

ANNEX B

THIRD PARTIES' SUBMISSIONS OR EXECUTIVE SUMMARIES THEREOF

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ANNEX B-1

THIRD PARTY SUBMISSION OF ARGENTINA

(28 April 2004)

TABLE OF CASES REFERRED TO IN THIS SUBMISSION

Short Title	Full Title
US - DRAMS	United States – Anti-dumping duty on dynamic random access memory semiconductors (DRAMS) of one megabyte or above originating from Korea, Report of the Panel, WT/DS 99/R
US – Hot Rolled Steel	United States – Anti-dumping measures on certain hot-rolled steel products from Japan. Report of the Panel, WT/DS 184/R
US – Hot Rolled Steel	United States – Anti-dumping measures on certain hot-rolled steel products from Japan. Report of the Appellate Body, WT/184/AB/R
US – Carbon Steel	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Report of the Panel, WT/DS213/R
US – Carbon Steel	United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, Report of the Appellate Body, WT/DS213/AB/R
Japan – Sunset	United States – Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan. Report of the Panel, WT/DS 244/R
Japan – Sunset	United States – Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan. Report of the Appellate Body, WT/DS 244/AB/R

I. INTRODUCTION

Argentina welcomes this opportunity to present its views to the panel in *United States – Anti-Dumping Measures on OCTG from Mexico* (DS 282). Mexico's case brings into question once again the United States' implementation of the obligations established by Article 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement").

Article 11.1 directs that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." The significant limitations established by Article 11.1 – on the duration of an anti-dumping measure, the permissible magnitude of the duty, and the purpose for which an anti-dumping measure can be imposed – are implemented in Articles 11.2 and 11.3 of the Anti-Dumping Agreement. Article 11.2 requires the termination of anti-dumping duties where it is shown that the imposition of anti-dumping duties is no longer necessary to offset dumping. Article 11.3 requires that anti-dumping duties be terminated within five years of their imposition in the absence of strict compliance with the conditions for maintaining the duties.

Mexico has demonstrated that the United States has failed to (1) properly implement its Article 11 obligations, and (2) satisfy the requisite conditions for maintaining anti-dumping duties on OCTG from Mexico. In the end, as Mexico's First Submission shows and as Argentina can attest based on its own experience (particularly in reviews conducted by the US Department of Commerce ("Department")), there is effectively no possibility of a negative likely dumping determination when shipment volumes have declined following the imposition of the measure.

Section II of this submission sets forth the relevant WTO jurisprudence regarding Members' obligations in reviews conducted under Article 11. Section III describes US violations of Article 11.3, both "as such" and "as applied" in this case. Section IV compares the experience of Argentina and Mexico with respect to Article 11 reviews conducted by the United States. Finally, in section V, Argentina endorses the specific request by Mexico for suggestions by the Panel on the manner in which the United States should implement the Panel's recommendations.

II. ARTICLE 11 OF THE ANTI-DUMPING AGREEMENT PLACES SIGNIFICANT LIMITATIONS ON THE USE OF ANTI-DUMPING DUTIES

A. ARTICLE 11.2 REQUIRES THAT ANTI-DUMPING DUTIES BE TERMINATED IF THEY ARE NO LONGER NECESSARY TO OFFSET DUMPING

Article 11.2 implements the general rule provided in Article 11.1. Specifically, Article 11.2 requires the administering authority to "review the need for the continued imposition" of an anti-dumping duty, and to terminate the duty if it is "no longer warranted." The authority must conduct this revocation review on its own initiative "where warranted," or upon the request of an interested party that has submitted "positive information" supporting the need for a review.

Where an interested party requests an Article 11.2 review, the authority must – at the interested party's request – examine "whether the continued imposition of the duty is necessary to offset dumping." The panel in *DRAMS from Korea* explained that the "need for the continued imposition of the duty must be demonstrable on the basis of [positive] evidence."¹ Thus, in order to justify the maintenance of a duty, the authority must demonstrate through positive evidence that the continued imposition of the duty is necessary to offset dumping.

¹ Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, para. 6.42 ("*DRAMS from Korea*").

B. ARTICLE 11.3 REQUIRES TERMINATION OF ANTI-DUMPING DUTIES AFTER FIVE YEARS ABSENT STRICT COMPLIANCE WITH THE LIMITED EXCEPTION

The Appellate Body in *Japan Sunset* confirmed that the obligation of Article 11.3 is termination of anti-dumping duties after five years. The Appellate Body thus reaffirmed the principle it first articulated in *Steel from Germany*.² Continuation of the measure is the exception, and is only permissible if the authorities conduct a "review," undertake a "rigorous examination" of the facts, and "determine" that termination of the anti-dumping measure would be likely to lead to continuation or recurrence of injury and dumping.³ The Appellate Body reaffirmed forcefully that, "[i]f any one of these conditions is not satisfied, the duty must be terminated."⁴

Under Article 11.3, the authority cannot passively assume that dumping and injury would likely continue or recur,⁵ but rather must take action and ground its determination on a "sufficient factual basis" to allow it to "draw reasoned and adequate conclusions concerning the likelihood" of continuation or recurrence.⁶ In this regard, the authority's determination cannot be based solely on outdated information, but rather "should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review."⁷ The authority must make a "fresh determination" that is forward-looking and "based on credible evidence."⁸

In interpreting the meaning of the words "review" and "determine" in Article 11.3, the Appellate Body highlighted the "investigatory and adjudicatory aspects" of Article 11.3 reviews:

This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.⁹

The Appellate Body in *Japan Sunset* made clear that the conduct of a review and the determination of the likelihood of dumping and injury in order to invoke the exception require a "rigorous examination" that comports with the "exacting nature" of obligations imposed by Article 11.3.¹⁰

Moreover, the authority must satisfy itself that dumping and injury would be "probable" in the event of termination. The ordinary meaning of the term "likely" as used in Article 11.3 is "probable"

² See 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, para. 63 (“*Steel from Germany*”) (interpreting Article 21.3 of the Agreement on Subsidies and Countervailing Measures, which parallels Article 11.3 of the Anti-Dumping Agreement).

³ See 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, paras. 104, 113 (“*Japan Sunset*”).

⁴ Appellate Body Report, *Japan Sunset*, para. 104.

⁵ See Panel Report, *Japan Sunset*, para. 7.177.

⁶ See Panel Report, *Japan Sunset*, para. 7.177.

⁷ Panel Report, *Steel from Germany*, para. 8.95.

⁸ Appellate Body Report, *Steel from Germany*, para. 88.

⁹ Appellate Body Report, *Japan Sunset*, para. 111.

¹⁰ Appellate Body Report, *Japan Sunset*, para. 113 (emphasis added).

and not "possible" or any other standard less than likely (or "probable"). The Appellate Body ended any possible dispute as to the meaning of the term "likely" in Article 11.3, stating authoritatively that "likely" means "probable."

Article 2 of the Anti-Dumping Agreement defines "dumping" "for the purposes of the Anti-Dumping Agreement," including reviews under Article 11. Article 2 sets forth the rules for determining whether a company is or is not dumping. The Appellate Body ruled that when a Member relies on a dumping margin in making a likely dumping finding in an Article 11.3 review, that margin must be WTO-consistent.¹¹ The Appellate Body confirmed that relying on a WTO-inconsistent margin in an Article 11.3 review would "taint the likelihood determination."¹² Therefore, in determining whether dumping would be likely to continue or recur under Article 11.3, the authority cannot ignore the disciplines prescribed by Article 2.

Article 3 of the Anti-Dumping Agreement defines "injury" for purposes of the Anti-Dumping Agreement. Thus, an authority's determination of whether "injury" would likely continue or recur under Article 11.3 must meet the requirements of that provision. Article 3.1 mandates that the authority's "determination of injury" be based on "positive evidence" and "an objective examination" of "(a) the volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."¹³ Articles 3.4, 3.5, 3.7, and 3.8 impose further obligations related to consideration of specific economic factors and indices having a bearing on the state of the domestic industry, causation, and rules related to all future injury determinations.

III. US SUNSET REVIEWS UNDER ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

Mexico's First Submission presents a compelling case. As explained by Mexico, certain provisions of US law, and US practice, violate the Article 11.3 obligations of the United States, and the US application of its law and regulations to Mexico in these specific "sunset" and "revocation" reviews reveals several violations of Articles 11.2 and 11.3.

A. BY ESTABLISHING A WTO-INCONSISTENT PRESUMPTION OF LIKELY DUMPING, CERTAIN US SUNSET REVIEW LAWS, REGULATIONS, AND ADMINISTRATIVE PROCEDURES ARE INCONSISTENT WITH US WTO OBLIGATIONS

19 U.S.C. § 1675a(c)(1), the Statement of Administrative Action (SAA),¹⁴ and the Sunset Policy Bulletin ("SPB"),¹⁵ as such, as well as the Department's consistent practice in sunset review cases (as set forth in MEX-62), establish a WTO-inconsistent presumption that termination of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping.¹⁶

Under US law, declines in import volume and/or the existence of historic dumping margins are given decisive weight. The burden is placed on exporters to convince the Department even to consider any other factors. With respect to the likelihood of dumping determination, the Department always treats dumping margins and/or declining import volumes as highly probative of the likelihood

¹¹ See Appellate Body Report, *Japan Sunset*, paras. 126-132.

¹² Appellate Body Report, *Japan Sunset*, para. 130.

¹³ Emphasis added. See also Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras. 192-93 (footnotes omitted).

¹⁴ SAA at 889-890.

¹⁵ SPB, Section II.A.3.

¹⁶ Mexico's First Submission, sec. VII.A.

of continuation or recurrence of dumping. Either or both of these factors are considered by the Department as constituting sufficient evidence to determine that termination would be "likely" to lead to continuation or recurrence of dumping.¹⁷ The mechanistic application of these criteria precludes the Department from conducting the requisite "review" and making a "determination" based on fresh evidence, contrary to the requirement of Article 11.3, and it establishes a presumption that dumping will likely continue or recur. Under the system implemented by the United States, satisfaction of at least one of the three basic criteria is nearly certain in every case.¹⁸

In addition, the United States employs a standard that is less than the "likely" or "probable" standard required by Article 11.3. This is because the SAA directs the Department to interpret the phrase "likely to lead to continuation or recurrence of dumping" to mean that *any* determination – negative or affirmative – is permissible as long as either outcome is "possible."¹⁹

The empirical evidence put forward by Mexico demonstrates that every time the Department finds that at least one of the three criteria contained in section II.A.3 of the SPB is satisfied (continuation of dumping, cessation of imports, and no dumping with a significant decline of imports), the Department makes an affirmative finding of likely dumping, without considering additional factors. The Department's determinations themselves demonstrate that they are based solely on the mechanistic application of presumptions.

In connection with the likelihood of dumping determination, the Department will not even consider factors other than dumping margins and import volumes (such as price, cost, market or economic factors), unless an interested party convinces it that "good cause" exists. The SPB places the burden on an interested party to provide information or evidence that would warrant consideration of the other factors in question.

In the *Japan Sunset* case, the Appellate Body emphasized that the likelihood determination under Article 11.3 could not be based "solely on the mechanistic application of presumptions" but instead must be grounded on a "firm evidentiary foundation."²⁰ Contrary to the Appellate Body's unambiguous statement, the Department's likelihood determinations operate exclusively on the "mechanistic application of presumption." In all (227 out of 227) of the full and expedited sunset reviews, the Department determined that dumping was likely to continue or recur. In all of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department failed to conduct a prospective analysis, as required by Article 11.3 of the Anti-Dumping Agreement.

In its First Submission, the United States attempts to discredit the clear import of Mexico's empirical analysis by noting that there were only 35 cases in which respondent interested parties contested the existence of likelihood of dumping.²¹ The United States attempted to do the same in the Argentina OCTG case. However, the US position is not persuasive. First, the US focus on only "contested" cases is dubious, because even where respondent interested parties do not participate in a sunset review, the United States still has "a duty to seek out relevant information"²² and to ensure that its likelihood of dumping determination is supported by a "sufficient factual basis."²³ The

¹⁷ Appellate Body Report, *Japan Sunset*, para. 171.

¹⁸ Out of the 227 full and expedited sunset reviews conducted by the Department, no respondent was able to overcome the three criteria prescribed by the SAA and Sunset Policy Bulletin, such that the Department determined that dumping would not be likely. See MEX-62.

¹⁹ SAA at 883.

²⁰ Appellate Body Report, *Japan Sunset*, para. 178.

²¹ See US First Submission, DS 282, para. 107.

²² Appellate Body Report, *Japan Sunset*, para. 199.

²³ Panel Report, *Japan Sunset*, paras. 7.177, 7.279.

United States cannot passively assume in such cases that the continuation of recurrence of dumping would be likely. Second, even assuming that only the "contested" cases are relevant, 35 out of 35 still proves Mexico's prima facie case. The United States simply cannot dispute that, in 100% of these cases, the Department gave declines in import volume and/or the existence of historic dumping margins decisive weight, and thus employed a WTO-inconsistent presumption. Indeed, as the United States itself explains, "In each of those 35 cases, the evidence presented a scenario that satisfied one or more of the criteria that the *Sunset Policy Bulletin* identifies as indicia of likelihood."

In any event, even if using the US benchmark of so-called "contested cases," Argentina would note that there were actually 43 cases in which respondents contested the likelihood determination. MEX-62 shows that the Department conducted 26 full reviews in which respondents participated. In addition, respondent interested parties participated in 17 expedited reviews.²⁴ Thus, respondent interested parties "contested" the likelihood determination in 43 (26 plus 17) sunset reviews.

