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

(WT/DS282)

Closing Statement of the United States at the Second Meeting of the Panel with the Parties

August 18, 2004

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank you for the opportunity to provide this closing statement.

2. In light of the fact that the United States has fully addressed Mexico's claims and arguments in our submissions, we will confine ourselves now to commenting on the few issues that remain outstanding, including new issues raised by Mexico in its second opening statement yesterday.

3. Before I begin, I would like to make one comment about Mexico's closing statement. Mexico continues to mischaracterize the U.S. arguments in this dispute. For example, Mexico just stated that paragraph 36 of the U.S. oral statement stands for the proposition that there is no causation requirement in sunset reviews. But this is inaccurate. The last sentence of paragraph 36 plainly states that, "Of course, nothing in Article 3.5 imposes these requirements, which instead are captured in Article 11.3." We trust that the Panel will, when considering Mexico's characterizations of U.S. arguments, look at what the United States actually said.

Volume Requirements

4. First, we want to address the issue of whether the commercial quantities threshold for revocation reviews should be defined. It is important to recall the context in which the

commercial quantities requirement is applicable: Companies have established zero dumping margins and thus request a review seeking revocation of the order. Absent a commercial quantities requirement, companies could simply obtain review by making one token sale to the United States each year in order to establish zero margins, after which they could then resume dumping. The commercial quantities requirement is thus necessary in order to establish whether the zero margins that were achieved can provide a realistic picture of the likely future behavior of the exporters. Without a commercial quantities requirement, companies could easily have antidumping orders eliminated and then simply resume dumping. That is not what Article 11.2 is about; what Article 11.2 does is to require reviews where warranted to determine whether maintenance of the duty is necessary to offset dumping.

5. As we have noted, there is no hard and fast number that is set up to be a bright-line threshold for determining whether companies meet the commercial quantities requirement, nor does Article 11.2 require the United States to establish this threshold in its order-wide reviews. Furthermore, such a threshold would simply not benefit respondents. Under the U.S. system, respondents are able to argue that they have satisfied the commercial quantities requirement even when they have shipped a comparatively low percentage of pre-order exports. A fixed threshold would deprive respondents of that opportunity. Moreover, Mexico has not demonstrated that the United States uses the commercial quantities requirement to deny revocation reviews where warranted. To the contrary, the United States has demonstrated that relatively low post-order import volumes can satisfy the commercial quantities requirement.

6. Furthermore, creating a bright-line threshold for commercial quantities would have no basis in the text of Article 11.2. Moreover, in the present dispute, TAMSA's volumes dropped to

0.2 percent of pre-order levels. Assuming *arguendo* that Article 11.2 applies to the review in question, this is not a close call.

7. The same logic applies to the sunset review analysis. As we have said before, a sunset review requires a Member to draw informed conclusions about what might happen in the future. If import volumes have dropped significantly, then it is reasonable to question whether it is the existence of the order – and not reformed behavior of the respondents – that led to the decrease in imports. Again, the United States does not believe that setting a firm, bright-line threshold of "x" percentage points is required by Article 11.3; nor does the United States believe that such a threshold would benefit respondents. At the end of the day, the Antidumping Agreement affords Members great discretion with respect to the details of conducting Article 11.2 and Article 11.3 reviews, both of which require counterfactual determinations about which petitioners and respondents will always be able to disagree.

The Statistics in Argentina OCTG and this Dispute

8. Mexico proffers a new and erroneous argument regarding the statistics it submitted in support of its claim that the *Sunset Policy Bulletin* is a measure. Mexico states that it is "surprised" by the U.S. arguments regarding these statistics because the United States has allegedly departed from its position in the Argentina OCTG dispute. Mexico further states that the United States did not challenge the statistics in that dispute but does so now by providing "alternative statistics." Mexico is wrong on all counts. First, the United States challenged the relevance of the statistics in Argentina OCTG, as it has here. Second, the United States has not offered "alternative statistics;" instead, the United States has analyzed the statistics that Mexico provided and revealed their lack of probative value. Thus, the United States has not "departed"

from its position in Argentina OCTG.

The Argentina OCTG Panel's Evaluation of the Likely Standard

9. Mexico incorrectly states that the Argentina OCTG panel failed to evaluate whether the Commission applied the right standard, *i.e.,* whether the ITC used a "likely" standard. The Argentina panel in fact did evaluate whether the ITC met the likelihood standard of Article 11.3 and concluded that it did.[1]

Other Issues Relating to Injury

10. In its opening statement yesterday, Mexico made other statements regarding the injury determination that are untenable. For example, Mexico states that a likely injury determination without a dumping margin is inconsistent with Article 11.3. Yet the Appellate Body has already concluded that Article 11.3 does not require a Member to calculate a margin. In further support of its point, Mexico selectively quotes from *German Steel* to imply that in a countervailing duty case, the level of subsidization is determinative for purposes of determining injury. In so doing, Mexico ignores the primary conclusion of the Appellate Body in that regard: Injury is not defined in the SCM Agreement in relation to any specific level of subsidization.[2] Likewise, injury in the Antidumping Agreement is not defined in relation to any specific magnitude of dumping.

