BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2005-7)

OTHER APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

August 19, 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

APPELLEE

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
Canada – Wheat (AB)	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004
Japan – Varietals (AB)	Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999
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 – Argentina OCTG (Panel)	Panel Report, *United States – Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, adopted as modified 17 December 2004
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
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

I. Introduction and Executive Summary

1. The United States is appealing the Panel's findings regarding the Sunset Policy Bulletin ("SPB"). In this dispute, the Panel erred both in the legal and factual analyses forming the basis of the Panel's findings regarding the SPB. The Panel found the United States in breach of its WTO obligations not based on an analysis by Mexico of a measure and what that measure requires, but based on its *own* superficial and erroneous analysis of Commerce's determinations.

2. In *US – Argentina OCTG*, the Appellate Body explained the seriousness of making an "as such" challenge against another Member:

> In our view, "as such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing "as such" challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims.
>
> We also expect that measures subject to "as such" challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged "as such."[1]

3. As detailed below, the Panel's analysis of the SPB failed to employ the rigor and care called for in an "as such" challenge. Rather than holding Mexico to its obligation to make a *prima facie* case that the SPB is not consistent with Article 11.3 of the *Agreement on Implementation of Article VI of GATT 1994* ("Antidumping Agreement"), the Panel instead

---

[1] *US – Argentina OCTG (AB)*, para. 173.

relieved Mexico of that burden and *sua sponte* conducted its own analysis of the evidence with the objective of performing a "qualitative assessment" of Commerce's determinations. The Panel compounded its error by performing a "qualitative assessment" that was little more than a more detailed analysis of the outcomes of these determinations that the Appellate Body rejected in *US – Argentina OCTG* . Moreover, the Panel's purported "qualitative assessment" reflected a selective, erroneous, and biased analysis of the few determinations forming the basis for the Panel's conclusion and was done without giving the United States a meaningful opportunity to rebut the evidence created and presented by the Panel, for the first time, in the interim report.

II. The Panel Erred in Concluding that the Sunset Policy Bulletin Is Inconsistent with Article 11.3

4. The Panel's conclusion that the SPB breaches Article 11.3 is based entirely on its analysis of Commerce determinations submitted, but never analyzed, by Mexico. The Panel's analysis focuses not on what these determinations actually say about the meaning and effect of the SPB, but rather, on the Panel's selective citation of statements by Commerce which the Panel found "troubling,"[2] as well the Panel's feeling that the "results of [Commerce] decisions" and "consistency of outcomes" were "troubling."[3] Likewise, the Panel purports to find from the determinations – without identifying where – that "some of the determinations *appear to indicate* that the Commerce perceives the SPB scenarios as conclusive or determinative . . ."[4]

[2]Panel Report, para. 7.58.
[3]Panel Report, paras. 7.59-60.
[4]Panel Report, para 7.63 (emphasis added).

5. The Panel in this dispute was not tasked with deciding, based on its own selective reading of Commerce's determinations, unassisted by argumentation of the parties, whether these determinations or their outcomes were "troubling." Such an approach cannot serve as the basis for the conclusion that a WTO Member's measure is, as such, inconsistent with that Member's WTO obligations. In this regard, the United States considers it useful to recall the Appellate Body's analysis of the SPB issue to date.

6. The question presented in *US – Japan Sunset* was whether the SPB was even a measure subject to WTO dispute settlement, and if so whether it mandated a breach of Article 11.3. The Appellate Body concluded that instruments setting forth norms or rules could be measures subject to dispute settlement,[5] and then separately analyzed whether the SPB "instructs" Commerce to attach "decisive or preponderant weight" to import volumes and dumping margins in every case.[6] With respect to the latter, the Appellate Body began by considering the text of the SPB. The Appellate Body reasoned that the text "might *not* instruct" Commerce to view dumping margins and import volumes as conclusive.[7] In view of the ambiguity of the text, the Appellate Body explained that the panel erred by failing to consider the evidence Japan supplied regarding the alleged "consistent application" of the SPB.[8]

7. Subsequently, the Appellate Body in *US – Argentina OCTG* was faced with the question of whether the panel in that dispute had properly concluded that the SPB was a measure that mandated a breach of Article 11.3. The panel had relied on a statistical analysis and aggregate

---

[5] *US – Japan Sunset (AB)*, para. 82.
[6] *US – Japan Sunset (AB)*, para. 176.
[7] *US – Japan Sunset (AB)*, paras. 179-181.
[8] *US – Japan Sunset (AB)*, paras. 183-184.

results to conclude that Commerce "does in fact perceive"[9] the SPB as "conclusive" of likelihood of continuation or recurrence of dumping. Thus, the panel did not examine whether the SPB "instructs" Commerce to consider dumping margins and import volumes as conclusive – which would have required an analysis of what the SPB actually does – but what it believed Commerce's "perceptions" must have been in light of the outcomes. The Appellate Body rejected the panel's approach because there had been no qualitative assessment of the determinations in question.[10] Such a qualitative assessment might have shed light on the question at issue, as posed by the Appellate Body in *Japan Sunset*: whether the SPB instructs Commerce to treat dumping margins and import volumes as conclusive.[11]

8. The flawed approach of the panel in *US – Argentina OCTG* has resurfaced in this dispute. The Panel failed to examine Commerce's determinations with a view to ascertaining what, if anything, the SPB actually instructs, but instead looked for "troubling" statements and outcomes that in no way supported even the highly qualified conclusion that "some" of the determinations "appear to indicate" that Commerce "perceives" the SPB scenarios as determinative.[12]

---

[9] *US – Argentina OCTG (Panel)*, para. 7.165.

[10] *US – Argentina OCTG (AB)*, para. 215.

[11] The Appellate Body has previously explained how such assessments of a Member's municipal law should generally be undertaken. In *US – German Steel (AB)*, the Appellate Body explained that "a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by the consistent application of such laws, the pronouncement of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars." Para. 157.

[12] Panel Report, para. 7.63.

Moreover, the Panel based its conclusions on a review of the determinations that was nothing but a more detailed version of the outcomes-oriented approach of the panel in *US – Argentina OCTG*.

9. According to the Panel, Mexico did not have to demonstrate that the SPB mandates a breach. Instead, the Panel undertook that work itself – thereby improperly relieving Mexico of the consequences of Mexico's failure to make a *prima facie* case. What is more, the Panel did that work poorly: it misunderstood its task (determining whether the facts of each determination might be shoehorned into an SPB scenario, rather than whether the SPB requires Commerce to treat import volumes and dumping margins as determinative, rather than merely indicative), and when it looked at individual determinations, the Panel failed to conduct any kind of qualitative analysis of those determinations, instead simply quoting statements out of context. Notably absent from the Panel's report is an analysis of whether the SPB caused the results in question. This legally unsound and subjective approach does not form a viable basis for finding Members to be in breach of their WTO obligations.

A. The Panel Failed to Properly Allocate the Burden of Proof and Impermissibly Made Mexico's Case for It

10. The Panel Report correctly stated the burden of proof:

> a party claiming a violation of a WTO Agreement by another Member must assert and prove its claim. In this dispute, Mexico, which has challenged the consistency of the United States' measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the relevant Agreements.[13]

The Panel also correctly identified the nature of a *prima facie* case:

---

[13]Panel Report, para. 7.8.

