34]

24. Finally, Mexico argues that the Panel failed to find that the USITC determination is flawed because it "lacked a sufficient factual basis demonstrating that the subject imports would be simultaneously present in the domestic market."[35] Mexico argues that the determination 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."[36] Without citing to any of its submissions below, Mexico introduces the argument that the "fact that imports were in the U.S. market during the time of the original investigation is an insufficient basis to establish that they would likely be in the market in the event of revocation."[37]

25. It is not clear whether Mexico is accusing the Panel of a lack of objectivity or a failure to apply the law correctly. If Mexico's claim relates to lack of objectivity, Mexico has failed to explain how the Panel's conclusions reflect that alleged lack of objectivity. If Mexico is simply

---

[34] Mexico seems to be introducing a new argument to the Appellate Body, *i.e.*, that the reasoning in the Appellate Body report in *US – Japan Sunset* applies by analogy such that if Members cumulate, they must do so according to Article 3.3. Mexico Appellant Submission, para. 101. Not only was this argument not made before the Panel, but it ignores the fact that the Appellate Body has already considered *this very issue* – cumulation in sunset reviews – and decided that Article 3.3 is "plainly" limited to investigations. Appellate Body Report, *US – Argentina OCTG*, para. 301.

[35] Mexico Appellant Submission, para. 24 (heading ii).

[36] Mexico Appellant Submission, para. 91.

[37] Mexico Appellant Submission, para. 91.

presenting new arguments to the Appellate Body, then this would further support the Panel's findings that Mexico did not present a *prima facie* case of inconsistency during the underlying proceeding. Therefore, Mexico has failed to identify a legal basis for its pursuit of this issue.

26. Regardless, Mexico's argument is substantively meritless. Mexico acknowledges that data from the original investigation were not the sole basis for the USITC's analysis; Mexico quotes the United States as noting that "imports of casing and tubing from each of the subject countries continued to be present in the U.S. market after the orders were imposed and throughout the sunset period of review, albeit at lower levels than those prior to entry of the order."[38] Mexico draws the extraordinary conclusion that this evidence suggests that "simultaneous presence would be even less likely" if the order were removed, and as a result, there was no evidence that "if the orders were revoked subject imports and the domestic like product would likely/probably be simultaneously present in the domestic market."[39]

27. This conclusion does not withstand the application of logic. If imports were simultaneously present before the order and imports were simultaneously present after the order, it is unclear how Mexico arrives at the conclusion that imports would *not* be simultaneously present if the order were revoked. Whether imports are themselves at lower levels is not only irrelevant but suggests that the order simply had a restraining effect on imports.

28. Therefore, even if Mexico is asserting that the Panel made some kind of error, a simple review of Mexico's own arguments reveals that Mexico could not have demonstrated that any error in fact occurred.

---

[38] Mexico Appellant Submission, para. 90, quoting U.S. Answers to Mexico's Questions at the 2nd Meeting, para. 12.

[39] Mexico Appellant Submission, para. 91.

3. Failure to Apply DSB Rulings in *US – Argentina OCTG*

29. The United States is not quite sure what to make of Mexico's assertion that the Panel committed an error by "failing to apply the rulings" of the DSB in *US – Argentina OCTG*. Mexico does not clarify whether the Panel's error was one of law and legal interpretation or whether it was an alleged lack of objectivity under Article 11 of the DSU.

30. Regardless, the United States is having difficulty reconciling Mexico's current position with the one it took before the Panel. In its comments to the Panel on the relevance of *US – Argentina OCTG*, Mexico stated:

> Mexico has maintained during the course of this proceeding that it did not believe that the *OCTG from Argentina* dispute should be "linked" with Mexico's case . . . As the Panel is well aware, recommendations of the DSB . . . are binding only on the parties to the dispute and the doctrine of stare decisis does not apply.

31. Mexico's correctly described the relevance of *US – Argentina OCTG*. Further, were the reasoning in a panel or Appellate Body report persuasive, that same reasoning might be relevant in a separate dispute. However, there is simply no possibility that the Panel could have applied the "findings" of the DSB in another dispute *here;* the findings to which Mexico refers are the so-called "waiver provisions" governing the treatment of interested parties who do not participate in Commerce's sunset review, which Mexico has not challenged here. It is even more puzzling that Mexico now seems to believe that the fact that the Panel agreed with Mexico somehow constitutes a basis for Mexico's appeal.

32. Moreover, even aside from the fact that there is no merit to the contention that the Panel should have "applied" these rulings, the relevance of Mexico's argument is unclear. Mexico asserts that the DSB rulings "combined with the Panel's finding in this case, 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. There is simply no basis for this assertion. In addition, Mexico's proposition relies on new facts – its chart in paragraph 57 – and therefore is beyond the scope of Appellate Body review.[40] Finally, not all of the likelihood of dumping determinations Mexico references have even been subject to WTO dispute settlement.

33. In addition, Mexico states that it "developed this argument with sufficient elaboration for the Panel to have made a finding and the Panel's conclusion to the contrary is erroneous."[41] Mexico fails to identify where its request for such a finding is located or where the Panel denied to make such a finding.

4. Conclusion

34. Mexico has failed to substantiate its assertions that the Panel lacked objectivity in its assessment of the matter before it. At its core, Mexico's argument is the claim that the Panel wrongly declined to make findings with respect to assertions upon which Mexico failed to elaborate. Nothing in Mexico's appellant submission demonstrates that the Panel's conclusion was in error. Mexico is merely plucking sentences from its submissions and asking the Appellate Body to make findings where the Panel correctly declined to do so.