Finally, Argentina notes that irrespective of whether the Panel is satisfied that Mexico has sustained its burden to demonstrate that the US law, SAA, and Sunset Policy Bulletin establish a WTO-inconsistent presumption that dumping would be likely, Mexico has demonstrated a US violation of Article X:3(a) of the GATT 1994. Article X:3(a) directs that the authority "shall administer in a[n] ... impartial and reasonable manner all its laws, regulations, decisions and rulings" covered by Article X:1. The results of the Department's sunset reviews demonstrate that the Department failed to administer in an impartial and reasonable manner US anti-dumping laws, regulations, decisions and rulings with respect to its conduct of sunset reviews, in violation of Article X:3(a).²⁵ It is simply not credible to believe that a review based on positive evidence could lead to an affirmative finding of "likely" dumping in each of the 227 cases in which the US industry requests continuation of the anti-dumping measure. A record of 227 wins and 0 losses for the US industry suggests a lack of impartiality, and the unreasonable administration of national laws.

B. THE DEPARTMENT'S LIKELIHOOD OF DUMPING DETERMINATION IN THE SUNSET REVIEW OF OCTG FROM MEXICO WAS INCONSISTENT WITH ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

As Mexico's First Submission demonstrates, the Department relied completely on declining import volumes of Mexican OCTG for its conclusion that dumping was likely to recur.²⁶ The Department justified its reliance on volume based on the authority of the US statute, the SAA, and the SPB. The Department disregarded the evidence and explanations offered by the Mexican exporters to explain the reason for the lower export volumes after the imposition of the order in 1995, and why the dumping margin from the original investigation was not relevant to the issue of whether dumping would be likely to continue or recur.

The Appellate Body stated that it was inconsistent with Article 11.3 for an authority to draw conclusive inferences in Article 11.3 reviews based solely on declines in import volumes without conducting a fact-specific analysis on a case-by-case basis to determine the cause for the decline.²⁷

²⁴ Similar to Mexico, Argentina conducted an exhaustive study of the Department's sunset reviews in DS 268, *United States – Sunset Reviews of Anti-Dumping Measures on OCTG from Argentina*. Unlike Mexico, however, Argentina recorded the extent of foreign interested party participation in each sunset review (conducted through December 2003). Argentina found that, in addition to the 26 full reviews in which respondents participated, respondents participated in 17 expedited reviews. See Argentina's Second Submission, *United States – Sunset Reviews of Anti-Dumping Measures on OCTG from Argentina*, DS 268, 8 January 2004, n. 119 (citing Argentina's Exhibit ARG-63).

²⁵ See Mexico's First Submission, Secs. VII.A and B, and MEX-62.

²⁶ Mexico's First Submission, sec. VII.C.

²⁷ Appellate Body Report, Japan Sunset, para.177.

Yet, this is precisely what the Department did in the sunset review of OCTG from Mexico. The Department relied solely on post-order import volume figures to the exclusion of a prospective analysis and thus violated Article 11.3. A substantive analysis is necessary in every case.

Moreover, the flaws with the Department's analysis were compounded in the sunset review of OCTG from Mexico. The evidence on the record demonstrated that the market and economic circumstances prevailing at the time of the original investigation no longer existed and were not likely to exist in the future.²⁸

After a dumping determination in the original 1994 investigation based on "best information available," TAMSA obtained three consecutive no dumping determinations in the administrative reviews immediately preceding the sunset review. Hylsa had never been shown to be "dumping" within the meaning of Article 2 of the Anti-Dumping Agreement.

In this case, the two Mexican exporters participated fully in the sunset review, and provided factual information to explain why export levels had declined after the imposition of the order in 1995 and why the dumping margin from the original investigation was not relevant to the issue of likely dumping.²⁹ The Department ignored the relevant evidence, and, with respect to the export volumes, considered that TAMSA's stated reasons for the decline were irrelevant.³⁰

Had the Department conducted the forward-looking review required by Article 11.3, it would have been clear that the severe peso devaluation of 1994 was an isolated event that was not likely to recur, and that it was inappropriate to mechanically assume that the historic rate of 21.70 per cent margin from years earlier was in anyway valid for purposes of the sunset analysis.

In sum, in rendering its likelihood of dumping determination in the sunset review of Mexican OCTG, the Department ignored current and relevant information and failed to conduct a prospective analysis. Thus, the Department's sunset determination was inconsistent with Article 11.3.

C. A CUMULATIVE INJURY ANALYSIS IS INCONSISTENT WITH ARTICLE 11.3

Consistent with Argentina's argumentation of this issue in DS 268, Mexico rightly asserts that the application of a cumulative injury analysis is not consistent with the rights granted to individual WTO Members by Article 11.3.³¹ The purpose of Article 11.3 is to provide each WTO Member with the right to have an anti-dumping measure affecting its exports terminated after five years, unless its exports are likely to be dumped within the meaning of Article 2 and are likely to cause injury within the meaning of Article 3. A cumulative injury analysis violates the object and purpose of Article 11.3, because it conditions each Member's right to termination of an anti-dumping measure covering its imports on the commercial practices of exporters from other countries.

In addition, fundamental to the rationale for cumulation is the concept of simultaneity. That is, the subject merchandise must be imported simultaneously and there must be demonstrated competition in the market. Otherwise, the cumulative effect of imports on the importing market could not properly be assessed. Consequently, if as Mexico's First Submission demonstrates, the Commission did not define the time frame within which injury would be likely to recur, how then could the Commission be certain that imports would enter the US market simultaneously? While the Commission discussed the likelihood of a reasonable overlap of competition of the subject imports,

²⁸ See Mexico's First Submission, paras. 129-144.

²⁹ Case Brief of TAMSA, *Sunset Review of Oil Country Tubular Goods ("OCTG") from Mexico*, A-201-817, (11 Dec. 2000) at 3-8 (MEX-39).

³⁰ *Sunset Review Issues and Decision Memorandum* at 4 (MEX-19)

³¹ See Mexico's First Submission, sec. VIII.E.

the Commission failed to link its analysis in this regard to the time frame within which injury would be likely to continue or recur under Article 11.3. As a result, the basis for the Commission's determination that imports would be simultaneously present in the US market and cause likely injury is flawed. Therefore, irrespective of the time frame within which injury most recur, for purposes of the obligation under Article 11.3, and even assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, it is clear from the record that the way the Commission cumulated in this case is inconsistent with Article 11.3.

Argentina also understands that Mexico has also rightly asserted that the express terms of the Anti-Dumping Agreement preclude cumulation in Article 11.3 reviews.³² As Argentina argued in its submission in DS 268, article 11.3 refers to an anti-dumping duty in the singular, not plural. Thus, on its face, Article 11.3 requires the authority to determine whether the revocation of a *single* anti-dumping measure – rather than the revocation of multiple anti-dumping measures – would be likely to lead to the continuation or recurrence of injury. Article 11.3 thus does not permit cumulation. A reading of Article 11.3 within the context of the Anti-Dumping Agreement as a whole lends further support to this conclusion.

Through Article 3.3, the Anti-Dumping Agreement limits the use of a cumulative injury analysis to "investigations," and even then only where certain conditions are met. The fact that Article 3.3 provides for the conditioned use of cumulation in "investigations" but not in "reviews" indicates that a cumulative injury analysis is not permitted in the likelihood of injury determination made in an Article 11.3 review. The failure of Article 3.3 and Article 11.3 to cross-reference each other corroborates this reading. Article 11.3 contains explicit cross-references to other articles of the Anti-Dumping Agreement (such as Articles 6 and 8), and other articles in the agreement explicitly cross-reference Article 11 (such as the cross reference in Article 12.3). Thus, it is evident that, "when the negotiators . . . intended that the disciplines set forth in one provision be applied in another context, they did so expressly."³³ Accordingly, the lack of cross-references between Articles 11.3 and 3.3 indicates that the drafters of the Anti-Dumping Agreement did not intend for the *limited use* of a cumulative injury analysis permitted in an *investigation* to be extended to the likelihood of injury determination in a *review* under Article 11.3. Moreover, there are no general references to cumulation in the Anti-Dumping Agreement, nor is cumulation generally defined for purposes of the Anti-Dumping Agreement, as are the terms "dumping" and "injury."³⁴

D. AN INJURY DETERMINATION UNDER ARTICLE 11.3 MUST SATISFY THE "LIKELY" STANDARD AS WELL AS THE EVIDENTIARY REQUIREMENTS OF ARTICLE 3.1

The evidence required by Article 11.3 must be sufficient to establish that injury would be "likely." The Appellate Body reaffirmed that "likely" in Article 11.3 means "probable."³⁵ Therefore, the authority must determine that injury would be *probable* upon termination of the anti-dumping measure in order to justify continuation of anti-dumping duties under Article 11.3. If the evidence is inconclusive, or is insufficient for a reasonable, objective person to say that injury is "likely," the measure must be terminated. The United States, however, has interpreted "likely" in the context of Article 11.3 to mean "possible," or "a concept that falls in between 'probable' and 'possible' on a

³² See Mexico's First Submission, para. 254.

³³ Appellate Body Report, *Steel from Germany*, para. 69.

³⁴ Similar to Argentina's reasoning in Ds 268, Mexico convincingly argues in the alternative argument that: "Assuming *arguendo* that Articles 3.3 and 11.3 do not preclude cumulation in Article 11.3 reviews, then the terms of Article 3.3 must be applied to a cumulative analysis in a sunset review. Indeed, the application of either the *de minimis* or negligibility requirements would have prevented cumulation in this case. The Commission's cumulative injury analysis in its Sunset Determination thus failed to satisfy the Article 3.3 requirements." Mexico's First Submission, para. 261.

³⁵ See Appellate Body Report, *Japan Sunset*, paras. 110-111.

continuum of relative certainty."³⁶ US courts have held that the Commission has not implemented the "likely" injury standard in sunset reviews.³⁷

It is clear that the United States did not apply a "probable" standard in this case. Indeed, in a NAFTA challenge to the sunset determination in this case, the Commission stated that the SAA precludes the Commission from applying a "probable" standard.³⁸

The same type of evidence necessary for an injury determination under Article 3 is required for a determination of "likely injury" under Article 11.3; that is, positive evidence sufficient to meet the substantive injury standards of Article 3. Moreover, that evidence must also satisfy the "likely" standard of Article 11.3. Article 3 applies to reviews under Article 11.3 by virtue of footnote 9 to the Anti-Dumping Agreement, which states, "*Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of injury to a domestic industry or material retardation to the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.*" (Emphasis added.) Article 11 does not specify an alternative definition of "injury" for the purposes of that article; therefore, the authority's likelihood of "injury" determination under Article 11.3 must comply with Article 3.³⁹ Article 3.1 mandates that the authority's determination of "injury" be based on "positive evidence" and "an objective examination" of "(a) the volume of dumped imports and the effect of dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

Accordingly, the authority's determination of likely injury under Article 11.3 must also be based on positive evidence and an objective examination of the likely volume, price effects, and impact of the imports subject to the measure under review. The likelihood of injury analysis is further subject to the requirements imposed by Articles 3.4, 3.5, 3.7, and 3.8 of the Anti-Dumping Agreement related to consideration of specific economic factors and indices having a bearing on the state of the domestic industry, causation, as well as the special rules related to all future injury determinations.

Argentina notes that the injury portion of the Article 11.3 review of Mexican OCTG imports is identical to the injury portion of the Article 11.3 review of Argentine OCTG at issue in DS 268. Argentina endorses all of Mexico's "as applied" arguments related to the injury portion of the review. The Commission's decision is based on speculation, and, at best, "possible" events based on the evidence developed during the review. The Commission's determination does not demonstrate, on the basis of positive evidence, that injury is "likely" to continue or recur.

E. 19 U.S.C. §§ 1675A(A)(1) AND (5) ARE INCONSISTENT AS SUCH WITH ARTICLES 11.3 AND 3 OF THE ANTI-DUMPING AGREEMENT

Consistent with Argentina's analysis in DS 268, Mexico convincingly demonstrates that 19 U.S.C. §§ 1675a(a)(1) and (5) are inconsistent as such with Articles 11.3 and 3 of the Anti-Dumping Agreement.⁴⁰ Article 11.3 requires the authority to determine whether termination of an

³⁶ See Mexico's First Submission, sec. VIII.A; see also SAA at 883 ("There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence or countervailable subsidies, or injury is erroneous . . .")(MEX-26); Int'l Trade Comm'n Remand Determ. Pursuant to *Usinor Industeel S.A., et. al v. United States*, No. 01-00006 (July 2002) at 6 (MEX- 45).

³⁷ See Mexico's First Submission, para. 171.

³⁸ See Mexico's First Submission, para. 171 and (MEX-47).

³⁹ See Panel Report, *Japan Sunset*, paras. 7.99 – 7.101; Panel Report, *DRAMs from Korea*, para. 6.59 n.501 ("We note that, by virtue of note 9 of the AD Agreement, the term 'injury' in Article 11.2 'shall be interpreted in accordance with the provisions of Article 3.'").

⁴⁰ See First Submission of Mexico, Sec. VIII.G.

anti-dumping measure would be likely to lead to the continuation or recurrence of injury. Thus, the authority's likelihood of injury determination must not be based on speculation about possible market conditions several years into the future, but rather must be based upon the likelihood of injury upon "expiry" of the measure.

Section 1675(a)(1) requires the Commission to determine whether injury would be likely to continue or recur "within a reasonably foreseeable time." The SAA explains that "reasonably foreseeable time" . . . normally will exceed the 'imminent' time frame applicable in a threat of injury analysis."⁴¹ Moreover, section 1675(a)(5) mandates that the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time." Accordingly, by defining a "reasonably foreseeable time" as longer than an "imminent" time, the US statutory provisions are inconsistent with the Anti-Dumping Agreement, which requires the determination to be based upon injury upon "expiry" of the duty.