> a *prima facie* case is one in which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.[14]

11. The Appellate Body confirmed in *US – Gambling* that a panel errs when it combs through a party's exhibits in search of evidence to support that party's claims. In that dispute, the Appellate Body criticized the panel for engaging in a "multi-step analysis in seeking to discern some connection" between the measures at issue and the "references in [Antigua's] written submissions and various exhibits."[15] In so doing, the Appellate Body stated that a complaining party may not "simply allege facts without relating them to its legal arguments."[16] The Appellate Body in *US – Gambling* further explained that in that dispute Antigua had to do two things to make its *prima facie* case: (1) allege that the United States had undertaken a commitment; and (2) identify – with supporting evidence – "*how*" the challenged measure was inconsistent with such commitments.[17]

12. Notwithstanding that the Panel correctly recited the requirements for a party to make a *prima facie* case, the Panel failed to apply those requirements in its analysis of the whether the SPB is inconsistent with Article 11.3 of the Antidumping Agreement. In doing so, the Panel impermissibly relieved Mexico of its burden of proof, including its obligation to make a *prima facie* case. Had the Panel limited itself to the evidence and arguments that Mexico actually presented, the Panel could not have concluded that Mexico established a *prima facie* case that the SPB was inconsistent with Article 11.3; indeed, the Panel would have been obliged to find that

---

[14]Panel Report, para. 7.8.
[15]*US – Gambling (AB)*, para. 152.
[16]*US – Gambling (AB)*, para. 140.
[17]*US – Gambling (AB)*, para. 143.

Mexico failed to meet its burden to present such a *prima facie* case that the United States had to refute. As the Appellate Body has explained, "a panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case."[18] That is precisely what this Panel did.

13. A review of Mexico's presentation of evidence and argument regarding the SPB confirms that Mexico did not make a *prima facie* case. Mexico's claims and evidence were, in the Panel's words, "substantially identical"[19] to the claims and evidence Argentina offered in *US – Argentina OCTG*, where "Argentina . . . sought to discharge its burden by filing Exhibits ARG-63 and ARG-64" (virtually the same exhibits that Mexico filed here).[20] The panel in that dispute relied "solely on the overall statistics or aggregate results," and for that reason the Appellate Body rejected the panel's conclusion that the SPB was inconsistent with Article 11.3.[21] The Appellate Body went on to state that "it is essential to examine concrete examples of cases where the likelihood determination of continuation or recurrence of dumping was based solely on one of the scenarios . . . of the SPB, even though the probative value of other factors might have outweighed that of the identified scenario."[22] The Appellate Body later referred to this type of analysis as a "qualitative assessment."[23]

14. Mexico, like Argentina before it, provided no such qualitative assessment but merely made a series of assertions about the aggregate results of the determinations filed in its exhibits.[24]

---

[18]*US – Gambling (AB)*, para. 139 (citing *Japan – Varietals (AB)*, para. 129).
[19]Panel Report, para. 6.26.
[20]*US – Argentina OCTG (AB)*, para. 200.
[21]*US – Argentina OCTG (AB)*, para. 210.
[22]*US – Argentina OCTG (AB)*, para. 209.
[23]*US – Argentina OCTG (AB)*, para. 212.
[24]*See, e.g.*, Mexico First Submission, paras. 113-114. Mexico only discussed *one* determination, *Industrial Cellulose from Yugoslavia*, in support of its claim. Mexico First

This Panel recognized that Mexico had failed to undertake such a qualitative assessment, noting that "*we* must undertake a qualitative assessment of the evidence"[25] and proceeding to engage in a "qualitative assessment" without a single citation to any argument or analysis by Mexico.[26] Indeed, the Panel could not have cited to Mexico's "qualitative assessment" because Mexico did not provide one. The Panel then confirmed that its conclusion as to the SPB's inconsistency with Article 11.3 was based on the its *own* analysis, not Mexico's:

> we undertook this analysis of the evidence put before us by Mexico in order to aid us in understanding the SPB and assessing whether it is, as such, inconsistent with Article 11.3 . . . because it establishes an irrebuttable presumption of likelihood of continuation or recurrence of dumping. Based on our analysis, we consider that the SPB scenarios are treated as conclusive or determinative in sunset reviews.[27]

The Panel's *sua sponte* qualitative assessment of the sunset determinations improperly relieved Mexico of its burden of proof, including its obligation to make a *prima facie* case.

15. As the United States explained in its comments on the interim report,[28] the Appellate Body in *Japan – Varietals* reversed the findings that a panel had made on a claim notwithstanding the failure of the complaining party, the United States, to establish a *prima facie*

Submission, para. 115-116. Yet the United States pointed out that Mexico had provided a misleading analysis of that determination, inasmuch as the "other evidence" in question had never been submitted to Commerce. *See* U.S. Second Written Submission, n. 12.

In response to a specific question from the Panel as to the relevance of the determinations in Exhibits MEX-62 and MEX-65 to the "scope and meaning" of the SPB, Mexico simply reiterated that its exhibits demonstrated the "consistent application" of the SPB, without any qualitative analysis. *See* Mexico Answers to 1st Set of Panel Questions, paras. 59-65. Mexico's second submission only discusses specific determinations because *the United States first discussed them*, as Mexico acknowledged. Mexico Second Written Submission, paras. 23-30.

[25]Panel Report, para. 7.49. (Emphasis added).

[26]Panel Report, paras. 7.52-7.64.

[27]Panel Report, para. 7.64.

[28]United States Request for Review of Precise Aspects of the Interim Report, para. 3.

case as to that particular claim. The Appellate Body explained that a complaining party must make its own *prima facie* case of WTO-inconsistency and that a panel that assumes that role exceeds the limits of its authority under the DSU:

> Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, *this authority cannot be used by a panel to rule in favour of a complaining party which has not established a* prima facie *case of inconsistency based on specific legal claims asserted by it.* A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the SPS Agreement, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, *but not to make the case for a complaining party*.[29]

16. The Appellate Body report in *Canada – Wheat* clarified that a complaining party cannot expect a panel to bear the burden of determining the relevance of evidence submitted:

> In our view, it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation—the evidence—on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.[30]

17. The Appellate Body report in *US – Gambling* confirms the analysis set forth in these prior reports. The Appellate Body's reasoning in all of these reports elucidates what a party must do – and what a panel may not do – in order to establish a *prima facie* case. The party must provide evidence and argument that actually *supports* its claim – including proving *how* the measure in question is inconsistent with the obligation in question. As part of that, the party must – through its argumentation – explain the relationship between the evidence it has submitted and its claims.

---

[29]Appellate Body Report, *Japan – Varietals (AB)*, paras. 125-131 (emphasis added).
[30]Appellate Body Report, *Canada – Wheat (AB)*, para. 191.

The party may not simply assert facts – in an exhibit or otherwise – and have the panel divine the relationship between the facts and the legal claims.

18. Mexico did not meet these requirements for making a *prima facie* case. Mexico argued that the SPB directs Commerce to treat continued dumping and import volumes as determinative/conclusive, and Mexico's evidence in support was the text of the SPB and what amounts to passing references to what it termed the "consistent application" of the SPB as evidenced by the outcomes in those disputes.[31] However, this was precisely what the Appellate Body report in *US – Argentina OCTG* considered to be insufficient to support the claim that the SPB is inconsistent with Article 11.3.[32] Throughout its argumentation, Mexico made no attempt to undertake the analysis to which the Appellate Body had pointed in *US – Argentina OCTG*.

19. The Panel then did what the Appellate Body has explained a panel must not do: the Panel undertook to determine, by engaging in a "multi-step analysis," the "relevance" of Exhibits MEX-62 and MEX-65. The Panel conducted its own "qualitative assessment" of the evidence in order to conclude that the SPB was inconsistent with Article 11.3; in doing so, the Panel relieved Mexico of its obligation to demonstrate "how" the SPB was inconsistent with Article 11.3, as well as Mexico's obligation to explain the relevance of the evidence Mexico supplied to Mexico's legal argument. In short, Mexico simply provided factual information, and the Panel mined that information for facts supporting a legal argument that Mexico did not even advance.

---

[31]*See, e.g.*, Mexico Answers to 1st Set of Panel Questions, paras. 59-65, Mexico Second Written Submission, paras. 12-18.