11. In addition, Mexico's arguments relating to the cumulation analysis are not persuasive. Mexico implies that the ITC did not properly evaluate whether subject imports are likely to

[1] *See United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/R), paras. 7.298, 7.305, and 7.312.

[2] *German Steel,* AB Report, para. 81.

compete with each other and with the domestic like product. However, Mexico fails to note that the U.S. statute at issue provides for such an evaluation not only in original investigations but in sunset reviews. Further, in this review, the ITC did thoroughly evaluate the competition issue,[3] notwithstanding Mexico's selective quotation of the ITC report. Mexico also argues that if imports are not in the market together, there is no justification for cumulation; but Mexico ignores the fact that there were imports in the market together, albeit at lower levels than those prior to the entry of the order.[4] Therefore, in this review, the Commission did not need to project whether competition would recur upon revocation of the order; the imports were already competing during the period of review.

12. In addition, in paragraph 34 of its opening statement yesterday, Mexico argues that "[f]indings made during pre-WTO original investigations are not consistent with any post-WTO Antidumping Agreement provision because by definition they cannot be the result of the application of the Agreement, as required by Article 18.3." Mexico uses this argument to attempt to discredit the ITC's likely injury determination, which took into consideration findings in the original investigation. However, Mexico mischaracterizes Article 18.3, which does not state that pre-WTO findings are not consistent with the Antidumping Agreement. Article 18.3 simply says that the Antidumping Agreement applies to investigations and review of existing measures initiated after the entry into force of the Agreement.

Procedural Concerns

13. The United States also has a some procedural concerns in connection with Mexico's

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[3] Exhibit MEX-20 at 10-14.

[4] Exhibit MEX-20 at 14, n.82.

opening statement yesterday.

Mexico's Claim Regarding Consistent Practice is Beyond the Panel's Terms of Reference

14. Notwithstanding the U.S. rebuttal, Mexico continues to argue that its claim regarding the U.S. "consistent practice" in sunset reviews is within the Panel's terms of reference. It is not. Mexico relies on the fact that the United States addressed Mexico's arguments regarding the consistent practice. Yet it is not whether arguments were made and rebutted that establishes whether a claim is properly within a panel's terms of reference. Rather, it is the panel request that establishes the terms of reference, and as such, Mexico must live with its panel request, which does not include a claim regarding "consistent practice" and a violation of Article 11.3. The terms of reference are the terms of reference, and they cannot be subsequently altered.

Remedy

15. Mexico's request that the Panel make suggestions regarding the appropriate remedy, should the Panel find in Mexico's favor, is also troubling. First, Members retain flexibility on how to implement DSB recommendations and rulings, and in recognition of this, prior panels have declined to make suggestions on implementation. There is no reason to depart from this practice in this dispute.

16. Second, the United States strongly objects to Mexico's statements that imply that the United States will somehow act in bad faith – *i.e.,* with the intent to "deprive Mexico of its rights under Article 11" – 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.

17. 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.

18. Also troubling is Mexico's argument in paragraph 72 of its oral statement yesterday 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. An additional suggestion by a panel cannot change this. Mexico ignores the prospective nature of dispute settlement remedies.

19. 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.

Consideration of a Possible Appeal in Argentina OCTG

20. Finally, with regard to the relevance of an Appellate Body report in *Argentina OCTG* to this dispute, should the former dispute be appealed, the United States noted at the Panel meeting yesterday that prior panel and Appellate Body reports are not binding on future WTO disputes. They are useful only to the extent that they have persuasive value with respect to specific arguments made by the parties in those disputes. That said, the United States would not object to delaying the current proceedings to take into account any such Appellate Body report. However, to ensure that the parties in this dispute have the opportunity to apprise the Panel of their respective views about the relevance of such an Appellate Body report, and given the fact that the Panel in this dispute can ultimately only evaluate the facts and arguments placed before it by the parties, the United States would respectfully request that the Panel provide each party with the opportunity to comment on any such Appellate Body report as it may pertain to this dispute, and

then to comment on the comments of the other party, prior to the Panel issuing its interim report in this dispute.

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21. This concludes our closing statement. We want to thank the Panel for its hard work and its consideration of our arguments. We look forward to receiving your written questions.