***** CHECK AGAINST DELIVERY *****

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

AB-2005-7

Statement of the United States at the
Oral Hearing of the Appellate Body

September 19, 2005

Introduction

Mr. Chairman, members of the Division:

1. Thank you for your time in considering this appeal. We will use this oral statement to respond to Mexico's Appellee Submission, which concerned issues relating to likelihood of dumping. Our Appellee Submission addresses Mexico's arguments concerning likelihood of injury, and we will not repeat those arguments here.

2. At this point in the proceedings, one thing is clear: According to Mexico, the burden of proof is borne not by the complaining party, but by the Panel. Mexico's appellant and appellee submissions are both premised on this mistaken view.

3. First, Mexico's appeal of the Panel's findings on likelihood of injury essentially come down to this: Mexico argues that the Panel erred in declining to make any findings concerning assertions that Mexico had failed to substantiate. Our appellee submission demonstrates that the Panel's findings was correct.

4. Second, Mexico's response to our appeal of the Panel's findings concerning the Sunset Policy Bulletin rests on the same premise – that Mexico is under no obligation to actually prove

its claims. A review of the issue reveals that Mexico failed to make its *prima facie* case and that the Panel did Mexico's job for it – and poorly.

5. We believe it is useful to reiterate what Mexico claimed, what it argued, and what it was obliged to prove. Mexico claims that the Sunset Policy Bulletin is, as such, inconsistent with Article 11.3 of the Antidumping Agreement. All Mexico demonstrated in its attempt to prove such a breach is that Commerce found continuation of dumping and/or depressed import volumes to be probative of likelihood of dumping if an order were revoked.[1] For the reasons described below, Mexico did not meet its burden of proving that the Sunset Policy Bulletin mandates a breach.

6. According to the spreadsheet Mexico provided in connection with Exhibit MEX-62, most of Commerce's sunset reviews have involved a situation in which respondents continued to dump over the life of the order. Continuation of dumping is, as the Appellate Body itself has said, highly probative that dumping will continue if the order is revoked. Mexico agrees.[2] Therefore, the fact that Commerce found continuation of dumping to be probative in any number of cases *cannot be sufficient* to demonstrate that the Sunset Policy Bulletin mandates a breach.

7. Mexico was under an obligation to demonstrate two things: (1) that in making its affirmative determinations, Commerce always ignored probative evidence concerning other factors that outweighed dumping behavior and declining import volumes, and (2) that it was *the Sunset Policy Bulletin that required* Commerce to disregard that evidence. Discharging this

[1] *See, e.g.*, Mexico Appellee Submission, para. 39.
[2] Mexico Appellee Submission, para. 90.

burden requires rigorous analysis; demonstrating that Commerce had disregarded probative evidence on one or two occasions would be insufficient to prove the breach. This is so because the question is not simply whether Commerce has actually disregarded probative evidence of other factors in one or two determinations – that question would be addressed by an "as applied" challenge in those particular determinations. Rather, the question is whether Commerce *always* disregarded such evidence and whether the Sunset Policy Bulletin *requires* Commerce to always disregard probative evidence of other factors. As the Appellate Body noted, the issue is whether the Sunset Policy Bulletin is "determinative/conclusive" or merely indicative;[3] Mexico provided no evidence whatsoever to support the conclusion that the Sunset Policy Bulletin is determinative rather than merely indicative.

8. This brings us to the question of the Panel's qualitative analysis. We explained in our Appellant Submission why the Panel's attempt to undertake a qualitative analysis relieved Mexico of its burden of proof. In its defense of the Panel's conclusion that Mexico made a *prima facie* case, Mexico fails to answer the one most obvious question: If Mexico made a *prima facie* case – *i.e.*, a case such that, absent rebuttal, the Panel would have had to find in Mexico's favor – *why did the Panel have to undertake a qualitative analysis at all*? The very fact that the Panel had to undertake a qualitative analysis demonstrates that Mexico did not meet its burden.