[32]The Panel noted that Mexico and Argentina provided "substantially identical" claims and evidence with respect to the SPB *See, e.g.*, Panel Report, para. 6.26.

20. In its request for interim review, the United States drew to the Panel's attention the fact that it had relieved Mexico of its obligation to make a *prima facie* case.[33] The Panel never addressed these comments. However, in response to a U.S. letter on the relevance of the Appellate Body's reasoning regarding burden of proof in *US – Gambling*, the Panel stated that

> we are satisfied that Mexico has made out a *prima facie* case with respect to the SPB Mexico clearly identified the measure, the SPB, and its import, that is how it operated, identified the relevant WTO provision, Article 11.3, and the obligation therein, to make a reasoned determination based on the facts, and explained the basis for the claimed inconsistency, that the SPB gave determinative or conclusive effect to the factors of historical dumping margins and import volumes in sunset reviews.[34]

---

[33]U.S. Request for Review of Precise Aspects of the Interim Report, paras. 1-7.

[34]Panel Report, 6.28. The Panel responded to U.S. concerns about Mexico's failure to make a *prima facie* case by commenting that the Appellate Body in *US – Argentina OCTG* had not found fault with Argentina's presentation of the evidence but with the Panel's analysis of the evidence. Panel Report, para. 6.27. Inasmuch as the claim of error in that appeal was pursuant to Article 11 of the DSU, *i.e.*, that the panel failed to make an objective assessment of the matter, rather than a claim with regard to the legal question of whether Argentina had made a prima facie case, it is not surprising that the Appellate Body confined itself to assessing the panel's conduct, as opposed to Argentina's evidence.

Similarly, the Panel wrongly dismissed the relevance of *US – Gambling.* The Panel argued that the Appellate Body in that dispute "faulted the Panel not for its evaluation of the evidence presented by the parties in assessing these claims, but for its review of the evidence presented in order to identify the challenged measures." Panel Report, para. 6.27. The Panel in this dispute did not simply "evaluate" the evidence Mexico presented. The Panel hunted through the 306 determinations Mexico filed in order to help Mexico make its *prima facie* case, just as the panel in *US – Gambling* mined the exhibits in order to do the same for Antigua. In both cases, the complaining party failed to prove each element of its claim based on its own evidence and argumentation; instead, in both cases, the complaining party relied on the Panel to make it case.

Moreover, even if the Panel considered *US – Gambling* inapposite, as noted above the Panel inexplicably failed to address the U.S. comments on the interim report, which explained that the Panel had impermissibly relieved Mexico of its burden of proof, contrary to *Japan – Varietals* and *Canada – Wheat.* See U.S. Request for Revise of Precise Aspects of the Interim Report, paras. 1-7.

21. The Panel's description of Mexico's *prima facie* case is strikingly at odds with its statement of what constitutes a *prima facie* case: a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favor of the party presenting the *prima facie* case.[35] The question the Panel needed to ask itself was not whether Mexico made a claim, but whether Mexico established each element necessary to prevail on its claim. However, as noted above, Mexico's argument about the SPB was a statistical analysis of the outcomes in prior sunset reviews. The Panel Report itself demonstrates that this evidence and argument did not permit the Panel to rule in Mexico's favor:

> We cannot just look at the statistics to determine if, as a matter of law, the scenarios in the SPB are consistently treated by USDOC as determinative or conclusive, in order to assist us in determining whether the SPB is, as such, consistent with Article 11.3 of the AD Agreement . . . . [I]t is not consistency in the outcomes of US sunset reviews, but rather consistency in the process of decision-making, and the bases on which the decisions were reached, that are relevant to our assessment. The fact that in each of 232 of the sunset review determinations put before us in evidence, USDOC made an affirmative determination . . . is *not sufficient in itself to demonstrate that the scenarios set out in the SPB are determinative or conclusive.*[36]

22. By its own admission, then, the Panel could not possibly have ruled in Mexico's favor based on the evidence and argumentation that Mexico provided. Indeed, if it had been possible to rule in favor of Mexico on that basis, the Panel would not have had to conduct its "own" qualitative analysis of the sunset determinations to reach its erroneous conclusion that the SPB is inconsistent with Article 11.3.[37]

---

[35]Panel Report, para. 7.8.
[36]Panel Report, paras. 7.50-7.51 (emphasis added).
[37]Panel Report, paras. 7.63, 7.64.

23. Throughout the panel proceeding, the United States pointed out that the evidence Mexico presented was inadequate to meet its burden of proof. For example, in its *first submission* the United States specifically noted that Mexico's "exhibit" containing all of the determinations revealed nothing more than the fact that in most cases respondents simply do not participate in sunset reviews.[38] The United States also made it clear that the "outcome" of any sunset determination is based on the facts of each case[39] and that the question is not whether dumping margins and import volumes were appropriate considerations but *whether other record evidence was excluded*.[40] In its opening statement at the first panel meeting, the United States noted:

> because Mexico's claim is based merely on the number of sunset reviews in which Commerce found likelihood, without an explanation of the facts in each of these sunset reviews, this Panel should reject it.

24. Mexico responded by assigning this task to the Panel:

> Choose some decisions, any decisions, and ask yourself if the SPB is the benign tool that the U.S. describes.[41]

In its second submission, Mexico simply dismissed the U.S. emphasis on the contested cases as "dubious" and declined to engage in any substantive analysis of these cases whatsoever.[42] Thus, Mexico was on notice well before the Appellate Body issued its report in US – Argentina OCTG that its bald assertions about the relevance of its "exhibits" were not sufficient to make its *prima facie* case. Mexico refused to even attempt to cure this defect.

---

[38]U.S. First Written Submission, paras. 106, 109.
[39]U.S. First Written Submission, para. 102.
[40]U.S. First Written Submission, para. 104.
[41]Mexico Closing Statement at the First Meeting of the Parties, p. 1.
[42]Mexico Second Written Submission, para. 18.

25. Therefore, the Panel impermissibly relieved Mexico of its burden of proof and made Mexico's case for it. Because the Panel's conclusion that the SPB was inconsistent with Article 11.3 was based on this impermissible approach, the Panel's finding should be reversed.

B. The Panel Failed to Apply the Correct Standard in Evaluating Whether the SPB is Inconsistent with Article 11.3

26. As noted above, the Appellate Body has made clear that the question is whether the SPB "instructs" Commerce to attach "decisive or preponderant weight"[43] to dumping margins and import volumes. In rejecting the *Argentina OCTG* panel's reliance on statistics and aggregate results in support of its conclusion that the SPB was inconsistent with Article 11.3, the Appellate Body explained the kind of analysis that is necessary to evaluate whether the SPB is inconsistent with Article 11.3.

> It is essential to examine concrete examples of cases where the likelihood determination of continuation or recurrence of dumping was based solely on one of the scenarios of section II.A.3 of the SPB, even though the probative value of other factors might have outweighed that of the identified scenario.[44]

27. Thus, according to the Appellate Body, in order to conclude from Commerce's determinations that the SPB instructs Commerce to treat dumping margins and import volumes as determinative, an analysis of those determinations must demonstrate that Commerce identifies a scenario in the SPB and bases its determination solely on the scenario, even though the probative value of other factors might have outweighed that of the scenario.

28. In this regard, the Appellate Body did not conclude that the probative value of the scenarios could be dismissed. To the contrary, the Appellate Body explained that the "'volume

---

[43] *US – Japan Sunset (AB)*, para. 176.
[44] *US – Argentina OCTG (AB)*, para. 209.

of dumped imports' and 'dumping margins', before and after the issuance of anti-dumping duty orders, are highly important factors for any determination of likelihood of continuation or recurrence of dumping in sunset reviews . . . ."[45] The Appellate Body went on to note that other factors "may also be important, depending on the circumstances of the case."[46]

29. In short, an examination of outcomes in determinations where the SPB is applied or, more accurately, referred to, may not serve as a basis for concluding that the SPB breaches Article 11.3; rather, for an examination of those determinations to establish a breach, there must be a qualitative assessment to evaluate whether the SPB requires Commerce to treat the SPB scenarios as determinative even though the probative value of other factors might have outweighed that of the identified scenario.