B. Claims of Substantive Legal Error

---

[40] Mexico seems to believe that its comments to the Panel on the relevance of the Appellate Body report in *US – Argentina OCTG* are sufficient to support its argument. However, under paragraph 14 of the Working Procedures, parties were obliged to present factual evidence to the Panel no later than the first meeting of the parties. The introduction of factual evidence thereafter required a showing of good cause. Mexico did not even allege good cause, let alone show it existed.

[41] Mexico Appellant Submission, para. 59.

35. In addition to its claims that the Panel lacked objectivity, Mexico also argues that the Panel made certain errors of law and legal interpretation. To the extent the United States has been able to discern which arguments are which, the United States addresses these arguments first as they concern "causation," and next as they concern "cumulation."

1. Causation

36. Mexico asserts that the Panel erred by failing to find that Article VI of the GATT 1994 and the Antidumping Agreement – independent of Article 3.5 of the Antidumping Agreement – require the USITC to establish a "causal link" between "likely dumping" and "likely" injury in likelihood of injury determinations "parallel to but independent of those in Article 3.5."[42]

37. The panel found that "Mexico's claims with regard to the USITC's determination in dispute are almost entirely premised on the provisions of Article 3 of the AD Agreement, either independently, or in conjunction with Article 11.3."[43] The Panel correctly viewed both aspects of Mexico's causation argument as based on Article 3.5.

38. The Panel's characterization of Mexico's arguments is confirmed by Mexico's Appellant Submission itself. Mexico's arguments in its Appellant Submission about the applicability of Article VI of the GATT 1994 and Article 11.1 of the Antidumping Agreement do not provide a single citation to Mexico's submissions.[44] As the Panel correctly noted, Mexico simply introduced its arguments concerning Article VI of the GATT 1994 to buttress its assertion that

---

[42] Mexico Appellant Submission, para. 39.
[43] Panel Report, para. 7.114.
[44] Mexico Appellant Submission, paras. 21-38.

Articles 3.5. and 11.3 of the Antidumping Agreement themselves contain causation requirements.[45]

39. Regardless, Mexico's *de novo* arguments are unavailing. At the outset, the United States notes that Mexico does not explain the purpose of its new arguments on Article VI of the GATT 1994 and Articles 1, 11.1, 11.2, 11.3, and 18.1 of the Antidumping Agreement. Mexico does not clarify whether it offers these arguments merely to substantiate the assertion that the conditions in Article 3.5 apply in sunset reviews or whether Mexico is now pursuing new claims.

40. If Mexico is not simply introducing its arguments on Article VI of the GATT 1994 and the various provisions in the Antidumping Agreement to buttress its argument that the requirements of Article 3.5 apply in sunset reviews, then Mexico must be pursuing *claims* against these provisions; if so, many of these claims were not set out in Mexico's panel request and therefore are beyond the terms of reference of this dispute; for those set out in Mexico's panel request, Mexico failed to make a *prima facie* case with respect to these claims.[46] Mexico cannot cure these defects now.

41. In any event, the United States notes that there is no reason for the Appellate Body to consider these arguments now. Mexico could have tried to pursue these as claims in and of themselves; Mexico elected not to. Faced with an Appellate Body report that considers Article 3 – including Article 3.5 – inapplicable to sunset reviews and with the Panel report that followed

[45] *See, e.g.* Mexico Second Submission, para. 158 (Article VI argument made in section entitled "The Commission's Sunset Determination Was Inconsistent with Articles 11.3 and 3.5).

[46] Mexico's panel request sets out a claim that the USITC determination was inconsistent with Article 3.5, Article 11.1, and Article 11.3, as well as consequential claims under Article 18.1. Mexico did not pursue a claim against Article 11.1 during the proceedings. As the Panel correctly noted, Mexico's claim was based on Article 3.5, and the other provisions were merely cited as support for the claim against Article 3.5. Panel Report, para. 6.12.

that reasoning, it appears that Mexico is trying to devise an alternative means to have the requirements of Article 3.5 read into sunset reviews.

42. Even so, Mexico's additional arguments all merely confirm what is uncontroverted – that in *investigations*, an Article 3.5 causation analysis is required. Mexico's arguments add nothing to support its conclusory statement that a similar analysis is required in addressing the *likelihood* of injury in *sunset reviews*, and they certainly do not establish that the actual requirements of Article 3.5 apply in sunset reviews. The Appellate Body has made it clear that the determinations for reviews are separate and distinct from those for investigations, and the requirements in an original investigation cannot "be automatically imported" into sunset reviews.[47] Therefore, Mexico's reliance on the substantive legal obligations for an original investigation do not support its assertion that the AD Agreement or Article VI of GATT 1994 contain some sort of "inherent" causation requirements for sunset reviews.

43. Mexico begins its analysis not with the text of Article 11.3 itself but with Article VI of the GATT 1994.[48] Article VI of the GATT 1994 does not mention or contemplate sunset reviews. It refers to a determination of injury, not determination of likelihood of continuation or recurrence of injury.[49] In this respect, there is no support for Mexico's contention that Article VI of the GATT 1994 independently contains some sort of "inherent" causation requirements for sunset reviews. In fact, Article VI of the GATT 1994 does not independently create *any* requirements for the conduct of a sunset review, given that it does not even require such reviews.