Sections 1675(a)(1) and (5) are also inconsistent with Articles 3.7 of the Anti-Dumping Agreement. Article 3.7 requires injury determinations to be "based on facts and not merely on allegation, conjecture or remote possibility," and that the circumstances under which injury would occur be "imminent." The US provisions provide that the likelihood of injury determination need not be based on "imminent" injury, thereby fostering speculation.

IV. THE UNITED STATES VIOLATED ARTICLES 11.2 AND 11.3 IN THIS CASE BY ASSIGNING DECISIVE WEIGHT TO DECLINING IMPORT VOLUMES.

Argentina is not surprised by the nature of the claims advanced by Mexico in this case. Indeed, as previously noted, Argentina is currently in the midst of a separate WTO dispute settlement proceeding with the United States involving many of these same issues, *United States – Sunset Reviews of Anti-Dumping Measures on OCTG from Argentina*, DS 268. Furthermore, as part of its case, Argentina also undertook a comprehensive analysis of the all of the Department's sunset reviews, including the sunset review of OCTG from Mexico.

Mexico's case offers compelling evidence that the United States has not faithfully implemented its obligations under Article 11. With respect to the sunset obligations established by Article 11.3, the United States uses presumptions and incorrect legal standards that enable the administering authorities to continue anti-dumping measures beyond the five-year term established by Article 11.3. For the Department's sunset review, the mere existence of historic dumping margins or a decline in volume after the imposition of anti-dumping duties is sufficient to keep an anti-dumping measure in place. For its part, the Commission concedes that it does not apply a "probable" standard in making the likely injury determination. The Commission also routinely conditions individual Members' rights of termination on the import practice of importers from other countries through its practice of cumulatively assessing the effects of imports in the likely injury analysis.

To compound these problems, the United States takes the position that because its Article 11.3 review determinations reflects an order wide (country-wide) decision, the fact that a particular exporter may not be dumping or causing injury is not determinative. The United States maintains that there are other US procedures in place that enable a company to have an order revoked as it pertains to that company and that these procedures implement US obligations under Article 11.2, such as where an exporter obtains consecutive no dumping determinations in three consecutive administrative reviews of the anti-dumping duty order.

Mexico's experience stands in stark contrast to the US characterizations of its procedures and practices for implementing the requirements of Article 11 as explained in DS 268 – the US-Argentina

⁴¹ SAA at 887 (MEX-26).

case. In DS 268, the United States argued that if only the Argentine producer, Siderca, had continued to ship to the United States after the imposition of the measure, or if only the company had participated in the annual review process, the results might have been different. In this case, however, neither the Mexican companies' complete participation in full sunset reviews in which the evidence showed that dumping was not likely to continue or recur (in accordance with the requirements of Article 11.3), nor one company's participation in the annual review process and its ability to obtain three consecutive no dumping findings (zero margins) to demonstrate that the order was no longer necessary to offset dumping (in accordance with the requirements of Article 11.2) resulted in termination of the anti-dumping duties.

As noted above, consistent with other WTO sunset cases, in DS 268, the United States asserted that sunset reviews are conducted on an "order-wide" basis. Based on this approach, the United States considered the relevance of the individual exporter participation to be limited.⁴² The result of such an approach is that continuation of an anti-dumping order can be based on circumstances wholly unrelated to any one individual company. At the same time, the United States repeatedly emphasized throughout that proceeding that US procedures enabled a company to have an order revoked as it pertains to that company by obtaining zero margins in three consecutive administrative reviews.⁴³

For example, the US Second Submission stated:

Specifically, revocation for a particular company from an antidumping duty order is possible by two methods under US law (revocations of antidumping duty orders, in part, are generally termed "company-specific" revocations in US parlance). The first and most common method is for a producer or exporter to seek revocation pursuant to section 351.222(b)(2) of *Commerce's Regulations*, i.e., after three annual administrative reviews wherein Commerce has calculated, in each review, a dumping margin of zero or de minimis for the producer or exporter seeking revocation.

The second method for a producer or exporter seeking revocation is the "changed circumstances" review. Under this method, a producer or exporter may request a review at any time after providing information that changed circumstances warrant a review for the purposes of revocation of an antidumping duty order.

Thus, a producer or exporter may seek revocation for itself from an antidumping duty order prior to the initiation of a sunset review.⁴⁴

Thus, the United States stressed that, although the Department issues its determinations in sunset reviews on an order-wide basis, US law permits a particular foreign producer/exporter to seek a company-specific revocation prior to the initiation of a sunset review. Contrary to the US assertion in its First Submission in this case (DS 282),⁴⁵ Argentina is of the view that satisfaction of the obligations in Article 11.2 could well require the termination of an anti-dumping duty on a company-specific basis. In DS 268, the United States referred to sections 351.222(b)(2) and 351.216 of the

⁴² See, e.g., US Answers to Argentina's First Set of Questions, DS 268 (8 Jan. 2004), para. 12; US Answers to Panel's First Set of Questions, DS 268 (8 Jan. 2004), paras. 3 and 19; US Answers to Panel's Second Set of Questions, DS 268 (Feb. 13, 2004), para. 3.

⁴³ US Oral Response to Panel Question During First Substantive Meeting of the Panel with the Parties; see also US Second Written Submission, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268 (8 Jan. 2004), paras. 13-15 ("US DS268 Second Submission").

⁴⁴ US DS268 Second Submission, para. 13 (footnotes omitted).

⁴⁵ US First Submission, DS 282, para. 147.

Department's regulations as providing company-specific revocation procedures. Under section 351.222(b)(2), a foreign producer/exporter may seek a company-specific revocation if the Department has calculated zero or de minimis dumping margins for that company in three administrative reviews. Under section 351.216, a foreign producer/exporter may argue that "changed circumstances" warrant the revocation of an order with respect to that company. According to the United States, "[t]he Appellate Body in *Japan Sunset* recognized the importance of the availability of these procedures in ensuring that an anti-dumping duty remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."⁴⁶

The facts of Mexico's case belie the US statements in DS 268. TAMSA continued to export to the United States throughout the life of the order and participated in three administrative reviews. In each review the Department determined that the company was not dumping. The company thus obtained three consecutive zero margins and thereby demonstrated that the order was no longer necessary to offset dumping, in accordance with the requirements of Article 11.2. The Department did not revoke the order, and ignored the results of the three, complete annual reviews that it conducted, based on the following rationale:

Because TAMSA did not meaningfully participate in the market, its sales during these periods do not provide a reasonable basis for determining that it is unlikely that TAMSA will dump in the future. Therefore, we find that TAMSA does not qualify for revocation of the order on OCTG under 19 CFR 351.222(e)(1)(ii) and 19 CFR 351.222(d)(1).⁴⁷

As Mexico argues, there are several flaws with the Department's Determination in the Fourth Review Not to Revoke the Order as Applied to TAMSA. As Mexico's First Submission demonstrates, the United States violated Article 11.2 because: (1) the Department applied a standard which required a demonstration that dumping was "not likely" in the future; (2) the Department arbitrarily imposed a "commercial quantities" threshold requirement that has no basis in Article 11.2; and (3) the Department ignored positive evidence that demonstrated that the measure was not necessary to offset dumping.⁴⁸

Argentina endorses all three elements of the argument put forward by Mexico. However, Argentina would like to draw the Panel's attention specifically to the role that import volumes play in the Department's Article 11.2 determination described by Mexico. As Mexico's submission makes clear, the Department's determinations not to revoke the measure as to TAMSA – under both the Article 11.2 and 11.3 mechanisms provided for in US law – were based solely on a comparison between import volume to the United States during the original investigation period and the OCTG volume shipped during each of the three relevant administrative review periods. The Department stated in the Article 11.3 review that:

⁴⁶ US DS268 Second Submission, para. 15. The United States cited paragraph 199 of the Appellate Body's report in *Japan Sunset* as support for this assertion. This paragraph, however, does not refer to the company-specific revocation provisions at sections 351.222(b)(2) and 351.216. Based on an earlier citation in the US second submission, it appears that the United States had intended to cite to paragraph 158 of the Appellate Body's report. Contrary to the US characterization, however, the Appellate Body did not endorse these provisions as consistent with Article 11.1 (i.e., "only as long as and to the extent necessary") in this paragraph (or in any other section of the report). Rather, the Appellate Body merely cited the US provisions in explaining that Article 11.3 does not preclude authorities from making separate likelihood determinations for individual producers and exporters. (Appellate Body Report, *Japan Sunset*, para. 158)

⁴⁷ See Mexico's First Submission, para. 301 (citing *Fourth Review Issues and Decision Memorandum* at 9 (MEX-9)).

⁴⁸ See Mexico's First Submission, sec. IX.C.

We disagree with TAMSA's claim that the Department cannot base its decision with regard to whether dumping is likely to resume if the order were revoked on the fact that the post-order export volumes were well below pre-order volumes. As discussed in section II.A.3 of the Sunset Policy Bulletin, the SAA at 889, and the House Report at 63-64, if the volume of imports declined significantly after the issuance of the order and dumping was eliminated, the Department may reasonably infer that dumping would resume if the order were revoked. The premise that the decline in TAMSA's export levels after the issuance of the order was the result of a prudent and necessary business strategy, and the fact that TAMSA was able to sell small amounts of OCTG without dumping in no way conflict with the Department's inference. If it became "prudent and necessary" to make fewer sales at more fairly traded prices while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such disciplines ceased to exist and it was no longer "necessary" for TAMSA and other Mexican exporters to maintain the same business strategy.⁴⁹

Likewise, in the Article 11.2 review, the Department specifically defended the "inference" it had drawn from the lower import volumes and justified the use of a so-called "commercial quantities" threshold test:

As explained in the SAA at 889-90, and the House Report at 63-64, if the volume of imports declined significantly after the issuance of the order and dumping was eliminated, the Department may reasonably infer that dumping would resume if the order were revoked. The same logic also applies on a company-specific basis. The premise that the decline in TAMSA's export levels after the issuance of the order was the result of a depressed market for OCTG and a high deposit rate, and the fact that TAMSA was able to sell small amounts of OCTG without dumping in no way conflict with the Department's inference. If it became necessary to make fewer sales at more fairly traded prices while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such disciplines ceased to exist, especially if TAMSA were again to encounter a "depressed market" in this very cyclical industry.⁵⁰

These statements leave no doubt that the United States did not fulfil its obligations under either Article 11.2 or 11.3 in this case. As in the treatment of Argentine exports examined in DS 268, the Department decisions relating to Mexican exports demonstrate clearly that the Department gave decisive weight to a single factor – declining export volumes. Reliance on this factor precluded the Department from making a determination consistent with the requirements of Articles 11.2 and 11.3. The Appellate Body has ruled that an administering authority cannot draw a conclusive inference from a decline in volume alone for purposes of an Article 11.3 determination,⁵¹ and the same rationale applies with equal force for purpose of the Article 11.2 determination.

While the common denominator in this case and DS 268 is the Department's reliance on declining import volumes, the two cases demonstrate the bias with which the Department applies its laws. In the Argentine case examined in DS 268, very small volumes from an unknown source were

⁴⁹ Mexico's First Submission, para. 123, citing *Oil Country Tubular Goods from Mexico*, 66 Fed. Reg. 14,131 (Dep't Commerce Mar. 9, 2001)(final results of sunset review); *Issues and Decision Memorandum for the Full Sunset Review of the Anti-Dumping Duty Order on Oil Country Tubular Goods from Mexico* (9 Mar. 2001)(final results)(“*Sunset Review Issues and Decision Memorandum*”) at 4 (MEX-19).

⁵⁰ Mexico's First Submission, para. 316, citing *Fourth Review Issues and Decision Memorandum* at 8 (MEX-9).

⁵¹ See Appellate Body Report, *Japan Sunset*, para. 177.

considered to be relevant enough to trigger the "waiver" provisions of US law, and to justify the application of "facts available," both of which were used by the Department to justify continuation of the measure against Argentine exports.⁵² In the review of Mexican exports, comparable import volumes are considered to be completely irrelevant. It simply does not matter that the imports in comparable volume are demonstrated to be traded fairly; now the volume is too small to be relevant. Not only is the demonstrated reliance on import volumes itself a violation of Articles 11.2 and 11.3, the inconsistency in treatment of the volume factor highlights concerns about the objectivity with which the United States implements its Article 11 obligations.

V. REQUEST FOR SUGGESTIONS FROM THE PANEL ON THE MANNER IN WHICH THE UNITED STATES SHOULD IMPLEMENT THE PANEL'S RECOMMENDATIONS

Mexico has alleged that the United States has committed multiple violations of its WTO obligations. Argentina believes that Mexico has presented a compelling case of violations. If the panel agrees and recommends that the United States bring itself into compliance with its obligations, Argentina agrees that termination of the anti-dumping measure on OCTG from Mexico would be the appropriate suggestion from the panel.

In light of the obligations in Article 11.3, the chance to renew the duties in the sunset review determination arise only at the time of the expiry of the five year period of the duty. Such a review can be conducted only once. Additionally, as stated in Article 11.1, which provides context for the obligation in Article 11.3, the duty "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." If in this context, an authority failed to conduct the review according to the Anti-Dumping Agreement, then there is no chance for that Member to cure in a subsequent proceeding. Otherwise, the obligation of Article 11 (i.e., termination of the anti-dumping measure) will be thwarted because Members could always continue the imposition of anti-dumping duties, knowing that they could again revisit that decision after WTO dispute settlement proceedings. As in the case of Argentina in DS 268, the only remedy that will restore the benefits obtained by Mexico through the negotiation of the Anti-Dumping Agreement is termination of the measure that has applied to its exports for the last decade.