9. Mexico attempts to distinguish the reasoning of Appellate Body reports supporting the argument that panels may not comb through a party's exhibits to make the party's case for it. Mexico's argument does not survive scrutiny. The Appellate Body has explained that the

[3] *See, e.g.*, *US – Argentina OCTG (AB)*, paras. 193, 197.

components necessary to make a *prima facie* case include identifying the challenged measure and its basic import, identifying the relevant WTO provision and obligation contained therein, and explaining why the identified measure results in the claimed inconsistency.[4] Mexico seeks to distinguish *US – Gambling* and *Japan – Varietals* based on *how* the party failed to make its *prima facie* case,[5] for example, whether the party identified the basic import of the challenged measure. But this is a distinction without a difference: the reasoning of the reports confirms that the *complaining party* must meet its burden of proving *all the elements* of its case. The point is that a panel may not prove any of those elements on behalf of the party in question, be it with respect to the measure, the obligation, or the basis for the inconsistency.

10. In fact, Mexico eviscerates the burden of proof altogether in attempting to distinguish *US – Gambling*, arguing that dispute is not relevant because in *this* dispute the *Panel* somehow bears the burden of proof.[6] Notably, neither Mexico, nor the Panel before it, even addresses the U.S. discussion of the Appellate Body's reasoning in *Canada – Wheat,* where the Appellate Body explained that the complaining party, not the panel, bears the burden of identifying in its submissions the relevant evidence in exhibits.

11. Mexico argues that the Appellate Body's findings in *US – Argentina OCTG* somehow support Mexico's contention that it made a *prima facie* case – allegedly because the Appellate Body found fault with the panel, not Argentina. But Mexico itself notes the flaw in that argument: the Appellate Body found fault with the panel and not Argentina "based on the

[4] *US – Gambling (AB),* para. 141.
[5] Mexico Appellee Submission, para. 45.
[6] Mexico Appellee Submission, para. 46.

standard of Article 11 of the DSU."[7] In *US – Argentina OCTG*, the U.S. claim was that the panel's conduct was inconsistent with Article 11 of the DSU, and it is in that light that the Appellate Body examined the issue. Mexico's inference that the Appellate Body's consideration of the panel's conduct was limited by anything more than the very nature of the appeal is simply wrong, and in fact inconsistent with the Appellate Body's report itself. The Appellate Body stated that:

> [i]n this case, *the burden was . . . on Argentina* to establish that the three scenarios in . . . the SPB are regarded by the USDOC as determinative/conclusive of likelihood . . . and, therefore, that [the SPB] is inconsistent with Article 11.3 . . . because the ensuing determinations are not founded on rigorous examination or a sufficient factual basis. In particular, as the text of the SPB is equivocal in this regard, *Argentina had to establish that the consistent application of the SPB revealed that the three scenarios in . . . the SPB are regarded by the USDOC as determinative/conclusive.*[8]

Therefore, the Appellate Body placed the burden of proving that the Sunset Policy Bulletin was dispositive, rather than indicative, with Argentina, not the Panel. Moreover, the Appellate Body noted that Argentina sought to discharge that burden simply by filing the very exhibits Mexico filed here,[9] and that the panel based its conclusion on the "data" from one of those exhibits.[10] The United States does not see how, in this light, Mexico can reasonably argue that the Appellate Body report in *US – Argentina OCTG* stands for the proposition that Mexico could discharge its burden simply by filing the same exhibits as Argentina had before it.

12. Indeed, Mexico acknowledges that the evidence it presented in support of its argument

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[7]Mexico Appellee Submission, para. 31.
[8]*US – Argentina OCTG (AB)*, para. 202.
[9]*US – Argentina OCTG (AB)*, para. 203.
[10]*US – Argentina OCTG (AB)*, para. 205.

was merely statistical.[11] Mexico later hedges by arguing that it "provided a qualitative analysis of every sunset review" to the Panel and "highlighted several cases," but Mexico provides no citation either to the qualitative analysis or to the "highlighted" cases. Further examination of Mexico's appellee submission explains why – because Mexico did not actually *present* a qualitative analysis to the Panel. Mexico argues that, at some point, Mexico had to have done a qualitative analysis in order to prepare the spreadsheet.[12] We see nothing in the DSU that would permit a party to discharge its burden of proof based on an alleged internal analysis that was never presented to the panel. Indeed, we do not see how a panel could comply with its duties under Article 11 of the DSU by assuming evidence and arguments that were never submitted.

13. In any event, Mexico's statement that it had to have done a qualitative analysis in order to prepare the spreadsheet only confirms that Mexico continues, even now, to fail to appreciate the evidentiary burden before it. The fact is that Mexico *could* have prepared the spreadsheet without doing the requisite qualitative analysis; that analysis requires an evaluation of the facts of the determinations to help answer the question of whether the Sunset Policy Bulletin requires Commerce to disregard probative evidence. The Appellate Body, when considering the same spreadsheet in the context of the Argentina dispute, noted that the spreadsheet's "statistical data" were insufficient to permit the panel to find in Argentina's favor.[13] Nothing in the spreadsheet required Mexico to undertake any analysis of the reasons underpinning the determinations – the very criticism the Appellate Body made of the panel's conclusion.