---

[47] Appellate Body Report, *US – Argentina OCTG*, para. 359.

[48] Appellant's Submission of Mexico, paras. 21-27.

[49] *Cf.*, Appellate Body Report, *US – German Steel*, para. 69. (Noting that the introduction of a "sunset" provision in the SCM Agreement was "regarded as [an] important addition[ ] to the Tokyo Round Subsidies Code.")

44. The GATT panel report in *US – Footwear*[50] upon which Mexico relies is irrelevant. In *US – Footwear*, the investigating authorities had never made an original injury determination. The GATT panel found that, when an injury determination had never occurred with regard to the pre-existing countervailing duty order, an original injury determination was necessary when the order subsequently became subject to Article VI of the GATT 1994 . In contrast, in this dispute, an injury determination preceded issuance of the antidumping duty order on OCTG from Mexico. As the Panel here found, when that requirement has already been met in an original investigation, it does not apply in a sunset review.[51]

45. Mexico's citation to the panel report in *US – 1916 Act* is equally unavailing.[52] The United States does not contest that causation requirements, specifically those set forth in Article 3.5 of the AD Agreement, exist in original investigations.

46. After its irrelevant discussion of Article VI of the GATT 1994 , Mexico next considers Article 11.3. Mexico simply states that a likelihood determination "must comply with the requirements of the GATT 1994 and the Anti-Dumping Agreement."[53] Mexico does not explain what this means. Which aspects of GATT 1994? Which aspects of the Antidumping Agreement? As the Appellate Body has made clear, Article 3 of the Antidumping Agreement is *not* applicable in sunset reviews.

---

[50] GATT Panel Report, *US – Footwear*.

[51] Panel Report, para. 7.118, quoting Appellate Body Report, *US – Argentina OCTG*, para. 280.

[52] Mexico Appellant Submission, para. 26, *quoting* Panel Report, *US – 1916 Act*, para. 6.253.

[53] Mexico Appellant Submission, para. 28.

47. Mexico follows this overbroad and unexplained assertion with a discussion of *US – German Steel*.[54] This report does not, as Mexico asserts, support its argument that the authorities must establish a new causal link between likely dumping and likely injury in a sunset review. The passage quoted by Mexico stands for the point that "subsidization" and "injury" under the SCM Agreement (and, by analogy "dumping" and "injury" under the AD Agreement), each have independent meaning that is not derived by reference to the other.[55]

48. Moreover, the quoted passage from *US – German Steel* addressed the relationship between the current level of subsidization (or, by analogy, the current magnitude of dumping) and current injury.[56] The question here, however, concerns the relationship between *likelihood* of *continuation or recurrence* of subsidization and *likelihood* of *continuation or recurrence* of injury. Therefore, Mexico's assertion that "it is unlikely that very low levels of *dumping* could be demonstrated to cause material *injury* . . . the *dumping* must be the cause of the *injury*"[57] begs the question of what Article 11.3 requires with respect to a determination of *likely* continuation or recurrence of injury.

49. Mexico next considers Article 11.2. Mexico quotes the panel report in *US – DRAMS* to support the theory that a finding of "likely dumping" is a necessary predicate to a finding of "likely injury."[58] Yet the quotation upon which Mexico relies undermines its very argument. First, the panel in *US – DRAMS* merely stated that in "conducting an Article 11.2 injury review,

---

[54] Appellant Submission of Mexico, para. 29.
[55] Appellate Body Report, *US – German Steel*, para. 81.
[56] Mexico Appellant Submission, para. 29.
[57] Mexico Appellant Submission, para. 29 (emphasis added).
[58] Mexico Appellant Submission, para. 30.

an investigating authority *may* examine the causal link between injury and dumped imports."[59] Thus, the panel's statement indicates that such an examination is not required by Article 11.2 but is instead a discretionary consideration.[60]

50. Mexico next addresses Article 11.1. Mexico fails to explain how Article 11.1 creates in Article 11.3 a causal requirement of the nature Mexico suggests. Again citing to *US – German Steel*, Mexico notes that "to be considered as 'necessary,' its 'purpose' must be to 'counteract subsidization which ***is causing*** injury.'"[61] Mexico does not explain why this statement obligates authorities to conduct a new causation analysis in sunset reviews The statement quoted refers to current subsidization and current injury. However, the Appellate Body has already made it clear that neither a determination of dumping, nor a determination of injury, need be made under Article 11.3.[62] Therefore, Mexico has failed to explain how Article 11.1 somehow contains particular causation requirements, much less the causation requirements of Article 3.5.

51. Mexico next turns to Articles 1 and 18. These arguments simply loop back to Mexico's inapplicable argument about Article VI of the GATT 1994.[63]

52. In short, Mexico's arguments – inappropriate as it would be to consider them for the first time here – only establish that the causation requirements of Article 3.5 exist in original

---

[59] Mexico Appellant Submission, para. 30, quoting Panel Report, *US – DRAMS*, para. 6.28.

[60] Moreover, Mexico fails to explain why a discussion of Article 11.2 has any relevance whatsoever to Article 11.3, simply stating that "the same principle would necessarily apply to reviews conducted under Article 11.3." *Why* would it necessarily apply? Mexico's argument simply establishes that investigating authorities *may* look at causation when conducting *Article 11.2* reviews. Mexico's argument establishes nothing with respect to causation in Article 11.3 reviews.