⁵² The key facts at issue in DS 268 relevant to the Department's sunset review of OCTG from Argentina are recounted briefly as follows. The Argentine producer, Siderca, had not exported any OCTG to the United States for consumption during the relevant period for purposes of the sunset review. Siderca provided this information to the Department and made similar "no-shipment" representations during each of the relevant administrative review periods. The Department conducted "no-shipment" reviews and in each instance verified Siderca's claims that the company had not exported OCTG to the United States. The Department's import data, however, showed the existence of very small quantities of Argentine OCTG imports to the United States. Because Siderca's total exports of OCTG to the United States (zero exports) were less than 50 per cent of total OCTG exports from Argentina to the United States, however, the Department determined Siderca's response to be "inadequate." See First Submission of Argentina, DS 268, paras. 97-99. The Department then determined that because Siderca's response was deemed to be "inadequate," the company was similarly deemed to have "waived" its right to participate in the sunset review. See First Submission of Argentina, DS 268, para. 98, citing the Department's *Issues and Decision Memorandum* at 4-5 ("In the instant reviews, the Department did not receive an adequate response from respondent interested parties. Pursuant to section 351.218(d)(2)(iii) of the Sunset Regulations, this constitutes a waiver of participation."). The Department deemed Argentina to have waived its right to participate because of the "inadequate" response to the initiation notice. The company's response was inadequate simply because of its low export volume. Ironically, it is interesting to note the Department's reliance in DS 268 on very small Argentine OCTG import quantities to deem Siderca to have waived its participation in the sunset review, with devastating consequences. In the end, it is clear that import volume is used by the Department in a very outcome determinative manner.

VI. CONCLUSION

Argentina thanks the Panel for providing the opportunity to comment on the important issues presented in this dispute.

ANNEX B-2

THIRD PARTY SUBMISSION OF CHINA

(28 April 2004)

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I. INTRODUCTION

1. China welcomes this opportunity to present its view in the dispute brought by Mexico over the consistency with Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT") and the Agreement on Implementation of Article VI of the GATT ("Anti-Dumping Agreement") of the decision made by the United States not to terminate the imposition of the anti-dumping duty on oil country tubular goods ("OCTG") from Mexico, to impose a positive dumping margin in the forth administrative review and US statutory, regulatory, and administrative measures with regard to sunset review.

2. China has systemic interests in the interpretation and application of the Anti-dumping Agreement with regard to sunset review and dumping margin calculation. As a third party, China would like to address the following issues raised by Mexico:

- Inconsistency of the determination by the US Department of Commerce ("Department") of likelihood of continuation or recurrence of dumping with Article 2 and Article 11.3;
- Inconsistency of the determination by the US International Trade Commission ("Commission") of likelihood of continuation or recurrence of injury with Articles 3.1, 3.4, 3.5 and 11.3;
- Inconsistency of margin of dumping determined by the Department based on the zeroing methodology for determining "dumping" with Articles 2.1 and 2.4.

II. ARGUMENTS

A. THE DEPARTMENT'S SUNSET REVIEW DETERMINATION IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

3. Article 11.3 of the Anti-Dumping Agreement requests that an existing anti-dumping measure shall be terminated unless "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The term "likely" in Article 11.3 requires that the authorities make an affirmative determination on a prospective basis¹ that there is a probability, not a mere possibility, that the dumping will continue or recur in the future.² In *US – Sunset Review of Steel from Japan*, the panel also expressed that the term "likely" in Article 11.3 means "probable."³ The continuation or recurrence of dumping and injury shall, therefore, be based on evidences that show "probability" rather than simple "possibility."

4. As Mexico pointed out in its first submission regarding this case, the United States itself acknowledged such interpretation of the term "likely" into "probable" in *US – Steel from Germany*,⁴ and it demonstrates the understanding of the United States regarding this issue.

5. In *The Sunset Review of Steel from Japan*, the Appellate Body reaffirmed that continuation of anti-dumping duty in a sunset review is exceptional and thus requires that "authorities must conduct **a rigorous examination** in a sunset review before the exception (namely, the continuation of the

¹ See Panel Report, *US – Carbon Steel*, para. 8.96.

² See Panel Report, *US – DRAMs*, para. 6.45.

³ Appellate Body Report, *US – Sunset Review of Steel from Japan*, paras. 110-111.

⁴ See the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 163.

duty) can apply. (emphasis added) The Appellate Body also agreed with the Panel's reasoning below⁵:

"In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigation authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence."⁶

6. Thus, in order to make a determination that is consistent with Article 11.3, the US authorities would need to find that it is "likely" and thus far more than "possible" (i.e., more probable than not) that termination of the anti-dumping measure will lead to the continuance or recurrence of injury and dumping, respectively.

1. Provisions Of Article 2 Apply To The Determination Of Likelihood Of Continuation Or Recurrence Of "Dumping" Under Article 11.3

7. The title of Article 2 states "Determination of Dumping." Article 2.1 then states that:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

8. The first phrase "[f]or the purpose of this Agreement" demonstrates drafter's clear intent to apply the obligation of Article 2 throughout the Anti-Dumping Agreement, wherever the word "dumping" appears. The basic concept of "dumping" under Article 2 thus applies to all "dumping" determinations throughout the Anti-Dumping Agreement, including sunset review under Article 11.3.

9. Therefore, the phrase "likely to lead to continuation or recurrence of dumping" in Article 11.3 does not change the core concept of "dumping," nor does it affect the applicability of Article 2 to Article 11.3. To find "continuation of dumping," the authorities must find the existence of dumping at the time of the sunset review. To find "recurrence of dumping," the authorities must first find that dumping has ceased by the time of sunset review.

10. The Appellate Body in *US – Sunset Review of Steel From Japan* has confirmed such cross-reference that general provision and definition of dumping applies to the sunset review provisions:

"[a]rticle 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 suggest that the question for investigation authorities, in making a likelihood determination in a sunset review pursuant to article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value)."⁷

⁵ Appellate Body Report, *US – Sunset Review of Steel from Japan*, p. 41

⁶ Panel Report, *US – Sunset Review of Steel from Japan*, para. 7.271.

⁷ Appellate Body Report, *US – Sunset Review of Steel from Japan*, p. 39.

11. Therefore, a determination of whether future dumping is likely to continue or recur under Article 11.3 must reflect the definition and obligations enumerated in Articles 2.1, 2.4 and other provisions in Article 2.

12. However, in the Department's sunset review practice, continued dumping margins, the cessation of imports, and/or declining import volumes accompanied by the elimination of dumping margins become the three criteria. Such criteria do not adhere to the "dumping" definition in Article 2 of the Anti-Dumping Agreement.

13. The United States admitted that "[a]s the starting point for making its likelihood determination is this sunset review, Commerce considered the findings concerning dumping made in the original investigation."⁸ The fact that the 21.70 per cent dumping margin for all other Mexican companies was provided to the Commission by the Department testifies the Department determination.

14. However, article 11.3 requests the importing authority to **determine** whether expiry of the duty would be likely to lead to continuation or recurrence of dumping. Based on Article 2 of the Anti-Dumping Agreement, the authority would need to use evidences that can prove that dumping continued at the time of the sunset review or that dumping has ceased at the time of the sunset review but is "likely" to recur.

15. The Appellate Body confirms the Panel's description of "determine" in the *US – Sunset Review of Steel from Japan*:⁹

The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury. The text of Article 11.3 does not, however, provide explicit guidance regarding the meaning of the term "determine." The ordinary meaning of the word "determine" is to "find out or establish precisely" or to "decide or settle". The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority **has to determine**, on the basis of positive evidence, that termination of the duty is likely to continuation or recurrence of dumping and injury. The investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence. (emphasis added)

2. The Department's Sunset Review Determination Is Not Consistent With The Anti-Dumping Agreement Article 2 And Article 11.3

16. The Department acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by not basing its determination on overall evaluation but rather ignoring the current information and focusing only on the import volume factor.

17. The United States made the following statement in its First Submission:¹⁰

"Commerce normally will find that dumping would be likely to continue or recur based on evidence of significantly depressed import volumes after imposition of the duty even where there is also evidence that dumping has been eliminated during the

⁸ US First Submission, para. 122

⁹ Panel Report, *US – Sunset Review of Steel from Japan*, para. 7.271.

¹⁰ US First Submission, para. 123.

five-year period preceding the sunset review. If there is evidence that no dumping has existed since the order was imposed but import volumes have been adversely affected to a significant degree, Commerce may make an affirmative sunset determination because, if these conditions are found, Commerce may reasonably conclude that dumping would continue were the discipline of the duty removed."

18. According to the First Submission of Mexico, "the record demonstrates vividly that the conclusion was based entirely on an approach which: 1) was based solely on Mexican OCTG import volumes; 2) ignored current and relevant evidence; and 3) was not prospective."¹¹

19. China agrees with Mexico that a determination solely based on the decrease of import volumes, bearing no consideration on the current information and prospective evidence, is not consistent with Article 11.3 of the WTO Anti-Dumping Agreement, as the latter clearly requests that no anti-dumping duty should be continued unless the authority determines that the expiration of such duty would be likely (probably) to lead to continuation or recurrence of dumping and injury.

20. As Mexico points out in its First Submission, in the "Sunset Review Issues and Decision Memorandum," the Department clearly states that it perceives that "if the volume of imports declined significantly after the issuance of the order and dumping was eliminated, the Department may reasonably infer that dumping would resume if the order were revoked."¹² According to the Department, the decline of import volume is directly attributed to the effect of the anti-dumping duty, and ceasing such duty would cause resumption of dumping. The Department also explained in the "Sunset Review Issues and Decision Memorandum" that "[b]ecause we continue to find that Mexican export volumes in the post-order period were significantly lower than pre-order levels, we also continue to find that recurrence of dumping of OCTG from Mexico is likely if the order were to be revoked."¹³

21. It is clearly demonstrated that the Department relied solely on the export volumes for its conclusion that dumping was likely to recur, is inconsistent with Article 11.3.

22. The Appellate Body in *US – Sunset Review of Steel from Japan* reasoned that "the cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated."¹⁴

23. Despite the fact that Article 11.3 requires a case-specific and proactive analysis rather than a passive assumption and simple comparison¹⁵, in the OCTG Sunset Review, the Department based its determination that termination of the anti-dumping measure would be likely to lead to recurrence of dumping solely on a comparison of the total quantities shipped to the United States during the original

¹¹ See the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 122.

¹² See the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 123.

¹³ *Oil Country Tubular Goods from Mexico*, 66 Fed. Reg. 14,131 (Dep't Commerce 9 Mar. 2001)(final results of sunset review); *Issues and Decision Memorandum for the Full Sunset Review of the Anti-dumping Duty Order on Oil Country Tubular Goods from Mexico* (9 Mar. 2001)(final results)("Sunset Review Issues and Decision Memorandum") at 4; see also the First Submission of Mexico before the World Trade Organization regarding the current dispute, para 123.

¹⁴ Appellate Body Report, *US – Sunset Review of Steel from Japan*, para. 177.

¹⁵ Appellate Body Report, *US – Sunset Review of Steel from Japan*, p.39.

investigation period with the total quantities shipped during review periods, which is a clear violation of the afore-mentioned Article.

24. The Department did not act consistently with its obligation under Article 11.3 to consider all positive evidence by ignoring the most recent administrative reviews where the Mexican companies obtained zero dumping margins. Although the Department conducted all these reviews and was well aware of the company's financial and export data, it gave preference to the "decisive factor" of the decrease in export volume and even rejected the company's justification of the decrease from the commercial aspect. Rather, the Department planted its position in the sole factor of export volume decrease and made the determination that dumping would continue or recur without a comprehensive and rigorous evaluation of all aspects.

25. In *US – Sunset Review of Steel from Japan*, the Appellate Body illustrated that "[t]he likelihood determination is a prospective determination. In other words, the authorities must undertake a **forward-looking analysis** and seek to resolve the issue of what would be likely to occur if the duty were terminated."¹⁶ (emphasis added) By using the 21.70 per cent dumping margin calculated in the original investigation years ago when there might be other factors (significant currency devaluation) involved and neglecting or ignoring the most recent dumping margins calculated by the Department itself in the administrative reviews, the Department failed its obligation to do a "forward-looking analysis".

26. In summary, that the Department relied solely on the depressed state of OCTG imports from Mexico to make its affirmative determination that dumping was likely to continue or recur is inconsistent with Article 11.3 and Article 2 of the Anti-Dumping Agreement.

B. THE COMMISSION'S SUNSET REVIEW DETERMINATION IS INCONSISTENT WITH THE ANTI-DUMPING AGREEMENT

27. Mexico challenged the Commission's standard for "likely" and concluded that the Commission's "likely" standard is compromised. China supports Mexico in this argument.

28. Article 11.3 of the Anti-Dumping Agreement states:

"Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review."

29. The Appellate Body has also reaffirmed the same principle repeatedly that continuation of an anti-dumping after its 5-year application period is an exception, which can only exist when the authority determines in the sunset review that the expiration of such duty would be "likely" to lead to continuation or recurrence of injury.¹⁷

¹⁶ Appellate Body Report, *US – Sunset Review of Steel from Japan*, para.105.

¹⁷ See Appellate Body Report, *US – Sunset Review of Steel from Japan*, para. 104; Appellate Body Report, *Steel from Germany*, para. 88.

30. In *US – Sunset Review of Steel from Japan*, the Appellate Body ruled that the ordinary meaning of "likely" as used in Article 11.3 is "probable," rather than simply possible or plausible.¹⁸ The *DRAMS from Korea* panel interpreted the word "likely" in accordance with "its normal meaning of 'probable.'"¹⁹

1. Provisions of Article 3 Apply to Article 11.3

31. Mexico correctly interprets that Article 3 applies to Article 11.3. The title of Article 3 states "Determination of Injury." Footnote 9 then defines the term "injury" that:

Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.(emphasis added)

32. The phrase "[u]nder this Agreement" in Footnote 9 ensures that, whenever the Anti-Dumping Agreement uses the term "injury," the provisions of Article 3 define the term. To find "injury," therefore, the provisions in Article 3 setting forth requirements for finding "injury" must be satisfied.