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[11]Mexico Appellee Submission, para. 25.
[12]Mexico Appellee Submission, para. 40.
[13]*US – Argentina OCTG (AB)*, paras. 203-205.

14. Therefore, Mexico failed to meet its burden of proof, and its appellee submission only confirms that Mexico continues to misapprehend what it was required to prove in the first place.

15. Notwithstanding that the Panel should have found against Mexico based on its failure to prove its claim, even the Panel's own qualitative analysis – improperly undertaken – simply does not demonstrate that Commerce considers evidence of continued dumping to be probative *to the exclusion of other probative evidence*, let alone that Commerce reached its conclusion because the Sunset Policy Bulletin is "determinative/conclusive rather than indicative."

16. In the end, the Panel's qualitative analysis is little more than a written version of the outcomes analysis the Appellate Body rejected in *US – Argentina OCTG* with a few quotes from a few determinations tossed in. The analysis does not include, as the Appellate Body requires, a discussion of the "reasons leading to such determinations;"[14] after artificially forcing the determinations into Sunset Policy Bulletin categories, the Panel then plucked statements out of context in order to support its preconceived notion that the Sunset Policy Bulletin was WTO-inconsistent. In other words, the Panel's analysis is another exercise in correlative, rather than causative, analysis.[15] The Panel is guilty of the very thing it accuses Commerce of doing – applying mechanistic presumptions without conducting a rigorous analysis.

17. In its appellant submission, the United States examined the few cases that formed the basis for the Panel's conclusion. Mexico attempts to rebut the U.S. discussion of these reviews, but in doing so, Mexico only confirms the error the Panel made in undertaking this analysis on

[14] *US – Argentina OCTG (AB)*, para. 212.
[15] *See, e.g.*, *US Argentina OCTG (AB)*, para. 196.

its own in the first place. The U.S. and Mexican appellate submissions reveal that the factual and legal bases for these reviews are complex and do not admit of the simplistic "analysis" the Panel provided in its report, and the Panel's foray into this analysis would have benefitted from a fulsome discussion by the parties, rendered impossible by the Panel's presentation of the analysis for the first time in the interim report. If Mexico had presented a qualitative analysis, the United States could have offered its rebuttal during the course of the panel proceedings, and the Panel could have avoided the errors of fact and law it made by undertaking the analysis absent comment by the parties.

18. Indeed, Mexico's attempted rebuttal to the U.S. arguments simply confirms that the Sunset Policy Bulletin is not determinative but rather only indicative; for example, Mexico quotes a determination in which Commerce states that "'[a]s discussed in . . . the Sunset Policy Bulletin . . . the Department *may reasonably infer* that dumping would continue if the discipline were removed.'"[16] It does not state that Commerce *must* infer that dumping would continue, or that even if such an inference were made that Commerce would have to make an affirmative determination. Instead, the determination states what the United States has noted all along: the Sunset Policy Bulletin does not require Commerce to do anything. Therefore, it is not determinative or conclusive. With regard to Mexico's characterization of the reviews, the United States would be pleased to rebut Mexico's assertions if the Appellate Body so desires. However, Mexico has assisted the United States in making its point: a proper analysis of these determinations, including the bases on which Commerce made its determinations, is complex,

[16]Mexico Appellee Submission, para. 74.

but the Panel's analysis is cursory, simplistic, and misleading. In short, the Panel's assessment was not consistent with Article 11 of the DSU.

19. In this vein, Mexico asserts that the United States is asking the Appellate Body to "reweigh" the evidence[17] and chastises the United States for failing to "rebut" Mexico's evidence during the Panel proceeding.[18] Both of these arguments are without merit. First, the Panel did not "weigh" any evidence at all. The Panel did not evaluate facts presented by Mexico and a rebuttal offered by the United States and then come to a conclusion; that is a "weighing" of evidence. Instead, the Panel on its own examined some of the determinations in order to make factual findings that are not based on evidence or arguments presented by the parties.