[61] Mexico Appellant Submission, para. 34.

[62] Appellate Body Report, *US – Argentina OCTG*, para. 280.

[63] Mexico Appellant Submission, paras. 36-37.

investigations. Mexico's arguments fail to establish that a parallel obligation exists in sunset reviews, let alone one that contains or mimics the requirements set forth in Article 3.5.

53. Rather, Article 11.3 states that an antidumping duty order must be terminated unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." With respect to the likely injury determination, the USITC met this obligation in the *OCTG* reviews by examining the likely volumes, price effects, and impact of likely dumped imports if the orders were revoked.[64] As the Appellate Body has explained, the requirements of Article 11.3 are met if the determination rests on a sufficient basis of positive evidence and reflects an objective examination of the facts.[65] The panel correctly found that the Commission's determination rests on a sufficient basis of positive evidence and reflects an objective examination of the facts, including its analysis of the likely impact of revocation of the order.[66]

2. Cumulation

54. As the Appellate Body has already made clear, the Antidumping Agreement prescribes no methodology with respect to cumulation in sunset reviews. The Appellate Body has also already found that the very likelihood of injury determination at issue in this dispute is not WTO-inconsistent. Nevertheless, Mexico appeals the Panel's findings – which are well-reasoned and track the Appellate Body's own reasoning when presented with the same question.

---

[64] *See* Panel Report, paras. 7.122 - 7.143; Appellate Body Report, *US – Argentina OCTG*, paras. 342, 348, 352.

[65] Appellate Body Report, *US – Argentina OCTG*, para. 322.

[66] Panel Report, para. 7.143.

55. Mexico maintains that the Panel made several errors with respect to the USITC's cumulation analysis. Mexico asserts that the Panel "simply assumed that because, in its view, Article 3.3 does not apply to sunset reviews, the USITC's cumulative injury determination could not be inconsistent with Article 11.3."[67] Mexico also asserts the Panel erred in failing to find that the determination was flawed because of alleged inherent requirements involving "simultaneity." Mexico's allegations of error are simply wrong.

56. First, Mexico asserts a claim that it asked the Panel to evaluate whether the USITC's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective as required by Article 17.6(i) of the Antidumping Agreement.[68] Aside from the fact that such a claim could not be successful,[69] the United States is unable to locate where, during

[67] Mexico Appellant Submission, para. 77.
[68] Mexico Appellant Submission, para. 85.
[69] Article 17.6(i) imposes an obligation on panels, not Members.

the Panel proceedings, Mexico advanced such a claim.[70] Article 17.6(i) is not identified in Mexico's Panel Request.[71]

57. In the event that Mexico is also arguing that the cumulation analysis was inconsistent with Article 11.3, rather than Article 17.6(i),[72] Mexico seems to be arguing that the Panel was obliged to fault the determination for failing to make a threshold finding that the subject imports

---

[70] Even if Mexico had properly raised an objection as to whether the USITC's determination meets the positive evidence and objective examination standard, that standard was satisfied by the USITC's analysis in these sunset reviews. Mexico's submission erroneously suggests that the USITC's decision to cumulate subject imports rested only on the question of the likely simultaneous presence of subject imports. Appellant Submission of Mexico, para. 93. This is a distortion of the USITC's decision regarding cumulation. U.S. law requires that, before cumulating imports from different countries, the USITC consider whether imports would be likely to compete with one another and with the domestic like product in the U.S. market. 19 U.S.C. § 1675a(a)(7). In assessing whether there is likely to be such an overlap of competition, the USITC considers four factors:

> (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality related questions;
>
> (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;
>
> (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and
>
> (4) whether imports are likely to be simultaneously present in the market.

The USITC applied this four-factor analysis in this case, as explained in detail in the USITC's views. USITC Sunset Determination at 11-14.

[71] The United States is confused by the fact that Mexico's Appellant Submission asserts this claim in connection with the argument in Section (c)(i) pertaining to whether a threshold finding regarding simultaneity is required in conducting a cumulation analysis – not in connection with Section (c)(ii), which pertains to Mexico's arguments as to whether the determination had a sufficient factual basis.

[72] The heading to the section states that the Panel erred in not finding the determination to be inconsistent with Article 11.3.

would be simultaneously present in the U.S. market.[73] Mexico states that the Panel "declined to examine and make a finding on this issue."[74] Yet Mexico fails to identify where Mexico requested such a finding, or where the Panel declined to make such a finding. Mexico fails to explain the genesis of the obligation, merely asserting that the obligation exists and that the Panel erred for not concluding that the USITC determination failed to meet this obligation.

58. In any event, the salient point is simply this: The Panel considered Mexico's claim that the determination was inconsistent with Article 11.3. The Panel rejected Mexico's claim on a number of grounds, including the fact that the Antidumping Agreement simply does not prescribe a methodology for cumulation in sunset reviews. Therefore, 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. The Panel implicitly found that no such thresholds exist.

C. The "WTO-Inconsistent Standard"

59. Mexico argues that the USITC applied a "WTO-inconsistent standard" because the Commission stated that nothing in the record of the determination indicated that subject imports and the domestic like product would not be simultaneously present.[75] Mexico goes on to state that the "Commission did not apply the legal standard required by Article 11.3 in connection with its assessment of likelihood of simultaneity."[76]

---

[73] Mexico Appellant Submission, para. 85.
[74] Mexico Appellant Submission, para. 85.
[75] Mexico Appellant Submission, para. 93.
[76] Mexico Appellant Submission, para. 94.