30. In this connection, the Panel itself identified its task as determining whether there is a "consistent USDOC practice" and a "pattern of consistent application of the SPB" which can aid in its analysis.[47] Yet the Panel in virtually the same breath admitted that it did not have the evidence before it which could have made such an analysis possible and did not look at all of the evidence that it had. It is hard to credit the Panel's conclusion that there was a "consistent application" when the Panel merely examined a "sampling" of 206 determinations.[48] Further, with regard to 21 determinations, the Panel explained that it relied only on the "published USDOC determinations in these [21] cases, and where they exist and *were submitted*

[45]*US – Argentina OCTG (AB)*, para. 208.
[46]*US – Argentina OCTG (AB)*, para. 208.
[47]Panel Report, paras. 7.54, 7.55.
[48]Panel Report, para. 7.53.

in evidence, the underlying decision memoranda."[49] Thus, the Panel explained that it was drawing its conclusion on Commerce's "consistent practice" in all cases based on evidence relating to only some.

31. In addition, the United States takes issue with the Panel's characterization of many of the determinations upon which its conclusion about the SPB was based. The United States addresses that issue in the next section. However, even more fundamental than the Panel's mischaracterization of the determinations was its failure to analyze those determinations with a view to determining the SPB's *role* in the outcomes, and in particular whether the SPB *caused* those outcomes.

32. The Panel in fact prejudged that question by undertaking, on its own, to classify the determinations according to the SPB scenario the *Panel* considered applicable. In other words, the Panel failed to analyze whether Commerce in a given determination even *identified* an SPB scenario that it considered applicable, let alone whether the SPB compelled an outcome on the basis of the applicability of that scenario.[50]

33. Second, having shoehorned the determinations into these classifications, the Panel selectively quoted the determinations out of context in order to conclude that Commerce disregarded evidence of other factors and treated the Panel-identified scenario as determinative. The Panel failed to explore whether Commerce disregarded evidence of other factors that had

[49]Panel Report, para. 7.55 (emphasis added).

[50]In addition, as detailed below, the Panel's classification does not always comport with the actual facts of the determinations.

any probative value at all, let alone probative value that might outweigh that of the "SPB scenario" the Panel presumed Commerce to have relied on.

34. The Panel's analysis assumed, for example, that if Commerce concluded that continuation of dumping over the life of the order was probative of the likelihood of continuation or recurrence of dumping, the SPB was responsible for Commerce's conclusion simply because the SPB describes a scenario in which dumping continued over the life of the order. The Panel's analysis does not explore whether those determinations reveal that the SPB caused Commerce to ignore probative evidence that might outweigh a scenario described in the SPB and identified as such by Commerce in the determination.

35. As a result, the Panel's analysis, as detailed below, consists of nothing more than noting that the SPB describes a number of scenarios that fit the facts of many of the sunset reviews in the Panel's "sampling";[51] it says nothing about whether the SPB required the outcome in those cases. In essence, the Panel simply undertook a more detailed "outcomes" analysis than the panel in *US – Argentina OCTG*.[52]

36. Indeed, the Panel admitted as much; at the conclusion of its "qualitative assessment," the Panel stated that the "consistency of the outcomes" of the sunset reviews was "troubling."[53] But the purpose of requiring a qualitative analysis was not to reinforce assumptions about the "results" – an approach the Appellate Body expressly rejected; it was to ascertain whether

[51]Panel Report, para. 7.53.

[52]Notably, this Panel stated at the conclusion of its "qualitative analysis" that the "consistency of the outcomes" of the sunset reviews was "troubling." Panel Report, para. 7.61.

[53]Panel Report, para. 7.61.

Commerce bases its determinations solely on the "identified" scenario in the SPB even though the probative value of other factors might have outweighed that of the identified scenario.

37. The Panel began its analysis by noting that there were 306 sunset review determinations. The Panel then excluded the 74 determinations that resulted in termination of the order based on lack of participation by the domestic industry.

38. The Panel next considered the determinations in which the foreign respondent parties did not participate at all or did not participate fully. These determinations – 206 of them – accounted for almost two-thirds of the total determinations. The Panel reviewed "a sampling" of these determinations and then simply *asserted* that each "final affirmative determination . . . was based on one of the three . . . scenarios."[54] The Panel did not provide a single citation to any of the determinations "sampled," making it impossible to evaluate the Panel's conclusion. This omission is particularly egregious in light of the fact that the Panel provided *no* justification for its conclusion that the "sampled" determinations were "based on"[55] the SPB scenarios. Moreover, the Panel failed to evaluate whether *any* evidence of other probative factors had even been presented – indeed, it seems likely that no such evidence was presented, given the limited or non-existent participation by the respondent interested parties. Thus, the Panel's "analysis" of these determinations certainly cannot support a conclusion that Commerce based its determinations solely on the scenarios in the SPB and because of the SPB, even though the probative value of other factors might have outweighed that of the identified scenario. Indeed,

[54]Panel Report, para. 7.53.
[55]Panel Report, para. 7.53.

the Panel's analysis of these determinations only confirms that the requisite qualitative assessment was not undertaken.

39. The Panel devoted the bulk of its consideration to the remaining 21 determinations in which both domestic and foreign parties participated.[56] With regard to these determinations, the Panel did little more than categorize the determinations according to what the Panel – not Commerce – decided was the applicable SPB scenario.[57] In other words, the Panel did not even consider whether Commerce in the determination "identified" any of the scenarios. Having itself concluded that the facts of the determination fit one of the SPB scenarios, the Panel assumed that Commerce did so as well, and that the outcome in the determination had to have been based on that "fact." In other words, the Panel assumed the role of the SPB from the facts of the case and the conclusion reached, rather than examining Commerce's analysis to ascertain the actual role of the SPB in the determination. In effect, the Panel simply engaged in another "outcomes" analysis.

40. According to the Panel's own categorization of these 21 cases, 15 involved a factual situation in which dumping continued over the life of the order. The Panel never found that Commerce itself identified this factual situation as corresponding to one of the scenarios of the SPB; rather, the Panel concluded that "the USDOC *appears to have considered* that scenario (a) of the SPB applied."[58]

---

[56]The Panel did not consider five reviews involving suspended investigations. Panel Report, para. 7.54.

[57]The Panel's exercise in categorization is particularly surprising, given that it ignores the aspect of the determinations the Appellate Body considered particularly relevant, whether "other good cause factors" had been alleged. *US – Argentina OCTG (AB)*, para. 206.

[58]Panel Report, para. 7.56 (emphasis added).

41. The Panel moved on to note its conclusion that, in almost half of the determinations the Panel categorized as involving dumping over the life of the order, no evidence of other factors was put before Commerce.[59] The Panel then simply jumped to the conclusion that in each of these determinations, Commerce's affirmative determination was "based on one of the three affirmative SPB scenarios."[60] However, as noted above, the Panel itself never went beyond the conclusion that the facts of the determinations fit within one of the SPB scenarios, and that Commerce "appears to have considered" scenario (a) applicable.[61] The Panel never actually examined whether the SPB was responsible for the outcome, rather than the logic of the evidentiary record before Commerce. In this regard, it is worth recalling the Appellate Body's explanation that a presumption of likelihood "might have some validity when dumping has *continued* since the duty was imposed . . . particularly when such dumping has continued with significant margins and import volumes."[62] In these determinations, no arguments or information was put before Commerce on "other factors," and the probative value of continued dumping over the life of the order went uncontested. In any event, these determinations shed no light on the question as to whether the SPB requires Commerce to make affirmative findings even when probative evidence might outweigh the SPB scenarios, since no evidence of other factors that "might outweigh" the "scenarios" in the SPB was even offered.