20. Mexico offers quotations from various Appellate Body reports to stand for the proposition that panels enjoy discretion in weighing evidence and making factual findings. But these reports only confirm that the Panel in *this dispute* exceeded the scope of its authority. Mexico does not contend that any of the disputes upon which it relies involves the Appellate Body's endorsing a panel's *sua sponte* combing through exhibits to make findings based on evidence and argument not presented by the parties. Indeed, the Appellate Body has expressly noted that panels may not do so.[19]

21. As for the allegation that the United States failed to rebut Mexico's evidence and must live with an "unsuccessful litigation choice," we note here, as we did in our appellant submission, that we *did* rebut the evidence *Mexico* presented. Mexico's assertion that the United

[17]*See, e.g.*, Mexico Appellee Submission, para. 55.
[18]Mexico Appellee Submission para. 49.
[19]*See, e.g., U.S. – Gambling*, *Canada – Wheat.*

States "focused much of its defense on arguing that the SPB is not a 'measure'"[20] is simply wrong. Mexico presented statistics and a compilation of determinations, with no factual analysis of the reasons underpinning the determinations, and the United States noted below, as it has here, that the statistics were irrelevant and that an examination of the *facts* of the determinations was necessary to evaluate whether the Sunset Policy Bulletin mandates a breach, including whether other record evidence was excluded.[21] This is the exact position the United States adopted in *US – Argentina OCTG* when presented with the same "evidence." Thus, Mexico errs when it states that the United States "did not avail itself of the opportunity to respond specifically to the evidence."[22] The lack of specificity lies not with the U.S. rebuttal, but with Mexico's evidence.

22. In its discussion of the evidence and the U.S. rebuttal to that evidence, Mexico seeks – again – to confuse the determinations themselves, which Mexico supplied, with the Panel's identification of the reasoning underlying Commerce's conclusions in those determinations, which Mexico did *not* discuss. Mexico also misrepresents the U.S. position with respect to Appellate Body consideration of factual findings made by a Panel. Mexico states that "the United States has consistently taken the position that the meaning of a Member's domestic law is a question of fact, outside the scope of Appellate review."[23] But the United States has not argued that a question of fact is outside the scope of Appellate review if a panel's consideration of that fact lacked objectivity and was therefore inconsistent with Article 11 of the DSU. Indeed, the

[20]Mexico Appellee Submission, para. 49.
[21]*See* U.S. Appellant Submission, para. 23.
[22]Mexico Appellee Submission, para. 51.
[23]Mexico Appellee Submission, para. 62.

dispute Mexico cites as support for the U.S. position was one for which, as Mexico notes parenthetically in a footnote, no claim under Article 11 of the DSU had been made.[24] And, in any event, a panel's misapplication of the burden of proof is not an error in fact-finding, it is an error in law.

23. Finally, the United States notes that Mexico's rebuttal substantiates the U.S. assertion that the Panel's analysis was lacking in objectivity. As the United States noted in its appellant submission,[25] the Panel artificially forced the Commerce determinations into what the Panel considered the appropriate Sunset Policy Bulletin scenario, in many cases erroneously. Indeed, Mexico's appellee submission confirms it. Mexico attempts to dismiss U.S. arguments concerning the Panel's analysis of *Sugar and Syrups from Canada* by noting that both Mexico now and the Appellate Body (in the Argentina dispute) considered that none of the Sunset Policy Bulletin criteria was present.[26] Yet, contrary to the views of the *complaining party and the Appellate Body*, the Panel considered that this determination fit into scenario "a" of the Sunset Policy Bulletin.[27] This is simply more evidence that the Panel was intent on finding the Sunset Policy Bulletin inconsistent with Article 11.3 and made the evidence fit the conclusion, rather than the reverse.

24. The common thread in this appeal is whether a complaining party bears the burden of proving its claims. Mexico considers that such a burden is discharged by bald assertions, or by

[24]Mexico Appellee Submission, n. 71.
[25]United States Other Appellant Submission, para. 54.
[26]Mexico Appellee Submission, para. 118.
[27]Panel Report, para. 7.62.

filing exhibits without establishing the relationship between the evidence in those exhibits and the argument in question. Mexico makes no attempt to reconcile the bedrock principle of the burden of proof – that is, the complaining party bears the burden of providing evidence and argument sufficient to prove its claim – with the notion that the Panel was somehow responsible for establishing the relationship between the evidence and the argument. Mexico's position is not tenable.

25. Thank you again for your time. We look forward to your questions.