60. There are two problems with this argument. First, Mexico ignores the fact that, as the Appellate Body has already found, "the 'likely' standard of Article 11.3 applies to the overall determinations regarding dumping and injury; it need not necessarily apply to each factor considered in rendering the overall determinations on dumping and injury."[77] Therefore, there is no "likelihood of simultaneity" standard as Mexico suggests. Second, as Mexico's own submission demonstrates, the USITC determination largely focused on the facts that simultaneity existed before the order was imposed and after the order was imposed. In the absence of any evidence to the contrary, it was certainly reasonably for the USITC to conclude that simultaneous presence of the subject imports would continue if the order were revoked. Furthermore, 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.[78]

D. Timeframe

61. Mexico argues that the Panel should have found the USITC determination to be flawed because the determination did not specify the timeframe within which subject imports would be simultaneously present in the U.S. market and within which injury would occur.[79] This is what the Panel had to say about the USITC's consideration of the timeframe in this particular determination:

> In light of our conclusion that Article 11.3 does not require investigating authorities to specify the time-frame on which the determination of likelihood of continuation or recurrence of injury is based, we see no inconsistency with the

---

[77] Appellate Body Report, *US – Argentina OCTG*, para. 323.
[78] Appellate Body Report, *US – Argentina OCTG*, paras. 326 and 328-329.
[79] Appellant's Submission of Mexico, paras. 96-99.

> AD Agreement in the fact that the USITC did not specifically identify the time-frame it considered in making its determination in this case . . . . Mexico goes on to argue that 'the only way to assess whether the law has been applied in a WTO-consistent way (i.e., whether the injury assessment has not focused too far in the future) is by knowing the time frame used by the Commission in its assessment regarding likelihood of injury." . . . [T]o the extent that Mexico seems to imply that this time-frame was "too far in the future", we note that Mexico never made this argument in its submissions and therefore it is not necessary for us to make a finding on this question.[80]

Mexico's appeal ignores the fact that the Panel squarely addressed the argument that Mexico attempts to make to the Appellate Body, and which the Panel rejected based on lack of argument (and evidence). Mexico does not argue that the Panel's dismissal of this argument was unreasonable; Mexico asks the Appellate Body to conduct a *de novo* review.

62. The United States also notes that the Appellate Body already explained that Article 11.3 does not require an investigating authority to specify the timeframe on which it bases its determination of injury:

> the text of Article of Article 11.3 does not establish any requirement for the investigating authority to specify the timeframe on which it bases its determination regarding injury. Thus, the mere fact that the timeframe of the injury analysis is not presented in a sunset review determination is not sufficient to undermine that determination. Article 11.3 requires that a determination of likelihood of continuation or recurrence of injury rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions. A determination of injury can be properly reasoned and rest on a sufficient factual basis *even though the timeframe for the injury determination is not explicitly mentioned.*[81]

As the Appellate Body has reasoned, a determination need not identify a particular timeframe. Mexico acknowledges this point and asserts, without explaining, that *this determination* would have to identify such a timeframe in order to meet the requirements of Article 11.3. For

---

[80] Panel Report, para. 7.111.
[81] Appellate Body Report, *US – Argentina OCTG*, para. 364.

example, Mexico simply asks a series of questions, such as how causation can be established absent the identification of a timeframe, or how the USITC could know when injury was likely to occur.[82] But these questions are not, under Mexico's theory of sunset reviews, unique to *this* determination. Mexico's own arguments suggest that Mexico is really suggesting that Article 11.3 *per se* requires identification of a timeframe. The Appellate Body has already rejected that argument,[83] and Mexico has provided no reason for the Appellate Body to abandon that reasoning here.

III. Margin Likely to Prevail

A. The Panel Correctly Found That Commerce Was Not Obligated To, And Did Not Rely On, the "Margin Likely to Prevail" in Making Its Determination of Likelihood of Continuation or Recurrence of Dumping

63. Mexico argues that with respect to issues concerning the "margin likely to prevail," the Panel failed to make an objective assessment and that the Panel made errors of law and legal interpretation. Mexico is wrong on both counts.

1. DSU Article 11

64. Mexico asserts that the Panel declined to "address Mexico's claims" as to whether Commerce's margin likely to prevail was inconsistent with Articles 2 and 11.3. Mexico also asserts that the Panel did not provide a "rationale for doing so." Notwithstanding that such a failure is a question of compliance with DSU Article 12.7 (and thus Mexico's appeal fails since Mexico did not refer to Article 12.7 in its Notice of Appeal), Mexico contradicts itself by later

[82] Mexico Appellant Submission, para. 99.
[83] Appellate Body Report, *US – Argentina OCTG*, para. 360.

stating that the Panel "declined to decide Mexico's claim based on a legally flawed interpretation" of Articles 2 and 11.3.[84]

65. Regardless, Mexico's claim is without merit. The Panel concluded:

> It is clear that USDOC made its determination of likelihood of continuation or recurrence of dumping exclusively on the basis of a decline in import volumes, and did not rely on information concerning historical dumping margins . . . . Nor did USDOC otherwise consider any evidence relating to the amount of dumping originally found [or] the basis of that calculation . . . .[85]

66. In declining to address Mexico's claims under Article 2, the Panel specifically stated: "We would note that, in any event, as it is clear that USDOC did not rely on historical dumping margins in this case, but solely on import volumes, we would not have made any findings concerning Article 2 even if we had reached a different conclusion on the adequacy of USDOC's consideration of the evidence."[86] Mexico does not assert that the Panel's finding that Commerce did not rely on the margin lacked objectivity. Therefore, it appears that Mexico's arguments are, at their core, questions of legal interpretation, rather than fact-finding.