42. The Panel next looked at five of the "continued dumping" cases in which the Panel stated that "respondent foreign parties appear to have made arguments concerning the relevance of the

---

[59]Panel Report, para. 7.57.
[60]Panel Report, para. 7.57.
[61]Panel Report, para 7.56.
[62]*US – Japan Sunset (AB)*, para. 177.

scenarios and other evidence, although they do not appear to have specifically asserted that good cause existed to consider other factors."[63] The Panel stated that "these cases *suggest* that USDOC *may* have considered the existence of facts fitting scenario (a) as determinative."[64] This statement is troubling. The Panel based its "qualitative assessment" on a mere 21 cases, and for five them – involving continued dumping – the Panel could not even come to a definitive conclusion as to whether other factors had been alleged or whether Commerce had considered them. As discussed below, the Panel also engaged in a selective analysis of these determinations, ignoring exculpatory statements found therein.

43. Again, the Panel simply assumed that the SPB had something to do with the outcome because there were "facts fitting" a scenario from the SPB, with no actual citation to where in the determination Commerce actually linked these facts to the SPB or stated that the SPB compelled that it treat those facts as determinative. Even more egregious, the Panel does not even conclude that Commerce actually treated those facts (let alone the SPB) as determinative; it states that the cases "suggest" that Commerce "may" have treated those facts as determinative. This is a far cry from the type of evidence needed to demonstrate that a measure, which on its face does not require a WTO-inconsistent result, in fact does require that result. This "evidence" consists of noting more than speculation about the role of the SPB by a Panel which assumed that the SPB played a role.

44. In connection with these five cases, the lone support the Panel provided was a single quotation from a preliminary determination in which, according to the Panel, Commerce stated

[63]Panel Report, 7.58.
[64]Panel Report, para. 7.58 (emphasis added).

that it based its preliminary results "on the continuation of dumping" such that "we have not considered the interested parties' arguments related to other factors."[65] In fact, the Panel misunderstood this determination. First of all, when read in full, the determination does not (as the Panel asserted) "suggest" that Commerce "may have" relied solely on evidence of continued dumping in reaching its affirmative conclusion. Commerce expressly stated that "given that dumping continued after the issuance of the order, *and that imports during 1997 and 1998 were at volumes far below pre-order levels*, we preliminarily determine that dumping is likely to continue if the order were revoked."[66] This statement makes no reference to the Sunset Policy Bulletin.

45. Moreover, the Panel failed to appreciate the fact that the respondent in that investigation *never contended* that it was introducing evidence concerning other factors. Rather, it was the domestic interested party that asserted the respondent was introducing evidence of "other factors" and that the respondent did so without alleging good cause.[67] Thus, when Commerce stated that it was not considering the interested parties' arguments relating to "other factors," Commerce was explaining that it was not considering the *domestic* interested parties' arguments about whether the respondent had introduced evidence of other factors.

46. In fact, according to the very Issues & Decision Memorandum quoted by the Panel, the evidence characterized by *domestic* interested parties as "other factors" evidence was submitted in support of the respondent's argument that *lifting the order would result in no significant*

---

[65]Panel Report, para. 7.58, citing Exhibit MEX-62 Tab 89.

[66]Exhibit MEX-62 Tab 89, Issues & Decision Memorandum (Preliminary, p. 5 (emphasis added).

[67]Exhibit MEX-62 Tab 89, Issues & Decision Memorandum (Preliminary), p. 4.

change in import volumes and prices.[68] In this case, the respondent was the exporter's supplier, and the exporter had a dumping margin of over 20%.[69] An admission that nothing will change – including prices which underpinned the dumping that had continued over the life of the order – hardly constitutes probative evidence outweighing the existence of continued dumping. There is, therefore, no basis for the Panel's contention that "such statements are troubling, as they certainly do not indicate an open-minded willingness to consider potentially relevant information and make an objective evaluation based on the circumstances of each case;"[70] the Panel failed to identify *any* potentially relevant information, and the supposed "other evidence" offered *supported continuation of the order*.

47. The Panel also considered the remaining three cases of "continued dumping," in which Commerce rejected the respondent foreign parties' assertion of good cause.[71] However, the Panel again failed to evaluate whether the SPB was even a factor in Commerce's decision-making, or whether the evidence of other factors the respondents sought to submit had any probative value whatsoever. Indeed, the picture the Panel paints of Commerce is belied by the Panel's admission that even when respondents failed to allege good cause in a timely fashion, Commerce nevertheless explained why the respondent's good cause arguments would not have been persuasive.[72] First, as above, the determination upon which the Panel relied did not only involve continuation of dumping, but rather a concurrent decline in import volumes: "Given that

[68]Exhibit MEX-62 Tab 89, Issues & Decision Memorandum (Preliminary), pp. 3-4.
[69]Exhibit MEX-62 Tab 89, Issues & Decision Memorandum, (Preliminary), pp. 1-2.
[70]Panel Report, para. 7.58.
[71]Panel Report, para. 7.59.
[72]Panel Report, para. 7.59.

dumping continued after the issuance of the order and imports continued in 1998 at levels far below pre-order levels, we determine that dumping is likely to continue if the order were revoked."[73] Therefore, again, this determination does not fit into the Panel's categorization. Second, Commerce explained that "even if the Department were to consider these factors, they would be outweighed by the margin and import volume evidence on record. These factors do not provide sufficient evidence that NSC is not likely to dump in the future . . . ."[74] In other words, Commerce *considered* the probative value of the evidence submitted and *weighed* it against the fact that dumping had continued over the life of the order and import volumes had declined. Commerce simply concluded that the continued dumping and low import volumes – and in particular the relationship between the two – were more probative.

48. The Panel next considered four cases in which dumping had been eliminated and import volumes had declined significantly.[75] In only two of the cases did the respondents argue good cause. Again, the Panel failed to evaluate the role the SPB played, if any, in Commerce's decision-making, as well as whether the evidence respondents sought to introduce had any probative value at all, let alone whether it may have outweighed the significant decline in import volumes.[76] Moreover, the Panel stated that in one of the cases, "despite an asserted willingness in the preliminary phase to consider additional evidence and arguments," Commerce made a final

---

[73]Exhibit MEX-62 Tab 78, Issues & Decision Memorandum (Final), p. 6. The Panel provided no specific citation with regard to its statements regarding Commerce's consideration of "good cause." The United States assumes the Panel was referring to the Issues & Decision Memorandum.

[74]Exhibit MEX-62 Tab 78, Issues & Decision Memorandum (Final), p. 6.

[75]Panel Report, para. 7.60

[76]The United States also takes issue with the Panel's characterization of how Commerce treated the "good cause" arguments, as discussed the next section.

affirmative determination of likelihood, "relying on a decline in import volumes, as set out in one of the SPB scenarios."[77] This statement ignores the fact that, while Commerce clearly indicated in the preliminary determination a willingness to consider additional evidence and arguments, the respondent *never actually submitted* such additional evidence and arguments. Furthermore, notwithstanding respondents' failure to provide this additional argumentation and evidence, Commerce nevertheless considered the evidence of other factors – in this case, a decline in market share – and stated that the record evidence did not support respondents' assertion. In other words, based on an examination of the evidence, Commerce did not consider the probative value of "other factors" to outweigh the probative value of the decline in import volumes.[78] In any event, the determination offers no indication that it was the SPB that compelled Commerce's decision, and the Panel does not claim that it does.

49. Finally, the Panel considered two determinations in which Commerce reached a preliminary negative determination of likelihood of continuation or recurrence of dumping. As before, the Panel failed to consider whether the SPB played any role whatsoever in the determination, whether evidence of "other factors" had been introduced , or whether such evidence had any probative value that might outweigh the identified scenario in the SPB[79]

50. In short, the Panel's analysis reveals only that in the vast majority of determinations, foreign respondent parties do not offer any evidence at all, and that for the majority of the remaining determinations, dumping continued over the life of the order. The Panel's analysis

---

[77]Panel Report, para. 7.60.