33. The Appellate Body in *US – Sunset Review of Steel from Japan* found that similar language in Article 2 ("For the purpose of this Agreement") made clear that the disciplines of Article 2 apply to sunset review under Article 11.3. The Appellate Body's reasoning thus requires the parallel finding that Article 3 applies to Article 11.3. Just as Article 2 contains the disciplines for making dumping determinations for the purpose of Anti-Dumping Agreement, Article 3 contains the disciplines for determining injury under the Anti-Dumping Agreement.

34. The texts of the individual provisions of Articles 3 further clarify that the requirements in these provisions apply to a determination of "injury." Article 3.1 sets forth general requirements for a determination of "injury." The phrase "a determination of injury for purposes of Article VI of GATT 1994" clarifies its cross-reference that the provisions of Article 3 apply to an "injury" determination throughout the Anti-Dumping Agreement to determine circumstances in which anti-dumping measure can be applied.²⁰

35. The Panel in *US – Sunset Review of Steel from Japan* states that:

Article 3 is entitled "Injury". This title is linked to footnote 9 of the Anti-Dumping Agreement ... This seems to demonstrate that the term "injury" as it appears throughout the Anti-Dumping Agreement-including Article 11-is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions in Article 3 concerning injury may be generally applicable throughout the Anti-Dumping Agreement and are not limited to the application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset review.

36. Article 3.1 requires the authorities to base their injury determination on "positive evidence" and "objective examination" of "the volume of the dumped imports" and "the effect of the dumped imports on prices."

¹⁸ See Appellate Body Report, *US – Sunset Review of Steel from Japan*, para. 111; see also Panel Report, *US – DRAMS from Korea*, para. 6.48 n.494.

¹⁹ Panel Report, *DRAMS from Korea*, para. 6.46.

²⁰ See Article 1 of the AD Agreement, which defines that "[a]n anti-dumping measure shall be applied under the circumstances provided for in Article VI of GATT 1994."

37. Article 3.1 also provides that the authorities must base their injury determinations on positive evidence and objective examination of "the consequent impact of these imports on domestic producers of such products." Article 3.4 then sets forth how "the impact of dumped imports on the domestic industry" must be examined. Article 3.4 thus provides the detailed requirements for the examination of the impact of dumped imports under Article 3.1, and therefore, for a determination of injury. As such, the authorities must satisfy the requirements in Article 3.4 to determine "injury" in any proceedings under the Anti-Dumping Agreement.

38. Article 3.5 provides that injury "within the meaning of this Agreement" must be caused by dumped imports through the effects of dumping as set forth in paragraphs 2 and 4. The phrase "injury within the meaning of this Agreement" ensures that the provisions of Article 3.5 further define the term "injury" whenever the term "injury" appears in this Agreement. The causation and non-attribution requirements under Article 3.5, therefore, must be satisfied to make a determination of "injury."

39. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury," as is the case of "dumping" discussed above. The terms "continuation or recurrence" demonstrate that the authorities must first find the current state of injury to the domestic industry, and then how the current state is likely to change. The modifying phrase therefore does not affect the applicability of Article 3 to Article 11.3.

40. The provisions of Article 3, therefore, apply to "injury" determinations in sunset reviews under Article 11.3.

2. The Commission's Injury Determination Is Inconsistent With Article 3.1, 3.4, 3.5, And 11.3

41. China supports Mexico's claims that Commission's injury determination was inconsistent with Article 3.1, 3.4 and 3.5 of the Anti-Dumping Agreement.

42. As mentioned before, Article 3.1 provides that the authority must base their injury determination on positive evidence and objective examination of the consequent impact of these imports on domestic producers. Article 3.4 thus provides detailed requirements for the examination of the impact of dumped imports under Article 3.1. Article 3.5 then provides that the authorities must examine any known factors other than the dumped imports to prove the causal link between the dumped imports and injury.

43. Mexico submitted convincing evidence²¹ that the Commission did not evaluate certain factors mandated by Article 3.4 for determining injury. As Mexico pointed out, Article 3.4 requires that the authorities evaluate all relevant economic factors indices as set forth in the Article. The Appellate Body in *Thailand – H-Beams* confirmed the obligation of the authorities, stating, "Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision."²²

44. By using outdated and fragmented information and failing to evaluate "all of the factors," the Commission acted inconsistently with Article 3.4 and accordingly with Article 11.3.

45. Mexico further indicated in its First Submission that the Commission failed to demonstrate a causal relationship of the dumped imports and likely injury to the domestic industry. The

²¹ See First Submission of Mexico, para. 229 and related exhibits.

²² Appellate Body Report, *Thailand – H-Beams*, para. 128.

Appellate Body in *Hot-Rolled Steel from Japan* laid out a framework for the Commission to conduct such causation analysis.

46. China respectfully requests that the Panel review whether the Commission did causal link analysis. If the Panel finds that the Commission failed to do so, the Commission has acted inconsistently with Article 3.5 and 11.3.

47. Furthermore, by failing to satisfy the requirements under Article 3.4 and 3.5, the Commission consequently failed to act consistently with Article 3.1, which requires an "objective examination" of "positive evidences".

3. 19 U.S.C. § 1675a(A)(1) And 19 U.S.C. § 1675a(A)(5), Are Inconsistent, As Such And As Applied, With Articles 11.1, 11.3 And 3 Of The Anti-Dumping Agreement

48. China upholds Mexico's position in that 19 U.S.C. § 1675a(a)(1) and 19 U.S.C. § 1675a(a)(5) are inconsistent with Articles 11.1, 11.3 and Article 3 of the Anti-Dumping Agreement.

49. The US legislation requires that in a sunset review the Commission must determine whether injury would be likely to continue or recur "within a reasonably foreseeable time,"²³ and the Commission "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."²⁴ The SAA further elaborates that the "'reasonably foreseeable time' ... normally will exceed the 'imminent' time frame applicable in a threat of injury analysis."²⁵ The SAA also provides that the Commission shall consider "factors that may only manifest themselves in the longer term."²⁶

50. Article 11.1 clearly states that an "anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." A literal interpretation of the article would tell that, if at the time of the review there is no injury then the anti-dumping duty should be terminated. The US statute, however, allows the authorities to probe into the long-term future possibilities which, even according to common sense, is unpredictable and is almost impossible to prove with sound facts.

51. As discussed above, the phrase "likely to lead to continuation or recurrence of injury" in Article 11.3 does not change the core concept of "injury". The footnote 9 of the Anti-dumping Agreement defines the term "injury" means material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry ... Therefore, to determine whether the injury is likely to continue or recur under Article 11.3 of sunset review also requests the investigating authority to identify the injury.

52. Article 3.1 of the Anti-Dumping Agreement requests the investigating authority to determine injury on the basis of positive evidence and involve an objective examination. There is no room that the investigating authority "shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time."

53. Furthermore, regarding threat to material injury, Article 3.7 of the Anti-Dumping Agreement makes it compulsory that the authority cannot base its threat of material injury determination on sheer "allegation, conjecture or remote possibility," and "the change in circumstances which would create a

²³ 19 U.S.C. § 1675a(a)(1).

²⁴ 19 U.S.C. § 1675a(a)(5).

²⁵ SAA at 887.

²⁶ *Id.*

situation in which the dumping would cause **injury must be clearly foreseen and imminent.**" (emphasis added).

54. The SAA's elaboration that the "'reasonably foreseeable time' ... normally will exceed the 'imminent' time frame applicable in a threat of injury analysis" is inconsistent with the Article 3 and Article 11.3 of the Anti-Dumping Agreement.

55. Further, the "reasonably foreseeable time," defined by the US statute, which the SAA interprets as an ambiguous and undefined term "in the longer term," is inconsistent with the Anti-Dumping Agreement that requires the determination to be based on injury upon "expiry" of the order.

C. THE DEPARTMENT ACTED INCONSISTENTLY WITH ARTICLE 2.1 AND 2.4 OF THE ANTI-DUMPING AGREEMENT BY APPLYING "ZEROING" IN ITS DETERMINATION OF DUMPING MARGIN

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

57. The practice of "zeroing" selectively calculates margins only for those sales of a product with positive margins, setting negative margins produced from sales of the product to zero. This methodology thus creates an artificially inflated dumping margin. As discussed below, a "dumping" determination based on margins with the "zeroing" practice is inconsistent with Articles 2.1 and 2.4.

58. Article 2.1 of the Anti-Dumping Agreement states that:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.²⁷

59. The term "a product" under Article 2.1 clarifies that the margin of dumping, i.e., the basis of the determination of "dumping," must incorporate all types of the product that are subject to a particular anti-dumping proceeding.

60. The Appellate Body in *EC - Bed Linen* has stated, "from the wording of this provision, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a product."²⁸ The Appellate Body in *EC-Bed Linen* further clarified this point:

"[a]ll references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. ... Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole."²⁹

61. The Appellate Body in *EC - Bed Linen* also confirmed, "dumping is a determination made with reference to a product from a particular producer [or] exporter, and not with reference to

²⁷ Article 2.1 of the AD Agreement.

²⁸ Appellate Body Report, *EC - Bed Linen*, para. 51.

²⁹ Appellate Body Report, *EC - Bed Linen*, para. 53.

individual transactions."³⁰ Article 2.1 thus provides that dumping must be determined on the basis of all types of a product under consideration as a whole, not some types of the product.

62. Article 2.4 requires the authorities to make "a fair comparison" between the export price and the normal value. The Appellate Body in *EC - Bed Linen* clarified that the "fair comparison" required in Article 2.4 and the "price comparability" defined in Article 2.1 mean that the establishment of dumping margins must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body stated "[a]ll types or models falling within the scope of a 'like' product must necessarily be 'comparable'."³¹ It then further stated that:

"[T]he European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another."³²

63. The Appellate Body in *US - Sunset Review of Steel from Japan* confirms that "zeroing" methodology will tend to inflate the margins calculated either in an original investigation or otherwise. The report states:

When investigating authorities use a zeroing methodology such as that examined in *EU-Bed Linen* to calculate a dumping margin, **whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated**. Apart from inflating margins, such a methodology could, in some instances, turn a negative dumping margin of dumping into a positive dumping margin of dumping. As the Panel itself recognized in the present dispute, "zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing". Thus, the inherent bias in zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also finding of the very existence of dumping. (emphasis added)

64. The United States makes the following statement in its First Submission:³³

"[I]n *Japan Sunset*, the Appellate Body found that it was unable to make findings on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the ADA by relying on dumping margins from administrative reviews in making its likelihood determination in a sunset review. Consequently, there were no findings in that report relevant to this dispute."

65. However, the Appellate Body in *US - Sunset Review of Steel from Japan* made the following findings and conclusions:

"[R]everse the Panel's findings, in paragraphs 7.170, 7.184, and 8.1(d) (iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 or Article 11.3 of the Anti-Dumping Agreement by relying, in the CRS sunset review,

³⁰ Appellate Body Report, *European Communities -- Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU India* ("EC - Bed Linen (Article 21.5 - India)"), WT/DS141/AB/RW (8 April 2003), para. 143.

³¹ Appellate Body Report, *EC - Bed Linen*, para. 58.

³² *Ibid.* para. 60.

³³ US First Submission, para. 213.

on dumping margins calculated in previous administrative reviews allegedly using a "zeroing" methodology; but finding that **there is not a sufficient factual basis** to complete the analysis of Japan's claims on this issue. (emphasis added).

66. The Appellate Body in *US – Sunset Review of Steel from Japan* confirms that "zeroing" methodology will tend to inflate the margins calculated either in an original investigation or otherwise. However, just due to there is no sufficient factual basis, the Appellate Body did not make any finding.

67. Mexico in its First Submission presented a table to prove that the Department adopted "zeroing" methodology in its fourth administrative review in calculating dumping margin for Hylsa.³⁴

68. China therefore respectfully requests that the Panel carefully review the evidence to confirm if the Department adopted zeroing methodology to find that 0.79 per cent dumping margin to Hylsa. If the Panel finds that the Department applied the zeroing methodology to find the positive dumping margin, the Department's determination in the fourth administrative review was inconsistent with Article 2.1 and 2.4 of the Anti-Dumping Agreement.

III. CONCLUSION

69. China hereby wishes to thank the Panel for providing it with an opportunity to comment on the issues involved in this proceeding, and hopes that these comments will prove to be useful.

³⁴ Mexico First Submission, para. 23-24.

ANNEX B-3

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

I. SUNSET REVIEW "AS APPLIED"

A. LIKELY RECURRENCE OF DUMPING

1. A sunset review necessarily involves an historical analysis, including a dumping determination, which must be consistent with Article 2 *ADA*. USDOC made a determination of likely *recurrence* of dumping. The historical basis for the recurrence determination was the dumping margin calculated in the original period of investigation (1 January to 30 June 1994). The events USDOC found likely to recur are thus those that occurred during that period.

2. With the US method, a dumping measure could be perpetuated indefinitely, on the basis of the calculation made in relation to the original investigation period, together with the prospective part of the likely recurrence determination. That is inconsistent with Article 11.1 and 11.3 *ADA*. Article 11.1 *ADA* states a general and overarching principle in the light of which Article 11.3 must be interpreted. *Only as long as there is dumping can there be an anti-dumping duty.* A dumping determination in relation to the original investigation period has a limited "shelf-life". There must be a sufficiently recent determination of *dumping*, not just a determination concerning *imports*. ***The minimum meaning of Article 11.3 ADA is that, to continue the measure beyond 5 years, a dumping determination more recent than that made in the original investigation is necessary.***

3. If the historical dumping determination relates only to the original investigation period, some new facts must be added for the prospective determination. The additional fact relied on by USDOC was that post-order export volumes were well below pre-order export volumes. This was insufficient. There are many reasons why imports from one Member to another might have been at a particular level prior to the order, and not increased after the order, other than the existence of the order itself. A sufficient and fair consideration of those reasons cannot be made if the factual basis for the determination is as narrow as that used by USDOC.