2. Alleged Error of Interpretation

67. The Panel properly concluded that nothing in the AD Agreement requires determination, or consideration, of a "margin likely to prevail" in determining likelihood of continuation or recurrence of dumping.[87] As the Panel correctly found, "'reporting' of a margin likely to prevail

---

[84] Mexico Appellant Submission, para. 113.

[85] Panel Report, para. 7.78; *see also* Panel Report, para. 7.81 ("USDOC did not rely on historical dumping margins in this case, but solely on import volumes . . .").

[86] Panel Report, para. 7.81.

[87] Panel Report, para. 7.83.

. . . appears to be an element of U.S. law that is not derived from any element of the AD Agreement."[88]

68. Mexico simply asserts that the "margin likely to prevail" was not calculated pursuant to Article 2 and, thus, the Panel erred by failing to find Commerce's sunset review inconsistent with Articles 2 and 11.3.[89]

69. The 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."[90] The Panel's conclusion that nothing in the AD Agreement requires determination, or consideration, of a "margin likely to prevail" in determining likelihood of continuation or recurrence of dumping is consistent with the Appellate Body's finding.[91] Mexico has made no argument to the contrary.[92]

70. Moreover, Mexico's quotation from *US – Japan Sunset* – that "should investigating authorities *choose to rely* upon dumping margins in making their likelihood determinations, the calculation of these margins must conform with the disciplines of Article 2.4" – highlights the

---

[88] Panel Report, para. 7.83.

[89] Mexico Appellant Submission, paras. 117-118. Mexico also argues that the Panel erred in failing to find that the margin likely to prevail and Commerce's sunset determination were inconsistent with Article 18.3 of the AD Agreement. Mexico Appellant Submission, paras. 119-126. The Appellate Body should decline to address Mexico's appeal in this regard because Mexico never made a claim based on Article 18.3. In other words, there is no basis for the Appellate Body to find that the Panel erred by failing to make findings on a claim that was never within the Panel's terms of reference. As the Appellate Body has recognized, identification of the treaty provision claimed to have been violated is a minimum prerequisite for purposes of defining a panel's terms of reference. *See* Appellate Body Report, *Korea – Dairy*, para. 124. Mexico did not identify Article 18.3 in its Panel Request. *See* WT/DS282/2.

[90] Appellate Body Report, *US – Japan Sunset*, para. 127.

[91] Panel Report, para. 7.83.

[92] Mexico in fact concedes that the Appellate Body has addressed this issue. *See* Mexico Appellant Submission, para. 114.

flaw in Mexico's argument.[93] As discussed above, as the Panel found, Commerce did not *rely* on any dumping margins in making its likelihood determination.[94] Thus the Panel properly concluded 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, we consider that there can be no basis for finding a violation of Article 2 of the AD Agreement."[95] Because of the Panel's finding that Commerce did not rely on the margin – a finding Mexico does not challenge – *US – Japan Sunset* is simply inapposite.

71. For these reasons, the Appellate Body should find that the Panel did not err when it made no findings concerning Mexico's claims regarding the margin likely to prevail determined by Commerce.[96]

B. The Commission's Determination of Likely Continuation or Recurrence of Injury Did not Rely on the Margin Likely to Prevail

72. Mexico alleges that the Panel erred in failing to find that the USITC determination was also flawed because of Commerce's margin likely to prevail. Mexico's argument fails for several reasons.

73. First, Mexico ignores the Panel's finding that the USITC did not rely on the margin likely to prevail.[97] Mexico makes no contention to the contrary. Therefore, it is not clear how the margin likely to prevail could render the USITC determination WTO-inconsistent when the Panel made a factual finding that the USITC did not "use" the margin in question.

---

[93] *See* Mexico Appellant Submission, para. 114, quoting Appellate Body Report, *US – Japan Sunset*, para. 127 (emphasis added).

[94] Panel Report, para. 7.83.

[95] Panel Report, para. 7.82.

[96] Panel Report, para. 8.3.

[97] Panel Report, para. 6.14.

74. Second, Mexico's argument is premised on the incorrect underlying assumption that Article 11.3 contains a requirement that the authorities establish a causal link between the likely magnitude of the margin and the likelihood of continuation or recurrence of injury.[98] Mexico wrongly contends that the USITC was *obligated* to rely on the margin and that its failure to do so means that the USITC "failed to establish the requisite causal link between the likely dumping and the likely injury."[99] Mexico has pointed to nothing in Article 11.3 that necessitates consideration of the likely magnitude of dumping for any purpose. On the contrary, the Appellate Body has already concluded that there is no obligation even to calculate a margin of dumping in a sunset review, let alone a requirement that the investigating authorities consider that margin for the purposes of either the likely dumping or likely injury determinations.[100]

75. Indeed, Mexico's view cannot be reconciled with the Appellate Body's consideration of the same likelihood of injury determination in *US – Argentina OCTG*. In that dispute, the panel had found the likelihood of dumping determination WTO-inconsistent; the Appellate Body nevertheless upheld the USTIC's likelihood of injury determination.