[78]Exhibit MEX-62 Tab 165, Issues and Decision Memorandum (Final), p. 3.

[79]Again, in the following section the United States disputes the Panel's characterization of these determinations.

reveals nothing about whether respondent interested parties offered evidence with any probative value at all, let alone whether Commerce disregarded evidence that might have outweighed the evidence concerning continued dumping and import volumes. And the Panel cited nothing from these determinations that suggested that the SPB required Commerce to treat the scenarios therein as determinative/conclusive, such that Commerce was required to disregard probative evidence that might have outweighed the factors provided for in those scenarios.

III. The Panel Failed to Make an Objective Assessment of the Matter Before It

51. As the United States demonstrated above, the Panel made two errors of law: Relieving Mexico of its burden of proof and applying the incorrect standard in evaluating whether the SPB is inconsistent with Article 11.3. In addition to these errors, the "qualitative assessment" that the Panel undertook does not constitute an objective assessment of the matter. Instead, the Panel's analysis was a distorted presentation of the evidence, including the selection of inculpatory statements, taken out of context, to the exclusion of other exculpatory statements.

52. After excluding reviews in which Commerce revoked the order, the Panel began its analysis with the explanation that it *sampled* the pool of 206 sunset reviews where there was little or no respondent interested party participation.[80] The Panel did not identify these determinations, nor the basis on which the Panel concluded that there was little or no foreign respondent participation; indeed, the Panel failed even to identify the "samples" it reviewed. The Panel then proceeded with the conclusory statement that based on this "sampling," the affirmative likelihood

[80]Panel Report, para. 7.53.

determinations were "based on one of the three affirmative scenarios."[81] If the Panel provides no reasoned explanation for its conclusion and fails even to provide citations in support of such conclusion, then it is impossible for the Appellate Body (or any reader of the panel report) to conclude that the Panel made an objective assessment of the matter.

53. The Panel stated that, in each of its identified "sampled" decisions, Commerce's final likelihood determination was based on one of the three SPB scenarios. The Panel failed to consider, in these cases, whether dumping had in fact continued over the life of the order, whether imports had declined, or, indeed, any of the actual reasoning underpinning Commerce's decisions. The implication of the Panel's exclusive emphasis on the SPB is that these bases, continued dumping and depressed import volumes, are somehow suspect because they are listed as factors for consideration in the SPB; in other words, regardless of the probative value of continued dumping or depressed import volumes in any particular case, Commerce's determination is suspect simply because the SPB describes a scenario involving those circumstances. As the Appellate Body in *US – Argentina OCTG* stated, however, "[in] our view, [dumping margins and import volumes], before and after the issuance of anti-dumping orders, are highly important factors for any determination of likelihood of continuation or recurrence of dumping in sunset review, although other factors may also be as important, *depending on the circumstances of the case.*"[82] Thus, the Panel's cursory assumption that the SPB required

---

[81]The Panel also opined that "there may well have been other facts that might be relevant or probative, but they were not before USDOC, and thus were not addressed." Para. 7.53. The Panel did not make clear how such supposed "other facts" could have been submitted given that the respondent interested parties did not participate at all.

[82]*US – Argentina OCTG (AB)*, para. 208 (emphasis supplied). See also *US – Japan Sunset (AB)*, para. 175 ("[D]umping margins and import volumes ... will often be pertinent to the

Commerce to make any of the determinations does not reflect an objective assessment of the matter.

54. The Panel then compounded its failure to make an objective assessment of the matter with its classification of the remaining reviews.[83] As noted above, rather than examining the determinations according to whether "good cause" was demonstrated – or even whether evidence of other factors was introduced – the Panel *assumed* that the determinations were based on one of the scenarios outlined in the SPB and analyzed them accordingly. This assumption is confirmed by the Panel's statements with respect to the "categories": Nowhere does the Panel provide that *Commerce* stated any particular SPB scenario was applicable. Instead, the Panel states that "these cases suggest that USDOC may have considered the existence of facts fitting scenario (a) as determinative"[84] and "USDOC appears to have considered that scenario (c) of the SPB applied."[85] The Panel did so absent a comprehensive textual analysis – a qualitative analysis – of the determinations it purported to be analyzing. This does not constitute an objective assessment of the matter.

55. Notwithstanding that the question to be considered with regard to the SPB is whether Commerce identifies a scenario in the SPB and relies solely thereon, even though probative value of evidence of other factors might outweigh the identified scenario, the Panel's analysis of Commerce's treatment of such evidence was subsidiary to its assumption that the SPB formed the basis for these determinations in the first place. Even when the Panel did undertake such an

---

likelihood determination.")

[83]The remaining reviews excluded those involving suspended investigations.

[84]Panel Report, para. 7.58.

[85]Panel Report, para. 7.60.

analysis, the Panel's evaluation was biased. Rather than reviewing the determinations in their entirety, the Panel selectively cited certain statements from the determinations while failing to acknowledge countervailing statements – or facts. Indeed, notably absent from the Panel's analysis is any assessment of the factual circumstances of the determinations in question, including the nature of the evidence introduced.

56. Of the 15 cases the Panel identified as involving "continued dumping,"[86] the Panel noted that respondent interested parties made arguments or discussed other evidence, without specifically asserting "good cause" existed, in five cases.[87] The panel, as noted above, simply stated that "[t]hese cases suggest USDOC may have considered the existence of facts fitting [Sunset Policy Bulletin] scenario (a) as determinative."[88] This statement is incorrect. The Panel conducted no analyses of these five sunset reviews, nor did it discuss Commerce's treatment of the interested parties' arguments.

57. Instead of considering Commerce's analysis in making the likelihood determinations in these sunset reviews, the Panel's entire analysis for these fives cases rests on one statement from a *preliminary* determination made in a single sunset review.[89] As noted above, the Panel quoted this determination out of context: "[b]ecause we have based these preliminary results on the continuation of dumping, we have no considered the interested parties' arguments related to other factors."[90] The respondent never alleged that it was introducing evidence of "other factors"

---

[86]The United States notes again that the Panel's classification is at odds with Mexico's classification.

[87]Panel Report, para. 7.58.

[88]Panel Report, para. 7.58.

[89]Panel Report, para.7.58.

[90]Panel Report, para. 7.58.

– rather, it was the domestic interested parties who characterized respondents' evidence.[91] As a result, when Commerce stated that it was not considering the interested parties' arguments relating to "other factors," Commerce was explaining that it was not considering the *domestic* interested parties' arguments about whether the respondent had introduced evidence of other factors, rather than refusing to consider such evidence itself. The respondent never addressed the domestic interested parties' arguments, nor Commerce's conclusion; as the Panel report itself notes, the respondent did not submit case briefs for the final determination.[92]

58. In addition, according to the very Issues & Decision Memorandum quoted by the Panel, whether the evidence presented by the respondent was of "other factors" or not, the respondent introduced such evidence by arguing that *lifting the order would result in no significant change in import volumes and prices.*[93] An admission that nothing will change hardly constitutes probative evidence outweighing the existence of continued dumping.[94] There is, therefore, no basis for the Panel's contention that "such statements are troubling, as they certainly do not indicate an open-minded willingness to consider potentially relevant information and make an objective evaluation based on the circumstances of each case;"[95] the Panel failed to identify *any* potentially relevant information, and the supposed "other evidence" offered *supported continuation of the order*.

---

[91]Exhibit MEX-62 Tab 89, Issues & Decision Memorandum (Preliminary), p. 4.

[92]Panel Report, n.72.

[93]Exhibit MEX-62 Tab 89, Issues & Decision Memorandum (Preliminary), pp. 3-4.