4. Identifying facts relevant to a prospective determination is problematic. Reasons assume a particular importance. A sufficiently detailed and persuasive set of reasons is necessary. USDOC failed to *review* the (highly unusual) reasons that gave rise to the original dumping determination, imposing a duty of 21.7 per cent (instead of 0 per cent) on all firms some *12 years, 2 months and 9 days* later. That determination neither meets the "likely" standard nor corresponds to a determination made by an objective and even-handed authority. The most that could be said is that USDOC established likely recurrence of dumping within the meaning of the Tokyo Round *AD Code*. That is not enough. USDOC must establish likely recurrence of dumping within the meaning of Article 2 of the *ADA*.

B. LIKELY RECURRENCE OF INJURY

5. The provisions of Article 3 *ADA* apply *mutatis mutandis* in the context of a sunset review investigation. The likely injury for the purposes of Article 11.3 *ADA* need not be imminent. A determination of likely injury within a reasonably foreseeable time would be based on a permissible

interpretation of the *ADA*. A cumulative analysis of injury is permissible in a sunset review, provided that the conditions set out in Article 3.3 *ADA* are fulfilled. The conditions should be fulfilled, if not at the time of the sunset review, at least within the reasonably foreseeable future.

II. SPB AND CONSISTENT PRACTICE "AS SUCH"

6. The SPB is "as such" reviewable by this Panel for consistency with the *ADA*.

7. The SPB is a useful tool for authorities and participants in anti-dumping proceedings. However, provisions that create "irrebuttable" presumptions, or "predetermine" a particular result, are inconsistent with the *ADA*. The US anti-dumping system is skewed towards findings of likelihood in sunset reviews. This case is just one more particularly egregious example. The suggestive language of the SPB makes an important contribution towards that state of affairs.

8. The drafters of the *ADA* contemplated the possibility of a recidivist dumper, and inserted provisions in the *ADA* to address that scenario. These provisions would have no purpose if, once a measure was in place, it was never terminated. It makes a difference in the US system if a measure is in place with a zero cash deposit rate. There is, in the US system, a chilling effect. If, in the long run, USDOC *always* found likelihood and *never* terminated, it would be possible to conclude in general terms that the US was not complying with its obligations under Article 11.3 *ADA*. The Panel should thus consider the history of past sunset cases and draw the appropriate conclusions.

III. FOURTH PERIODIC REVIEW OF AMOUNT OF DUTY

A. ZEROING

1. Article 2.4 *ADA*

(a) Overarching and independent obligation

9. The first sentence of Article 2.4 *ADA* establishes a general principle - an overarching obligation to make a fair comparison between export price and normal value. That is an independent and separate obligation on Members. It is more than a mere introduction to the following sentences of Article 2.4.

10. This is confirmed by the fact that the text of the Uruguay Round *ADA* contains an important and significant innovation by comparison with the text of the Tokyo Round *AD Code*. The words "fair comparison ... between the export price and the normal value" were lifted up and placed on their own in a new first sentence of Article 2.4.

(b) US zeroing unfair

11. Given the common and ordinary meaning of the word "fair", the obligation to make a fair or equivalent comparison must necessarily normally involve a fairly balanced comparison, being one based on equivalent methodologies - that is, a symmetrical comparison. A symmetrical comparison for the purposes of calculating a dumping margin and eventually imposing a duty, in relation to a given product or time, is necessarily one that precludes zeroing.

12. The inherent unfairness of the zeroing method used by the US, and the dramatic effect it can have on the outcome of the calculation is illustrated in table 1. Table 1 shows a hypothetical dumping calculation for three models (A, B, C) and four customers (1 to 4). Without zeroing the dumping margin is 2.8 per cent. With model zeroing the dumping margin is 4.7 per cent. With simple zeroing the dumping margin is 6.7 per cent. Thus, the effect of the zeroing method used by the US in periodic

reviews of the amount of duty is that, even if an exporter's selling prices and quantities are identical to those examined in the original investigation, USDOC will find a higher dumping margin, simply because it has switched from model zeroing to simple zeroing. If model zeroing in an original investigation does not involve a "fair comparison" as required by Article 2.4 *ADA*, it cannot be that simple zeroing, which leads to an even higher margin of dumping, constitutes a fair comparison.

13. These conclusions are confirmed if one considers the situation from the exporter's point of view. Having been made subject to a duty following the original investigation, an exporter will wish to raise its prices to eliminate dumping. However, the removal of the original margin of dumping will not prevent the exporter from being subject to the further imposition of a duty following a US periodic review of the amount of duty, unless the exporter actually increases its prices by *more than* the margin of dumping. In the example in table 2, even if the exporter raises its prices so as to eliminate the margin of dumping found by USDOC in the original investigation, USDOC will still calculate a margin of dumping of 3.6 per cent. This cannot be consistent with the general overarching principle that comparisons between normal value and export price be fair.

14. Another aspect of the inherent unfairness of the zeroing methodology used by the US in periodic reviews of the amount of duty is illustrated in table 3. In the logic of the US, an exporter's liability for anti-dumping duties may depend entirely on the frequency and size of its sales in the US. Two exporters, A and B, both sell 1.000 units of an identical product to the same customer in the US at an average price of \$100 per unit, normal value also being \$100. Exporter A chooses to sell at the same time in one large transaction, whilst exporter B chooses to sell at five different times in five separate transactions. USDOC will calculate a dumping margin of zero for exporter A, and a dumping margin of 4 per cent for exporter B, despite the fact that the pricing policy of both is the same to the same customer, and the return on their export sales is identical. This is an absurd result. In effect, the US appears to be making its assessment on the basis that exporter B is engaged in some kind of targeted dumping simply because its shipments are carried out as five transactions instead of one. There is nothing in Articles 2.4 or 2.4.2 *ADA* that would permit this, as there is nothing in those provisions that would permit a targeted analysis on the basis of the model zeroing condemned in the *EC – Bed Linen* case. In truth, the proposition that exporter B is engaged in "dumping" in such circumstances is an illusion – nothing more than that.

(c) Existing case law confirms US zeroing unfair

15. These conclusions are confirmed by the findings of the Appellate Body in *EC – Bed Linen* and *US – Carbon Steel from Japan* and by the panel Report in *US – Softwood Lumber from Canada*.

16. In the present case, the zeroing methodology used by the US involved an inherent bias that had the effect of inflating the margin of dumping, and even of turning a negative margin into a positive one.

2. Article 2.4.2 ADA

(a) Method for comparing normal value and export price

17. The main purpose of Article 2.4.2 *ADA* is to provide for an exception (asymmetrical comparison in the case of targeted dumping) to the normal methods of comparison (symmetrical comparison) in order to ensure a fair comparison within the meaning of Article 2.4 *ADA*. The US acted inconsistently with the *ADA* for three reasons : use of the asymmetrical method when neither the first nor second conditions were fulfilled; and failure to use a symmetrical method when that was the only lawful option.

(b) Simple zeroing

18. Just as an anti-dumping proceeding concerns "a product" (the subject product), so it also concerns a margin of dumping based on a comparison of sales made at as nearly as possible "the same time" (the investigation or review period). Just as the *ADA* contains no express rule governing the definition of the "subject product", so it contains no express rule governing the definition of the period of investigation or the period of review. The "same time" might be a shorter period or a longer period (such as a year). Just like product characteristics, time (along with geography) is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability – are defined. Just as the US defined the "subject product", so the US defined the period of review, and decided to calculate a single dumping margin for that period of review. Just as in the case of "model zeroing", having defined the period of review, and having decided to calculate a single overall dumping margin for that period of review, the US was obliged to ensure that the dumping margin for that period of review was calculated in conformity with Articles 2.4 and 2.4.2 of the *ADA*. The US had become bound by its own logic.

19. The reasoning of the Appellate Body in the *EC – Bed Linen* case in relation to model zeroing also applies whenever an investigating authority decides to fix the parameters of its investigation, whether in relation to subject product, time, level of trade, region, or any other parameter. USDOC thereby became bound by its own logic, and should have completed its analysis on the basis of the same logic.

20. The US decision to calculate a single dumping margin and impose a single rate of duty in relation to "the same time" (the period of review), means that whichever of the two methods would have been chosen, simple zeroing would not have arisen or would have been impermissible. Thus, since the US used simple zeroing, it must necessarily have acted inconsistently with Articles 2.4 and 2.4.2 *ADA*.

(c) During the investigation phase

21. The words "during the investigation phase" in Article 2.4.2 *ADA* do not mean that the methodologies set out in that provision are irrelevant to the present case.

22. First, the "periodic review of amount of duty" carried out in the US must be consistent with the provisions of Article 9 *ADA*, which expressly provide that the amount of duty shall not exceed the margin of dumping calculated under Article 2.

23. Second, the term "investigation" and "review" are not mutually exclusive. There is no definition of the terms "investigation" or "review" in the *ADA*. Those words are used in many different senses, including initial or original investigation within the meaning of Article 5 of the *Agreement*; and in the more general sense of Article 6 of the *Agreement*, which must apply to the exercise under scrutiny in this case because of the express cross-reference from Article 11.4 to Article 6, and absent the words *mutatis mutandis*, which are used in Article 11.5 of the *Agreement*. It is not possible to apply the provisions of Article 6 of the *Agreement* in a US periodic review of the amount of duty and assert that there is no investigation, when that word is used repeatedly – there must at least be a review investigation, conducted by investigating authorities. The word "investigation" in Article 2 of the *Agreement* has the same general and unqualified meaning as in Article 6. If the drafters had intended otherwise, they would have inserted words to that effect, which they chose not to do. There is no reason based on context or purpose to conclude otherwise. The Panel should not read into that provision words such as "original" or "initial" or "Article 5" that are not there.

24. Third, the exercise conducted by the US in a periodic review of the amount of duty corresponds, objectively, to an investigation or assessment by an investigating authority.

25. Fourth, Article 2 of the *ADA* contains a definition, which goes beyond a cross-reference, and is not qualified by the words "unless otherwise specified".

26. Fifth, even if the US would be correct, that would not mean that simple zeroing would be permitted in periodic reviews – it would still be prohibited by Article 2.4 *ADA*, as analysed above.

27. Sixth, if the US would be correct on its interpretation of the phrase "during the investigation phase", that could effectively only mean that the negotiators, when agreeing to transform a commonly used method of comparison into an exception subject to certain conditions, decided to limit the scope of application of such method to original investigations only. Otherwise, the implication would be that that Members could use the exception outside original investigations without being subject to any conditions at all. That would be a very strange conclusion that would be at odds with the overall obligation to make a fair comparison in all circumstances. The United States has offered no context or reason to explain why the exception could become the norm outside original investigations. The European Communities considers that such proposition, if accepted, would severely undermine the overall obligation to make a fair comparison in all margin of dumping determinations.

28. Seventh, if the US would be correct in respect of both Articles 2.4.2 and Article 2.4 *ADA*, that would open up in the *ADA* a vast loophole on the fundamental issue of how to calculate a dumping margin.

29. Eighth, the view expressed by the US would appear to be an attempt to create a gross distortion between systems of retrospective collection and those of prospective collection, for which there is no basis in the *ADA*.

3. Articles 11.1 and 11.2 ADA

30. If an investigating authority makes or relies on a dumping determination for the purposes of Article 11.2 *ADA*, it is bound to establish any such dumping margin in conformity with the provisions of Article 2.4, including Article 2.4.2 *ADA*.

31. It being *temporal* considerations that are at the heart of this provision, recourse to Article 11.2 *ADA* does not provide an opportunity for a Member to switch to making a comparison between normal value and export price that is "unfair" within the meaning of Articles 2.4 and 2.4.2 *ADA*, insofar as it involves unlawful zeroing. To accept that would be to accept a fundamental rupture in continuity that would set at naught the word "continued" in the text of Article 11.2. This is all the more so when the first review period stretches back to the date on which provisional measures were first imposed, thus eclipsing entirely the results of the original investigation.

Table 1

Model	Customer	EP	NV	Amount of dumping	No zeroing	Zeroing per model	Zeroing by transaction	
A	1	95	100	5			5	
A	2	110	100	-10			0	
A	2	95	100	5			5	
A	3	110	100	-10			0	
A	4	115	100	-15			0	
	AVERAGE	105	100	-5		0.0		
B	1	95	110	15			15	
B	2	90	110	20			20	
B	3	100	110	10			10	
B	4	125	110	-15			0	
	AVERAGE	102.5	110	7.5		7.5		
C	1	115	120	5			5	
C	3	95	120	25			25	
C	4	120	120	0			0	
	AVERAGE	110	120	10		10		
		1265		MARGIN		2.8%	4.7%	6.7%

Table 2

Initial investigation							Review	
Model	Customer	EP	NV	Amount of dumping	No zeroing	Zeroing Per model	EP Increased by original dumping amount	Zeroing By transaction
A	1	95	100	5			95	5
A	2	110	100	-10			110	0
A	2	95	100	5			95	5
A	3	110	100	-10			110	0
A	4	115	100	-15			115	0
	AVERAGE	105	100	-5		0.0	105	
B	1	95	110	15			102.5	7.5
B	2	90	110	20			97.5	12.5
B	3	100	110	10			107.5	2.5
B	4	125	110	-15			132.5	0
	AVERAGE	102.5	110	7.5		7.5	110	
C	1	115	120	5			125	0
C	3	95	120	25			105	15
C	4	120	120	0			130	0
	AVERAGE	110	120	10		10	120	
		1265		MARGIN		2.8%	1325	3.6%

Table 3

Exporter	Transaction	Quantity	Export Price	Dumping
A	1	1000	100	0
B	1	200	90	2000
	2	200	90	2000
	3	200	100	0
	4	200	110	0
	5	200	110	0
Total/Average				
A		1000	100	0
B		1000	100	4000

ANNEX B-4

THIRD PARTY SUBMISSION OF JAPAN

(7 May 2004)

1. Japan joined this proceeding as a third party because it has systemic concerns with respect to the interpretation and the application of the AD Agreement, the GATT 1994 and the WTO Agreement with regard to sunset reviews and administrative reviews. Japan would like to address the legal issues as follows.

