ANNEX B

WRITTEN SUBMISSIONS OF THIRD PARTIES

ANNEX B-1

THIRD PARTY WRITTEN SUBMISSION OF THE PEOPLE'S REPUBLIC OF CHINA

26 April 2006

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I. INTRODUCTION

1. China welcomes the opportunity to present its views in these proceedings on the dispute between Argentina and the United States ("US") with respect to the implementation by the US of the recommendations and rulings of the Dispute Settlement Body ("DSB") on *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*.

2. In this submission, China will focus on the following four questions:

(1) Whether the US Department of Commerce ("USDOC") is permitted by Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("*AD Agreement*") to rely on the facts newly developed in its 2005 Section 129 proceeding and covering the original sunset review period;

(2) Whether the finding in the Section 129 Determination that Acindar likely was dumping during the sunset review period was properly made in line with the requirement of Article 11.3 of the *AD Agreement*;

(3) Whether the finding in the Section 129 Determination that declining import volumes were apparently resulted from the imposition of an anti-dumping dumping order constitutes a reasoned and adequate conclusion as required by Article 11.3 of the *AD Agreement*;

(4) Whether the USDOC's consideration of the factual findings and conclusion of likelihood of dumping were made in a reasoned way as required by Article 11.3 of the *AD Agreement*.

3. In China's view, these issues are closely related to this Panel's assessment on whether the US has implemented the DSB recommendations and rulings and therefore deserve the attention by the Panel.

II. CHINA'S VIEWS ON ARTICLE 11.3 OF THE *AD AGREEMENT*

4. As the issues discussed in this submission mainly relate to Article 11.3 of the *AD Agreement*, China would like to firstly present its understanding of the obligations imposed on investigating authorities in sunset reviews on the basis of the said provision and WTO jurisprudence.

5. **First**, the structure of Article 11.3 indicates that generally the definitive anti-dumping duty shall be terminated no later than five years. The only exception to this general rule is the case where the authorities, by means of sunset review, determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. As observed by the Appellate Body in *US Corrosion-Resistant Steel Sunset Review*, Article 11.3 imposes a temporal limitation on the maintenance of anti-dumping duties and lays down a mandatory rule with an exception.[1]

6. **Second**, in a sunset review, the authorities shall play an *active* rather than a passive decision-making role with appropriate degree of diligence to arrive at a reasoned conclusion that dumping would be *probable* if the duty were terminated.[2] In other words, the investigating authorities must have a *sufficient* factual basis to allow it to draw *reasoned and adequate* conclusions concerning the likelihood of continuation or recurrence of dumping.[3]

7. **Third**, in sunset reviews, the evidence is essential for an affirmative determination though the nature and extent of the evidence required for the proof of likelihood of continuation or recurrence of dumping and injury will vary with the facts and circumstances of the case under review.[4]

III. COLLECTING NEW INFORMATION IN A REVISED SUNSET REVIEW

8. Argentina argues that in the 2005 Section 129 Determination, the USDOC acted inconsistently with Articles 11.3 and 11.4 of the *AD Agreement* by developing new factual information to support its 2001 Sunset Review Determination. According to Argentina, information on two of the key factual findings were developed in the 2005 Section 129 proceeding rather than in the review initiated "at that time" before the expiration of the original anti-dumping measure. In Argentina's view, in relying on new information developed in 2005, the USDOC did not render a decision that brings the US into compliance with its obligations under Article 11.3 and 11.4.[5]

9. With respect to this issue, China submits the following views for the consideration of this Panel.

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[1] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion - Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, para. 104 (adopted 9 January 2004) ("*US —- Corrosion-Resistant Steel Sunset Review (AB)*").

[2] *Ibid*, para. 111.

[3] *Ibid*, para. 114.

[4] Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005, para. 123 ("*US – OCTG from Mexico*").

[5] Argentina First Submission, para. 57.

10. **First**, China notes that neither Article 11.3 of the *AD Agreement* by itself nor the DSU prohibits the investigating authorities from collecting new factual information in the proceedings intended to bring its WTO-inconsistent measure into conformity with the DSB recommendations and rulings.