[94]In addition, only one respondent participated in the review. Another respondent with a dumping margin of over 20% did not participate in the review. Exhibit MEX-62 Tab 89, Issues & Decision Memorandum (Preliminary), p.1 (Sidex provided a substantive response) and p.3 (Windmill's rate was 20.62 percent).

[95]Panel Report, para. 7.58.

59. Moreover, the Panel provides no explanation for its argument that these particular cases even involved arguments regarding "other evidence." For example, in *Canned Pineapple Fruit from Thailand*, Dole was the only respondent that participated, notwithstanding that the determination identified seven foreign companies.[96] After rejecting domestic interested parties' arguments that Dole's participation did not warrant a full sunset review,[97] Commerce then reviewed Dole's arguments, which pertained to whether its own dumping margin was above *de minimis* and not to the issue of whether dumping was likely to continue or recur if the order were revoked. It is not at all clear that these arguments even constituted evidence of "other factors;" regardless, the evidence supplied was irrelevant to the issue at hand. Commerce's sunset reviews are conducted on an order-wide basis. Thus, an individual company's margin is not germane to the question of whether dumping is likely to continue or recur, particularly when six other exporters have continued to dump over the life of the order.

60. In short, the Panel failed to explain the basis on which it concluded that respondents had introduced evidence of other factors, in addition to failing to justify its assertion that Commerce "appears" to have considered the SPB determinative. The Panel's cursory conclusions about these cases, without any qualitative examination of them, is not consistent with its obligation to conduct an objective assessment of the matter.

---

[96]Exhibit MEX-62 Tab 35, Issues & Decision Memorandum (Preliminary), p. 1.

[97]The United States notes that Commerce did so by noting that while the regulations state that Commerce "normally" will not conduct a full review where the respondent interested parties account for less than 50% of imports, the qualification "normally" in fact permits Commerce to conduct such reviews. Exhibit MEX-62 Tab 35, Issues and Decision Memorandum (Preliminary), para. 3. Notably, the word "normally" also appears in the SPB, and the United States has consistently argued that use of the word "normally" confirms that the text of the SPB itself does not *require* Commerce to do anything.

61. Next, the Panel examined three sunset reviews where "good cause" was asserted and the interested parties submitted arguments concerning "other factors." The Panel concluded that Commerce rejected the assertion of good cause in each of these cases.[98] The Panel again revealed its lack of objectivity by selectively quoting from just one of the determinations. In particular, the Panel noted that, although the respondent failed to make its good cause argument in a timely fashion, "USDOC indicated that even if it had considered the other factors, the determination would still have been based on the import volumes and dumping margins on the record."[99] This statement is misleading. In that determination, Commerce explained that

> even if the Department were to consider these factors, they would be outweighed by the margin and import volume evidence on record. These factors do not provide sufficient evidence that NSC is not likely to dump in the future . . . ."

Commerce *considered* the probative value of the evidence submitted and *weighed* it against the fact that dumping had continued over the life of the order and import volumes had declined. Again, the Appellate Body has made clear that continued dumping over the life of the order is a valid basis for rendering an affirmative determination; thus, the question is not whether continued dumping (and low import volumes) are *per se* an invalid reason for continuing the order but whether the SPB required Commerce to disregard other evidence even though its probative value might have outweighed that of the "identified" SPB scenario.

62. Commerce simply concluded that the continued dumping and low import volumes – and in particular the relationship between the two – were more probative. The Panel's conclusion that Commerce "rejected" the assertions of "good cause" in this review without any serious analysis

---

[98]Panel Report, para. 7.59.
[99]Panel Report, para. 7.59.

sheds no light on the reasons for the "rejections" or the relevance of Commerce's actions in this review or any of the other reviews before the Panel. Rather than engaging in such an analysis, the Panel simply concluded that wherever continued dumping formed the basis for Commerce's decision, the SPB was the reason for it, and that reason was insufficient, regardless of the evidence of other factors submitted.

63. Finally, the Panel also considered four cases where "USDOC appears to have considered that scenario (c) of the SPB applied."[100] The Panel asserts that respondents argued "good cause" only two of the cases. The Panel then states that "these arguments were rejected by USDOC in each case. Again, the stated rationale for certain of the rejections is circular and troubling: 'Since we are basing our likelihood determination on the elimination of dumping at the expense of exports, it is not necessary to consider other factors . . . ."[101] The Panel quoted Commerce's *preliminary* determination without taking into account Commerce's views in the final: "

> [T]he Department will consider factors other than import volumes where good cause for such consideration is shown to exist. While the apparent focus of [respondent's] business may have been modified since the order was issued, *we are not persuaded that this change, rather than the issuance of the order* accounts for the drastic reduction in exports to the United States since the period prior to the order.[102]

In fact, in the process of considering whether the respondent had shown good cause, Commerce weighed the probative value of the evidence itself. The Panel, however, ignored this aspect of the determination. The Panel's approach hardly constitutes an objective assessment of the matter.

---

[100]Panel Report, para. 7.60.
[101]Panel Report, para. 7.60.
[102]Exhibit MEX-62 Tab 201, Issues and Decision Memorandum (Final), p. 5.

64. The Panel's assessment also fails to be objective because the Panel simply disregards the language that the Panel itself quotes: "the Department will consider factors other than import volumes where good cause for such consideration is shown to exist." The Panel itself finds that Commerce has publicly stated that the SPB scenarios are not determinative. The Panel says that: "we recognize that the USDOC itself has stated that the SPB scenarios are not determinative in its decision-making."[103] And again, the Panel states that: "We therefore conclude that, despite the apparent recognition that it may do otherwise . . . ."[104] The Panel never explains how its analysis of the various determinations - which is at best indirect evidence of the interpretation of the SPB - could outweigh the express statement of Commerce that it did not view the SPB scenarios as determinative. These statements were presumably highly probative of the issue, yet the Panel ignores them. The Panel appears to simply disregard the statements by the authority that issued the SPB as to its import, and instead the Panel relies on an approach concerning what the Panel believes Commerce thought about the SPB.

65. In addition, the Panel finds that the relevant statute does not require Commerce to treat historical dumping margins and import volumes as determinative, but rather mandates that Commerce take into account other factors. The Panel states that it is its "view that the statute does not establish that the factors of historical dumping margins and import volumes have conclusive or determinative weight in USDOC determinations of likelihood of continuation or recurrence of dumping."[105] The Panel however ignores this important evidence when considering

[103]Panel Report, para. 7.61
[104]Panel Report, para. 7.64.
[105]Panel Report, para. 7.38.

the SPB. The Panel never considers any basis for the SPB to be able to contradict a statute, nor did Mexico present any evidence that this was possible. The Panel's findings concerning the SPB ignore its place in the U.S. domestic legal system. The Panel's findings concerning the statute and SPB are contradictory, and the Panel's findings concerning that the SPB could impose a requirement on Commerce contrary to that required by statute are unsupported by evidence. The Panel's findings are not the result of an objective assessment of the matter.

66. In the second determination, the Panel stated that "despite an asserted willingness in the preliminary phase to consider additional evidence and arguments, USDOC made a final affirmative determination of likelihood, relying on a decline in import volumes, as set out in one of the SPB scenarios."[106] This characterization of the determination is profoundly misleading. The respondent interested parties preliminarily argued that changes in the market indicated that the reduction in imports over the five-year period prior to the sunset review could be explained by their reduced market share generally. The respondent interested parties, however, failed to provide any information or factual support for their market share claims. Nevertheless, Commerce provided the respondent interested parties an additional opportunity to provide documentation or other information to support their market share claim.[107] The respondent interested parties did not avail themselves of this additional opportunity.[108] Moreover, rather than simply ignoring the argument, Commerce discussed it and concluded that the evidence did not support respondents' assertion.[109]

---

[106]Panel Report, para. 7.60.
[107]Exhibit MEX-62 Tab 165, Issues and Decision Memorandum (Preliminary), pp. 2-3.
[108]Exhibit MEX-62 Tab 165, Issues and Decision Memorandum (Final), p. 5.
[109]Exhibit MEX-62 Tab 165, Issues and Decision Memorandum (Final), p. 3.