A. THE THREE SCENARIOS IN THE *SUNSET POLICY BULLETIN* ARE INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT AS SUCH

2. Japan agrees with Mexico that the three scenarios, which the DOC sets forth in Section II.A.3 of the *Sunset Policy Bulletin* to instruct individual sunset review determinations, are inconsistent with Article 11.3.

3. The Appellate Body in *US – CRS Sunset Review*, as a preliminary jurisdictional matter, clarified that the *Sunset Policy Bulletin* is a measure that is challengeable, *as such*, under the WTO Agreement.¹

4. In this dispute, Mexico claims the inconsistency of the *Sunset Policy Bulletin* with AD Agreement as such. The Panel, therefore, must review whether the *Sunset Policy Bulletin* satisfies the substantive requirements of Article 11.3 of the AD Agreement.

5. As also clarified by the Appellate Body in *US – CRS Sunset Review*, if the three scenarios in the Section II.A.3 of the *Sunset Policy Bulletin* are found to be determinative or conclusive of the likelihood of future dumping, they are, as such, inconsistent with Article 11.3.²

6. In this dispute, Mexico has established that the DOC consistently applied, and never deviated from, the three scenarios in all past sunset reviews, and every time it found that at least one of the three scenarios was satisfied, the DOC made these affirmative findings of likely dumping without considering additional factors.

7. The repeated and consistent application of the three scenarios to all sunset reviews could not be a coincidence. Nor were similar facts presented to the DOC in all previous cases. It demonstrates the DOC's mechanical application to all cases of the presumption in the three scenarios in the *Sunset Policy Bulletin* that respondents, who were found to have dumped in the original investigations and did not sell more volume than the pre-order level at non-dumped price, are likely to continue or recur dumping. It also demonstrates that the DOC's sunset reviews in accordance with the *Sunset Policy Bulletin* lack any rigorous or diligent examination of facts underlying individual sunset reviews.

¹ See WT/DS244/AB/R, paras. 87-88.

² See WT/DS244/AB/R, para. 178.

8. As such, the DOC's mechanical and consistent applications without rigorous and diligent examination of facts on a case-specific basis well prove that the three scenarios in the Section II.A.3 of the *Sunset Policy Bulletin* are determinative and conclusive and are inconsistent with the requirements of Article 11.3.

B. THE ITC'S DETERMINATION OF LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY WOULD BE INCONSISTENT WITH ARTICLES 3.1, 3.4, 3.5 AND 11.3 OF THE AD AGREEMENT

1. Provisions of Article 3 Apply to Article 11.3

9. Mexico correctly stated that provisions of Article 3 apply to Article 11.3.

10. The phrase "[u]nder this Agreement" in Footnote 9 of Article 3 ensures that, whenever the AD Agreement uses the term "injury," the provisions of Article 3 define the term.

11. The texts of the individual provisions of Articles 3 further clarify that the requirements in these provisions apply to a determination of "injury." Article 3.1 sets forth general requirements for a determination of "injury." The phrase "a determination of injury for purposes of Article VI of GATT 1994" clarifies its cross-reference that the provisions of Article 3 apply to an "injury" determination throughout the AD Agreement to determine circumstances in which an anti-dumping measure can be applied. The Appellate Body in *Thailand – H-Beams* has confirmed that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs."³

12. Article 3.1 requires the authorities to base their injury determination on positive evidence and objective examination of "the volume of the dumped imports" and "the effect of the dumped imports on prices." Article 3.2 then sets forth further rules on how the authorities shall consider these two elements. In this way, Article 3.2 informs Article 3.1 and all other provisions of the AD Agreement of the analytical methods that the authorities must follow for making an injury determination.

13. Article 3.1 also provides that the authorities must base their injury determinations on positive evidence and objective examination of "the consequent impact of these imports on domestic producers of such products." Article 3.4 then sets forth how "the impact of dumped imports on the domestic industry" must be examined. Article 3.4 thus provides the detailed requirements for the examination of the impact of dumped imports under Article 3.1, and therefore, for a determination of injury. The authorities must satisfy the requirements in Article 3.4 to determine "injury" in any proceedings under the AD Agreement.

14. Article 3.5 provides that injury "within the meaning of this Agreement" must be caused by dumped imports through the effects of dumping as set forth in paragraphs 2 and 4. The phrase "injury within the meaning of this Agreement" ensures that the provisions of Article 3.5 further define the term "injury" whenever the term "injury" appears in this Agreement. The causation and non-attribution requirements under Article 3.5, therefore, must be satisfied to make a determination of "injury."

15. The phrase "likely to lead to continuation or recurrence" in Article 11.3 does not change the core concept of "injury," as is the case of "dumping" as the Appellate Body in *US – CRS Sunset Review*.⁴ The terms "continuation or recurrence" demonstrate the drafters' intent that the authorities must first find the current state of injury to the domestic industry, and then how the current state is likely to change. The modifying phrase therefore does not affect the applicability of Article 3 to

³ See, WT/DS122/AB/R, para.106.

⁴ See WT/DS244/AB/R, para.109.

Article 11.3. The provisions of Article 3, therefore, apply to "injury" determinations in sunset reviews under Article 11.3.

2. The ITC Would Have Acted Inconsistently with Articles 3.4 and 11.3

16. Japan agrees with Mexico that the authorities must evaluate all relevant economic factors and indices as set forth in the Article 3.4 in sunset reviews.

17. It seems to us that Mexico submitted convincing evidence that the ITC did not evaluate certain factors mandated by Article 3.4 for determining injury.

18. We note that the ITC's evaluation of the magnitude of the margin of dumping, even if the ITC were to evaluate it, would be inconsistent with Article 3.4. The magnitude of the margin of dumping is a factor that the ITC must evaluate in accordance with Article 3.4. If the ITC did not evaluate this factor, the ITC's injury determination is inconsistent with Article 3.4. As Mexico has established, the DOC had no positive evidence which would show that the OCTG market would be under the conditions similar to those at the time of the pre-AD order. The ITC's evaluation of the magnitude of the margin of dumping was, thus, not supported by positive evidence required by Article 3.1, and, therefore, is inconsistent with Articles 3.1 and 3.4.

3. The ITC Would Have Acted Inconsistently with Articles 3.5 and 11.3

19. The first sentence of Article 3.5 expressly states that the authorities must demonstrate that the effects of "dumping" actually caused the injury.

20. Further, the "non-attribution" requirement in the second and third sentences of Article 3.5 requires that the authorities explicitly separate and distinguish the injurious effects of other injury factors from the injurious effects of the dumping.⁵

21. Japan, therefore, respectfully requests that the Panel carefully review whether the ITC demonstrated that the likely injury to the domestic industry was caused by the effects of dumping and whether the ITC separated and distinguished effects of all known factors to the likely injury to the domestic industry from the effects of dumping.

C. THE DOC'S DETERMINATION IN THE FOURTH REVIEW NOT TO REVOKE THE ANTI-DUMPING MEASURES BASED ON THE DUMPING MARGINS CALCULATED WITH ZEROING METHODOLOGY IS INCONSISTENT WITH ARTICLES 11.2 AND 2.4 OF THE AD AGREEMENT

1. Article 11.2 Reviews are Subject to Disciplines in Article 2

22. The Appellate Body clarified that the disciplines in Article 2 of the AD Agreement are applicable to any determination of "dumping," and dumping margins, in any kind of AD proceedings, unless otherwise indicated in the provisions which set forth such proceedings. A determination of dumping, including likelihood of dumping under Article 11.3, therefore, would be inconsistent with Article 2.4 (and Article 11.3), if it relies on the dumping margins calculated in a manner inconsistent with Article 2.4.⁶

23. The DOC's revocation review in question was conducted under Article 11.2 of the AD Agreement. As is the case of Article 11.3, Article 11.2 does not contain any language, which indicates that "dumping" has a different meaning in the context of such proceedings from that in the

⁵ See WT/DS184/AB/R, paras. 222-223.

⁶ See, WT/DS244/AB/R, paras. 109 and 127.

rest of the AD Agreement. Therefore, the disciplines of Article 2 apply with equal force to the determination of "dumping" and calculation of the dumping margins, including those for the reviews under Article 11.2.

2. The Zeroing Methodology for Calculating Dumping Margins Is Inconsistent With Article 2.4

24. The "zeroing" occurs when the authorities calculate the dumping margins in two steps. At the first step, the authorities calculate dumping margins of various sub-groups of all export transactions separately. At the second step, the authorities add up these individual margins to obtain the overall margin of dumping, but setting negative individual margins to zero.

25. The Appellate Body in *EC – Bed Linen* clarified that such zeroing methodology is inconsistent with Articles 2.4 and 2.4.2. It found that the EC's methodology "inflated the result from the calculation of the margin of dumping" and was inconsistent with "fair comparison" because it "did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found."⁷

26. The Appellate Body in *US – CRS Sunset Review* also confirmed the above-stated rationales for prohibiting the zeroing methodology, and further stated that the zeroing not only distorts the magnitude of the dumping margin, but may distort a finding of the very existence of dumping.⁸

27. Thus, the zeroing methodology to calculate dumping margins, whether in an original investigation or otherwise, is inconsistent with Article 2.4.

3. The DOC Uses Zeroing Methodology to Calculate Dumping Margins in Its Administrative Reviews, and Thus the Calculation Is Inherently Inconsistent with Article 2.4

28. The above rationale squarely applies to the DOC's dumping margin calculation methodology in administrative reviews. In administrative reviews, the DOC calculates the dumping margins using a weighted average-to-transaction method. Under this method, at the first step, the DOC calculates the dumping margin of each individual export transaction. If there are 100 export transactions, for example, the DOC calculates 100 different dumping margins. The DOC then calculates the total dumping margin of all export transactions. The DOC, however, does not simply add all 100 dumping margins. In adding these margins, the DOC turns negative dumping margins to zero. In effect, the DOC adds only positive dumping margins of individual transactions to reach the total dumping margin.

29. Thus, there is no methodological difference between the EC's method challenged in *EC – Bed Linen* and the DOC's method in administrative reviews in applying the zeroing methodology to the individual negative margins at the second calculation step. The DOC's method of zeroing in administrative reviews is, therefore, equivalent to, if not worse, the zeroing methodology which was disputed and found to be inconsistent in *EC – Bed Linen*.

⁷ See, WT/DS141/AB/R, para. 55.

⁸ See, WT/DS244/AB/R, para. 135.

30. As demonstrated by Mexico, the DOC's determination not to revoke the AD order against OCTG from Mexico relied on dumping margins which were calculated on the basis of the zeroing methodology. Therefore, the DOC's determination is inconsistent with Articles 2.4 and 11.2.

ANNEX B-5

THIRD PARTY SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

(28 April 2004)

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I. INTRODUCTION

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu presents this third party submission because of its systemic interest in the interpretation of Article VI of the General Agreement on Tariffs and Trade of 1994 (GATT) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) with respect to sunset reviews. In particular, this third party submission will address the following issues:

- the ability of the Statement of Administrative Action (SAA) and the Sunset Policy Bulletin (SPB) to be challenged as such;
- the inconsistency of the SAA and the SPB with the ADA Article 11.3 obligation to terminate the duty no later than five years from the date of the imposition, unless the conditions set forth in the Article are met; and
- the applicability of Article 3 of the ADA in sunset reviews.

2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that the limited scope of this submission does not prejudice its position on the other claims raised by Mexico in this dispute. Accordingly, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu reserves its right to raise the issues not contained in this written submission in the oral statement.

II. LEGAL ARGUMENTS

A. THE STATEMENT OF ADMINISTRATIVE ACTION (SAA) AND THE SUNSET POLICY BULLETIN (SPB) CAN BE CHALLENGED AS SUCH

2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with Mexico that the SAA and SPB are "measures" that can be challenged as such.¹ In *US – Sunset Review of Steel from Japan*, the Appellate Body reversed "the Panel finding...that the Sunset Policy Bulletin is not a mandatory legal instrument and thus is not a measure that is 'challengeable', as such, under the *Anti-Dumping Agreement* or the *WTO Agreement*."² Though the Appellate Body stopped short of stating that the SPB *in itself* is an "administrative procedure" within the meaning of ADA Article 18.4 and therefore a measure, the Appellate Body, in examining specific as such claims by Japan on Sections II.A.2, 3, and 4 of the SPB, did consider those provisions as measures, and entertained Japan's as such challenges.³ Similarly, in this case, these same provisions, and others, of the SPB can certainly be considered measures capable of being challenged as such.

3. Neither the Panel nor the Appellate Body addressed the nature of the SAA to be challenged as such in *US – Sunset Review of Steel from Japan* because the claim was not raised by Japan.⁴ However, in its examination of the SPB, the Appellate Body cited its own report in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico* in observing the broad scope of

¹ First Submission of Mexico, 24 March 2004, paras. 42-46.