IV. Mexico's Claim Regarding the "Legal Basis" of Maintaining the Anti-Dumping Duty Beyond Five Years

76. Mexico states that the Panel erred in "failing to make the specific finding requested by Mexico that the United States had no legal basis to continue its anti-dumping measure on OCTG from Mexico beyond its scheduled expiration date . . . ."[101] Mexico complained to the Panel that it had failed to make such a finding, to which the Panel responded:

---

[98] Mexico Appellant Submission, para. 127.
[99] Mexico Appellant Submission, para. 129.
[100] Appellate Body Report, *US – Japan Sunset*, para. 123.
[101] Mexico Appellant Submission, para. 134.

> To the extent Mexico is referring to its request for a suggestion or recommendation concerning implementation, we denied that request at paragraph 8.18 of the report . . . . Our decision not to make any suggestion regarding implementation, and specifically not to suggest immediate termination of the measure, fully disposed of Mexico's request, and no further findings are necessary.[102]

77. Mexico argues that this error constituted a failure on the part of the Panel to make an objective assessment of the matter.[103] There are numerous flaws with Mexico's views.

78. First, Mexico appears to premise its argument on a legal theory that the Panel was obliged to make such a finding in the first place. Notwithstanding that Mexico's claim is not one of an error of law or legal interpretation on the part of the Panel,[104] Mexico argues that the Appellate Body report in *US – Steel Safeguards* somehow supports this theory, stating that "[j]ust as a safeguard measure cannot be maintained without a WTO-consistent injury determination, an anti-dumping measure cannot be maintained beyond the time established by Article 11.3 without a WTO-consistent determination of likely dumping."[105] Mexico's argument fails under its own analogy. Notwithstanding that the Appellate Body concluded that the U.S. measure in that dispute had been "'deprived of a legal basis,'"[106] *neither the panel nor the Appellate Body suggested termination of the measure*. Indeed, *both* the panel *and* the Appellate

---

[102] Panel Report, para. 6.22.

[103] Mexico Appellant Submission, para. 140.

[104] Mexico's contention is that the Panel violated Article 11 of the DSU. Mexico Appellant Submission, para. 140.

[105] Mexico Appellant Submission, para. 136.

[106] Mexico Appellant Submission, para. 136, quoting Appellate Body Report, *US – Steel Safeguards*, para. 511.

Body simply recommended – as did the Panel here – that the United States bring its measure into conformity with its obligations under the applicable agreements.[107]

79. Mexico's contention that the Panel abused its discretion in exercising judicial economy is also flawed. As Mexico's discussion of judicial economy makes clear, panels exercise such economy with respect to *claims*. The Panel, as it noted, ruled on Mexico's *claim*. The Panel considered that it was unnecessary to make any further findings. Thus, Mexico's discussion of judicial economy is simply inapposite.[108]

80. Mexico's request is at odds with a Member's right to retain flexibility on how to implement DSB recommendations and rulings. In recognition of this right, prior panels have declined to make suggestions on implementation. This Panel followed that approach, and there is no reason to deviate from it. Whether Article 11.3 has a "time-bound" obligation is immaterial; Mexico has offered no logical or legal justification as to why Members cannot correct breaches of so-called time-bound provisions as they do breaches of any other obligation.

81. To the extent Mexico relies on the text of Article 11.3 as justification for the argument that termination necessarily flows therefrom, Mexico misreads Article 11.3. The so-called "temporal" obligation under Article 11.3 is for a Member to terminate a measure unless it *initiates* a review before the expiry of the five-year period, not that it complete a WTO-

---

[107] Appellate Body Report, *US – Steel Safeguards*, para. 514; Appellate Body Report, *US – Steel Safeguards*, para. 11.4.

[108] The United States, like the Panel, has some difficulty understanding what it is Mexico is requesting. To the extent Mexico is simply asking for a finding that the measure was deprived of its legal basis, the United States has explained why the Panel's conclusion that such a finding was unnecessary was reasonable. To the extent Mexico is arguing that the Panel should have made a particular recommendation, Art. 19 of the DSU sets forth the only recommendation that a panel is authorized to make. Anything else would be a "suggestion" within the panel's discretion to make.

consistent review before then. Further, Article 11.3 provides that the duty may remain in force pending the outcome of the review. Even if the review in this dispute were found inconsistent with Article 11.3, it will remain true that the United States timely initiated the review. And, even were it incorrectly concluded that the United States breached Article 11.3, there is no reason why such a breach could not be corrected.

V. Mexico's Conditional Appeals

82. Mexico requests that, in the event that the Appellate Body reverses the Panel's conclusion regarding the Sunset Policy Bulletin, the Appellate Body address, complete the analysis, and rule in favor of Mexico "on the following claims that the Panel declined to decide: (1) the statute, the SAA, and the Sunset Policy Bulletin establish a standard that is less than or other than 'likely/probable,' and (2) the United States failed to administer the applicable U.S. anti-dumping laws, regulations, decisions, and rulings with respect to the Department's sunset reviews consistently with its obligations under Article X:3(a) of the GATT 1994." The United States addresses each of Mexico's conditional appeals below.