67. The Panel last considered two determinations in which Commerce made a preliminary negative determination and then made a final affirmative determination. According to the Panel, in one of the determinations, "scenario (c) appeared to be relevant."[110] As with the other determinations, however, the Panel failed to identify whether Commerce even identified "scenario (c)," much less whether Commerce relied on scenario (c) to the exclusion of other evidence. Rather than examining Commerce's treatment of the "other factors" information in these review, the Panel, instead, again chose to focus on the result – the final affirmative likelihood determination.[111] A closer examination of the facts of this review would have indicated *why* Commerce made an affirmative determination. It was not because the SPB required it to; it was because the evidence of other factors upon which Commerce relied in making the determination proved to be unfounded – *as the respondent admitted*.

> The Department's preliminary results that the recently calculated [zero] margins were, despite the significant decrease between pre- and post-order import volumes, nonetheless probative of [the respondent's] behavior without the discipline of the order was based on [the respondent's] representation that the acquisition of [an American producer] enable [the domestic producer] to meet U.S. demand . . . .[112]

In other words, Commerce considered that because the respondent had acquired an American company and argued that the American company would supply the American market, the respondent's argument that it would not need to import in significant volumes in the future was probative. Thus, the currently depressed import volumes were not indicative of future import

---

[110]Panel Report, para. 7.62. It is not clear why the Panel did not consider this determination with the other so-called "scenario (c)" determinations.

[111]Panel Report, para. 7.62.

[112]Exhibit MEX-62 Tab 32, 65 Federal Register 737.

volumes, and the elimination of dumping at the expense of imports was not likewise not indicative of future behavior.

68. However, the respondent ultimately contradicted its assertions concerning import volumes and in fact admitted that it intended to increase these volumes once the order was revoked:

> [I]n light of [the respondent's] stated intent to begin importing subject merchandise into the United States at pre-order levels once the order is revoked . . . the more recently calculated margins are not probative of the behavior of [the respondent] were the order revoked.[113]

69. Thus, far from demonstrating that the SPB requires Commerce to ignore probative evidence of other factors, this determination proves that Commerce in fact does consider such evidence. However, if the other evidence proves to be *false,* by the respondent's *own admission*, no objective assessment can conclude that the *SPB* compelled the affirmative determination.

70. The Panel's "analysis" of the remaining determination is equally lacking in objectivity. Noting that Commerce initially made a negative determination, the Panel then stated that Commerce took "the unusual step of conducting a cost-of-production analysis, and calculated a dumping margin, and made an affirmative determination of likelihood, based on the conclusion that dumping continued over the life of the order, as suggested by scenario (a)."[114] What the Panel's selective recitation of "facts" failed to acknowledge is that in this determination Commerce initially rejected the *domestic interested party's* assertion of good cause to consider cost-of-production information.[115] In addition, Commerce noted that the arguments of *both* the

---

[113]Exhibit MEX-62 Tab 32, 65 Federal Register 737.
[114]Panel Report, para. 7.62.
[115]Exhibit MEX-62 Tab 261, 64 Fed. Reg. 48363.

respondent and the domestic interested party "revolve around whether or not pricing and cost data indicate that dumping has been taking place."[116] Commerce noted: "Although we had not requested the information and had determined for the preliminary results that there was no basis to consider such additional information, because [respondent] had presented the information in its substantive and rebuttal responses"[117] Commerce conducted an on-site verification. As a result of that verification, Commerce concluded that "at least some of [respondent's] sales to the United States" were at prices below constructive value.[118]

71. Moreover, nothing in this determination suggests that Commerce conducted this analysis because of "SPB scenario (a)." The determination makes clear that Commerce engaged in the cost-of-production analysis because of the arguments of *all* the domestic interested parties, not because of the SPB. Commerce's affirmative determination was not driven by the SPB but by the fact that a verification provided evidence that, if the order were revoked, it was highly likely that respondent would have to engage in dumping. The Panel's misrepresentation of this determination only further confirms the lack of objectivity with which it considered this matter.

72. The Panel's ultimate conclusion that "USDOC has consistently based its determinations in sunset review exclusively on the scenarios, *to the disregard of other factors*" is simply

[116]Exhibit MEX-62 Tab 261, 64 Fed. Reg. 48363.

[117]Exhibit MEX-62 Tab 261, 64 Fed. Reg. 48363.

[118]Exhibit MEX-62 Tab 261, 64 Fed. Reg. 48364. The Panel also erred in stating that Commerce "calculated a dumping margin." Commerce did not calculate a dumping margin. Commerce concluded that some sales had been made at prices below constructed value. Commerce reported a margin likely to prevail, but that was the rate from the original investigation. 64 Fed. Reg. 48366.

unsupported by the sunset reviews found in MEX-62.[119] As we have demonstrated above, the Panel's conclusion relies on a flawed, biased, and superficial recitation of certain facts in certain determinations. The Panel stated that it does not "dispute that USDOC might have reached the same conclusions in some cases even had it not mechanistically applied the SPB scenarios, but rather carried out an objective analysis of the relevant facts. However, the existence of some correct results does not undermine our conclusion that USDOC made its determinations by applying the SPB scenarios, to the disregard of other potentially relevant and probative information."[120] This statement is extraordinary for a number of reasons. First, nothing in the Panel's analysis established that Commerce "mechanistically applied" the SPB scenarios. Nothing in the Panel's analysis established that Commerce applied the SPB scenarios at all. Second, this statement reveals that the Panel did not even inquire as to whether any such "application" was because the SPB *so required.* The Appellate Body did not ask whether Commerce applies the SPB mechanistically. The Appellate Body asked whether the SPB instructs Commerce to regard the scenarios therein as determinative, rather than indicative, to the disregard of other factors. Third, the Panel engaged in no analysis as to whether Commerce actually disregarded probative evidence. Therefore, the Panel had no basis for concluding that Commerce applied the SPB "to the disregard of other potentially relevant and probative

[119]Panel Report, para. 7.63. The Panel's conclusion is not necessarily surprising given the emphasis the Panel placed on the final likelihood determinations rather than on an analysis of the evidence submitted in the sunset reviews themselves - "Overall, the consistency of the outcomes is troubling." The Panel drew this conclusion notwithstanding the facts that respondent interested parties participated at all only in a limited number of sunset reviews and, in those reviews where respondent interested parties did participate, fewer still provided any "other factors" argument or submitted any additional information relevant to the likelihood inquiry.

[120]Panel Report, n. 86.

information." Fourth, the Panel's statement that "some correct results" does not undermine its conclusion is perturbing in view of the fact that nothing in the Panel's analysis suggests that there were any *incorrect* results at all. Again, it reflects an unsubstantiated preconception on the part of the Panel that these determinations were somehow flawed.

73. Similarly, the Panel asserted that it emphasized "that our analysis of the USDOC determination is **not** to be understood as suggesting that any particular decision was made consistently with US obligations under the AD Agreement. Indeed, we have serious doubts about the consistency of some of the decisions reviewed . . . ." There is no basis for the Panel's statement, which plainly demonstrates its lack of objectivity. Nothing in the Panel's report suggests the Panel engaged in any kind of qualitative assessment of any of the determinations such that it could conceivably draw a conclusion about the consistency of any of the determinations, even if such a conclusion were warranted in the first place.

IV. Conclusion

74. For the foregoing reasons, the United States respectfully requests that the Appellate Body reverse the Panel's finding that the SPB is inconsistent with Article 11.3 of the Antidumping Agreement.