² *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (US – Sunset Review of Steel from Japan), Appellate Body Report, WT/DS244/AB/R, paras. 100, 212.

³ *Id.*, paras. 156 and 169.

⁴ The United States does not seem to be refuting Mexico's claim that the SAA can be challenged as such. Nevertheless, this submission presents the arguments with regard to the SAA for consideration by the Panel in case the United States raises the issue in future submissions.

"measures" that could be subject to WTO dispute settlement, including "non-binding administrative guidance".⁵ The Appellate Body further stated that,

instruments of a Member containing *rules or norms* could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if *instruments setting out rules or norms* inconsistent with a member's obligations could not be brought before a panel ... It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application.⁶ [emphasis added]

4. In reversing the Panel's conclusions that the SPB is not a mandatory legal instrument and therefore cannot be challenged as such under the WTO, the Appellate Body also faulted the Panel for concentrating too much on the mandatory/discretionary distinction⁷, and failing to recognize the undue limitations the SPB has on the US Department of Commerce's determinations⁸ and thus the "normative nature" of the provisions⁹.

5. According to the Appellate Body, therefore, a "non-binding administrative guidance" containing "rules or norms" can constitute a "measure". Furthermore, even if the measure is non-mandatory, it can be challenged as such if it improperly limits the factors to be taken into account by the investigating authorities in making determination in a sunset review as to become normative in nature.

6. The SAA, following the Appellate Body reasoning outlined above, is a measure capable of being challenged as such. As Mexico has pointed out, the SAA contains three criteria or rules that the United States believes to be "highly probative" of likely dumping.¹⁰ The introduction of the SAA also confirms that,

this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements ... Furthermore, the Administration understands that *it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement*. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.¹¹ [emphasis added]

⁵ *Id.*, para. 85.

⁶ *Id.*, para. 82.

⁷ *Id.*, para. 93.

⁸ *Id.*, para. 97.

⁹ *Id.*, para. 98.

¹⁰ First Submission of Mexico, para. 91.

¹¹ Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Volume 1, 103d Congress, 2nd Session, 656 (1994), page 656.

7. The SAA has been approved by Congress.¹² The investigating authority, as part of the Administration of the United States, is expected by Congress to "observe and apply" the SAA. This is language which indicates that the SAA is intended to be normative; the Administrative does not have the discretion to deviate from the SAA in its implementation of the Uruguay Round agreements. And in practice, as Mexico has demonstrated in Exhibit MEX-62, the US Department of Commerce follows the interpretation of the SAA, which is further elaborated by the SPB, in every sunset review case. Based on these facts, the SAA is certainly a measure that can be challenged as such.

B. THE SAA AND THE SPB VIOLATE THE EXPLICIT OBLIGATION IN ADA ARTICLE 11.3 TO TERMINATE THE DUTY NO LATER THAN FIVE YEARS FROM THE DATE OF THE IMPOSITION, UNLESS THE CONDITIONS SET FORTH IN THE PROVISION ARE MET

8. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agrees with Mexico that the SAA and SPB are inconsistent with ADA Article 11.3 as such.¹³ Leaving aside the question of whether a WTO-inconsistent presumption of the continuation or recurrence of dumping has been created by the SAA and the SPB, as Mexico alleges,¹⁴ the SAA and the SPB are nevertheless inconsistent with the explicit obligation in Article 11.3 of termination of the anti-dumping duty within five years unless the specific conditions are met. In particular, this submission will discuss the incorrect "likely" standard called for by the SAA and the SPB, and the improper assignment of burden on the exporters to provide information and to demonstrate good cause to consider other factors.

1. The explicit obligation contained in Article 11.3 of the ADA is the termination of the anti-dumping duty within five years, unless the conditions set forth in the provision are met

9. Article 11.3 of the ADA requires at the outset that "any definitive anti-dumping duty shall be terminated on a date no later than five years from its imposition."¹⁵ The conditions for the continuation of the duty beyond five years are stated in the subsequent dependent clause following the word "unless". The use of such a grammatical construction suggests that the main sentence, which calls for termination no later than five years, should be considered the norm and thus constitutes the obligation on Members under Article 11.3, while continuation of the duty is the exception, and only if the conditions are met.

¹² 19 USC § 3511

(a) Approval of agreements and statement of administrative action
... the Congress approves –

(1) ...

(2) the statement of administrative action proposed to implement the agreements that was submitted to the Congress on September 27, 1994.

¹³ First Submission of Mexico, para. 88.

¹⁴ *Id.*, paras. 88-109.

¹⁵ The full text of Article 11.3 provides that,

11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.²² The duty may remain in force pending the outcome of such review.²² When the amount of the anti-dumping duty is assessed on a retroactive basis, a finding in the most recent assessment proceeding under subparagraph 3.1of Article 9 that no duty is to be levied shall not be itself require the authorities to terminate the definitive duty.

10. The Appellate Body in *US – Sunset Review of Steel from Japan* agrees with this interpretation:

Article 11.3 imposes a temporal limitation on the maintenance of anti-dumping duties. It lays down a mandatory rule with an exception. Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition "unless" the following conditions are satisfied...If any one of these conditions is not satisfied, the duty must be terminated.¹⁶ [emphasis original][footnote omitted]

The Appellate Body further noted the parallel language between Article 11.3 of the ADA and Article 21.3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and affirmed that its similar prior interpretation in *US – Carbon Steel* with regard to Article 21.3 of the SCM Agreement can be applied *mutatis mutandis* to Article 11.3 of the ADA.¹⁷

11. Article 11.1 of the ADA re-enforces the obligation of termination in Article 11.3. It states that, "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." The Panel in *EC – Pipe Fittings from Brazil* explained that Article 11.1 contains "a general, unambiguous and mandatory requirement ... It furnishes the basis for the review procedures contained in Article 11.2 (and 11.3) by stating a general and overarching principle, the modalities of which are set forth in paragraph 2 (and 3) of that Article."¹⁸ Article 11.1 thus informs Members of the obligation to terminate a anti-dumping measure should the dumping and injury, and in the case of Article 11.3, the likelihood of continuation or recurrence of dumping and injury, no longer exist.

12. A Member may extend an anti-dumping measure only if the conditions for the exception, as set forth in Article 11.3 are met. The text of Article 11.3 is clear that the authorities, in asserting that exception, must actively "determine ... that the expiry of the duty would be likely lead to continuation or recurrence of dumping and injury." This active role of the authorities is affirmed by the Appellate Body in *US – Sunset Review of Steel from Japan*, that:

Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination.¹⁹

Any other interpretation or the reversal of the burden of demonstrating information or evidence in order to assert the exception would be inconsistent with Article 11.3.

2. The SAA and the SPB are inconsistent with the "likely" standard in Article 11.3 of the ADA

13. One of the conditions for the continuation of the anti-dumping order under Article 11.3 of ADA is a determination by the authorities that the end of the duty would "likely lead to continuation or recurrence of dumping and injury." The Separate Customs Territory of Taiwan, Penghu, Kinmen

¹⁶ *US – Sunset Review of Steel from Japan*, Appellate Body Report, para. 104.

¹⁷ *Id.*, Fn. 114. See also *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany* (US – Carbon Steel), Appellate Body Report, WT/DS213/AB/R, paras. 63, 88.

¹⁸ European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube and Pipe Fittings from Brazil (EC Pipe Fittings from Brazil), Panel Report, WT/DS219/R, para. 7.113.

¹⁹ *US – Sunset Review of Steel from Japan*, para. 111.

and Matsu agrees with Mexico that the SAA and the SPB, in interpreting the statute of the United States²⁰ on the revocation of the anti-dumping order, establish a standard that is inconsistent with the "likely" standard in Article 11.3.²¹

14. The Appellate Body in *US – Sunset Review of Steel from Japan*, citing the Shorter Oxford English Dictionary, defined the term "likely" as "[h]aving an appearance of truth or fact; that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable; to be reasonably expected."²² In the next paragraph, the Appellate Body stated that, "an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be *probable* if the duty were terminated – and *not simply if the evidence suggests that such a result might be possible or plausible*."²³ [emphasis added] The "likely" standard in Article 11.3, therefore, is one of probable occurrence.

15. Instead, the SAA and the SPB establish a much looser standard. The "likely" language in Article 11.3 is transformed in the SAA to the much more uncertain languages of "highly probative of the likelihood", "it is reasonable to assume", "may provide a strong indication," and "highly probative of the likelihood."²⁴ Because of these uncertain indications and assumptions, the SPB directs the US Department of Commerce (Department) to determine that dumping is likely to continue or recur, if,

- (a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;
- (b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or
- (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.²⁵

16. Without going into too much detailed analysis, these criteria bear minimal relationship with the probable occurrence of dumping in the future. Import volumes may fluctuate for any number of reasons, with or without the anti-dumping duty. In addition, the imposition of the duty and the manner in which the duty is collected²⁶ may further affect the business decisions of the importers and exporters. The resulting decline or cessation of imports therefore is not surprising, nor should it be an indication of the likelihood of future dumping, especially when no other factors are considered.

17. These criteria are based on uncertain indications and assumptions and simply do not meet the higher and more certain "likely" standard. Therefore, they are inconsistent with Article 11.3. Furthermore, the SAA and the SPB, by establishing a lower standard, violates the presumptive action in Article 11.3 to be taken by the authorities that the duty is to be terminated no later than five years from its imposition unless the conditions for the assertion of the exception are met.

²⁰ 19 USC § 1675a(c)(1).

²¹ First Submission of Mexico, paras. 105-109, 166-175.

²² *US – Sunset Review of Steel from Japan*, para. 110.

²³ *Id.*, para. 111.

²⁴ SAA at 889-890.

²⁵ Sunset Policy Bulletin, Section II.A.3, at 18872.

²⁶ The US assesses anti-dumping duties on a retrospective basis, by which the final duty is not certain until the Department conducts the annual review. With this system, the importers face more uncertainty with respect to the maximum amount of final anti-dumping duties that will eventually be levied, and thus may affect their purchase decision.

3. The burden is erroneously assigned to exporters instead of remaining with the investigative authority

18. The SPB recognizes that the above criteria are not only indicators of likelihood of dumping to continue or recur: "[t]he Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood."²⁷ Instead of directing the Department to consider other criteria or factors on its own, the statute, the SAA, and the SPB shifts the burden onto the exporters to show that other factors warrant consideration. The SPB states,

the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question²⁸.

19. By shifting the burden onto the exporters to provide information or evidence, the SPB is essentially reaffirming the supremacy and the decisive nature of the historical dumping margin and import volumes as factors in the Department's determination of likelihood. The implication here is that if exporters do not demonstrate good cause (and there is no explanation of what constitutes good cause) to consider other factors, the Department would automatically take the existence of any one of the three above criteria as a demonstration of the likelihood of the continuation or recurrence of dumping, without examining other economic and market factors.

20. Article 11.3 simply does not allow such a shift of burden. As already discussed above, the obligation in Article 11.3 is the termination of the duty "no later than five years from its imposition." The exception, namely, the continuation of the duty, is allowed only if investigating authorities have properly determined, on the basis of sufficient evidence, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping²⁹.

21. By requiring the exporters to provide information that would warrant the consideration of other factors by the Department, the SPB, and by extension SAA and the statute, grants the authorities the discretion of examining only the historic dumping margin and import volumes, and re-assigns the burden on the exporters to produce information and to demonstrate good cause to examine other factors. The Department, as a result, can mechanically apply the three criteria, assuming a passive role and relinquishing the requirement of active information gathering by investigating authorities in Article 11.3. The conditions for the assertion of the exception under Article 11.3 cannot be met if the Department follows the SPB, and in the process, the United States ignores the obligation of termination pursuant to Article 11.3. Therefore, the United States violates Article 11.3 as such.

C. ARTICLE 3 OF THE ADA APPLIES TO ARTICLE 11.3 SUNSET INVESTIGATIONS

22. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu disagrees with the assertion of the United States that Article 3 does not apply to sunset reviews.³⁰ The text of Article 11.3 places on the authorities an obligation to examine dumping and injury. Recalling the statement of the Appellate Body in *US – Sunset Review of Steel from Japan* cited above, the words "review" and "determine" assigns an active role to the authorities, should the authorities wish to assert the exception in Article 11.3. While the nature of sunset reviews differs from an original investigation in that

²⁷ *Id.*

²⁸ *Id.*, at Section II.C, at 18874.

²⁹ *US – Sunset Review of Steel from Japan*, para. 158.

³⁰ First Written Submission of the United States of America, 21 April 2004, paras. 238-258.

Article 11.3 requires a prospective analysis, the underlying determination to be made by the authorities still relates to dumping and injury.

23. In addition to the arguments Mexico has already presented in its first written submission³¹, the Appellate Body ruled in *US – Sunset Review of Steel from Japan* that Article 2 applies to the calculation of dumping margins in Article 11.3 likelihood determination:

Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins ... should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins.³²

24. Similarly, Article 3 of ADA must also apply to the likelihood determination for the likelihood of injury, because it represents the agreed disciplines for the determination of injury, and no other provisions of ADA exist upon which Members may make their determination of injury. Therefore, even in the case of prospective injury analysis pursuant to Article 11.3, the authorities must necessarily apply, wherever appropriate, Article 3.

III. CONCLUSION

25. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu takes the position that the SAA and SPB are measures capable of being challenged as such. The SAA and SPB, as such, violate the explicit obligation under ADA Article 11.3 to terminate the duty no later than five years after the imposition. Finally, ADA Article 3 applies to the prospective injury analysis in Article 11.3, wherever appropriate.

26. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu respectfully requests that the Panel consider the views presented above and make its findings accordingly.

³¹ First Submission of Mexico, paras. 191-195.

³² *US – Sunset Review of Steel from Japan*, para. 127.