A. Mexico's "Claim" Regarding the "Likely/Probable" Standard

83. Mexico asserts that it advanced a "claim" that the "statute, the SAA, and the Sunset Policy Bulletin . . . establish a standard that is less than or other than 'likely/probable/ contrary to the requirement of Article 11.3."[109] Mexico further asserts that the Panel "declined to decide" this "claim."[110] Mexico errs. The panel expressly stated that "we have resolved the issue in dispute, Mexico's claim that the US statute, SAA, and SPB are, *per se*, in violation of Article

[109] Mexico Appellant Submission, para. 158.

[110] Mexico Appellant Submission, para. 158. Mexico incorrectly characterizes this argument as a "claim."

11.3 of the AD Agreement. We do not consider that we are obliged to make findings in this context with respect to each aspect of Mexico's arguments in support of its claim."[111]

84. Mexico states that the "Panel record is sufficient to permit the Appellate Body to complete the analysis and rule" on Mexico's "claim."[112] The Panel Report itself notes that it made *no* findings with regard to this "aspect" of Mexico's "arguments." According to the Appellate Body, it can only "complete the analysis" based on sufficient factual findings by the Panel, or undisputed factual findings on the Panel record.[113] There are *no factual findings at all* that would shed light on Mexico's "likely/probable" argument. Mexico submits that the findings upon which the Appellate Body should rely in completing the analysis are the findings relating to whether the Sunset Policy Bulletin establishes an "irrebuttable presumption" of likelihood.[114] Not only do these findings have nothing to do with the statute or the SAA (indeed, the Panel did not find the SAA to be a measure in the first place), or even with the "likely/probable" standard, but these are the very findings that would have to be overturned in order for the Appellate Body to even reach this issue, given that Mexico's appeal is *conditioned* on the Appellate Body's reversal of the Panel's conclusions with regard to the Sunset Policy Bulletin. It is unclear to the United States how the Appellate Body could overturn these findings and then use them to "complete the analysis."

B. Mexico's Claim Regarding Article X:3(a) of the GATT 1994

---

[111] Panel Report, para. 6.6.

[112] Mexico Appellant Submission, para. 164.

[113] Appellate Body Report, *US – Section 211*, para. 343 ("In the past, we have completed the analysis where there were sufficient factual findings in the panel report or undisputed facts in the in the panel record to enable us to do so, and we have not completed the analysis where there were not.")

[114] Mexico Appellant Submission, para. 165, notes 146 and 147.

85. Mexico has asked the Appellate Body to consider its claim that "the United States failed to administer in an impartial and reasonable manner the applicable U.S. anti-dumping laws, regulations, decisions, and rulings with respect to the Department's sunset reviews of anti-dumping duty orders, in violation of Article X:3(a) of the GATT 1994."[115] The Panel stated that "we make no findings concerning alleged inconsistency . . . of Article X:3(a) of the GATT 1994 in the administration of US anti-dumping laws, regulations, decisions and rulings with respect to USDOC's conduct of sunset reviews of anti-dumping duty orders . . . ."[116]

86. In *US – Argentina OCTG*, the Appellate Body considered Argentina's conditional appeal with respect to its Article X:3(a) claim. The Appellate Body noted first that such a claim "must be supported by solid evidence; the nature and the scope of the claim, and the evidence adduced by the complaining in support of its claim, should reflect the gravity of the accusations inherent in claims" under that Article.[117] The Appellate Body went on to consider the evidence Argentina supplied in connection with its claim, stating that Argentina relied on exhibits to contend that:

> A "record of 223 wins and 0 losses . . . for the U.S. industry demonstrates a lack of impartiality and the unreasonable administration of national laws, regulations, decisions, and rulings."[118]

---

[115] Mexico Appellant Submission, para. 167.

[116] Panel Report, para. 8.13. The United States notes that Mexico did not actually identify the laws, regulations, decisions, and rulings forming the basis of its Article X:3(a) claim.

[117] Appellate Body Report, *US – Argentina OCTG* , para. 217.

[118] Appellate Body Report, *US – Argentina OCTG*, para. 218.

87. The Appellate Body stated that, based on this evidence, "it would be impossible to conclude on the basis of the overall statistics alone that the determinations were flawed due to lack of objectivity on the part of the USDOC."[119]

88. With the benefit of the Appellate Body's views on this precise claim, Mexico nevertheless offers the following:

> A record of 232 wins and 0 losses for the U.S. industry demonstrates a lack of impartiality, and the unreasonable administration of national laws, regulations, decisions, and rulings.

89. But for updating the number of reviews, Mexico has recycled, *verbatim*, the very argument the Appellate Body has already squarely rejected. Mexico's appellant brief does not reflect the Appellate Body's admonition that the evidence offered in support of an Article X:3(a) claim must reflect the gravity of the accusations inherent in the claim.

90. The Panel stated that it made *no findings* on this issue. The only findings that the Appellate Body might use to "complete the analysis" are the very findings it would have overturned even to reach this conditional appeal. Mexico's evidence, then, by definition is not "solid" inasmuch as it consists of "evidence" the Appellate Body has already disregarded, as well as findings the Appellate Body would have to have disregarded even to reach the claim.

VI. Conclusion

91. For the foregoing reasons, the United States respectfully requests that the Appellate Body dismiss Mexico's appeal.

---

[119] Appellate Body Report, *US – Argentina OCTG*, para. 219.