11. **Second**, China notes that the panel in *US Countervailing Measures on Certain EC Products (21.5 – EC)* made a relevant observation in this respect. In that dispute, the USDOC, in a Section 129 proceeding, refused to consider the additional evidence submitted by the respondents in the proceeding.[6] The panel noted that "an investigating authority has the obligation to consider ***all*** evidence placed on the record in making a likelihood of continuation or recurrence of subsidization ***re-determination***. Without so doing, the investigating authority could not ensure that the new measure, that is, the likelihood-of-subsidization re-determination set out in the Section 129 determination, is based on a sufficient factual record and therefore satisfies the requirements of Article 21.3 of the *SCM Agreement*"[7]. The panel concluded that, with respect to "evidence provided for the first time by the interested parties during the Section 129 proceedings. . . . Article 21.3 of the *SCM Agreement* imposes an obligation on the investigating authority during sunset review or ***revised sunset review*** proceedings to take into account ***all*** the evidence placed on its record in making its determination of likelihood of continuation or recurrence of subsidization".[8]

12. Therefore, the panel finds that the refusal to consider new evidence presented during the Section 129 proceedings is inconsistent with the requirement of Article 21.3 of the *SCM Agreement*.[9]

13. China submits that the above panel's ruling in respect of Article 21.3 of the *SCM Agreement* also applies to Article 11.3 of the *AD Agreement* in this case. The Appellate Body in *US Corrosion-Resistant Steel Sunset Review* has noted that Article 11.3 of the *AD Agreement* is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word "countervailing" is used in place of the word "anti-dumping" and the word "subsidization" is used in place of the word "dumping".[10] Consequently, Article 11.3 of the *AD Agreement* also imposes an obligation on the investigating authority during revised sunset review proceedings to take into account all the evidence in record, including newly submitted evidence, in making its determination of likelihood of continuation or recurrence of dumping.

14. **Third**, in this dispute, when finding the inconsistency of the anti-dumping measure at issue with Article 11.3 of the *AD Agreement*, the original panel held that such inconsistency stems from two aspects: (i) the USDOC's reliance of its finding of continued dumping on the dumping margin found in the original investigation; (ii) the application of the WTO-inconsistent waivers provisions. In China's view, these deficiencies are assumptions that lack in sufficient factual basis. In the attempt to remedy such deficiencies, the USDOC inevitably needs to solicit new factual information and make objective assessment on such information. If the USDOC is not permitted to seek new information to adapt its measure, the lack of information would leave the USDOC with no choice but to continue to apply the methodology found inconsistent with Article 11.3 of the *AD Agreement* – making assumptions.

15. In summary, China holds the view that, in order to bring its measure into compliance with DSB recommendations and rulings, the USDOC is permitted to solicit and collect relevant factual

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[6] Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities (21.5 – EC)*, WT/DS212/RW, para. 7.68 (adopted 17 August 2005) ("*US – Countervailing Measures on Certain EC Products*").

[7] *Ibid*, para. 7.238. (emphasis added)

[8] *Ibid*, paras. 7.252-7.253. (emphasis added)

[9] *Ibid*, para. 7.255.

[10] Appellate Body Report, *US Corrosion-Resistant Steel Sunset Review*, footnote 114.

information so as to make its determination on a sufficient factual basis. Notwithstanding, China does not consider that this position necessarily means the USDOC's Section 129 Determination is a reasoned and adequate conclusion based upon positive evidence.

IV THE LIKELIHOOD DETERMINATION IN THE SECTION 129 DETERMINATION

A. THE USDOC'S REASONING IN THE SECTION 129 DETERMINATION

16. China notes that, during the Section 129 proceeding, the USDOC requested information from three Argentine producers, i.e., Tubhier, Siderca and Acindar, none of which filed the statement of waiver including a statement that the respondent interested party is likely to dump if the order is revoked. Therefore, in accordance with the newly amended US regulations, no producer waived to participate in the proceedings and thus the USDOC simply made one likelihood determination on an order-wide basis.

17. During the Section 129 proceeding, it was reported by Tubhier and confirmed by the USDOC that Tubhier did not ship OCTG to the US during the sunset review period and did not intend to ship to the US in the future. Thus, the USDOC did not make any finding on whether Tubhier had dumped during the sunset review period.

18. With respect to Siderca, since the USDOC considered the estimated cost information provided by Siderca was unreliable and Siderca had no US sales of OCTG during the original sunset review period, the USDOC made "no findings regarding specific instances of likely dumping by Siderca during the original sunset review period".[11]

19. With respect to Acindar, due to its failure to provide data adequate to calculate costs for the subject merchandise, the USDOC was unable to calculate the costs for Acindar. For that reason, the USDOC compared Acindar's US selling prices during the original sunset review period with prevailing US market prices during that same period and found that the former prices were substantially lower than the latter. In addition, the USDOC also found supports from the depression in the OCTG market as indicated by the losses shown by Acindar and other significant OCTG producers. On such basis, the USDOC reached the conclusion that Acindar likely was dumping significantly in the US market. [12]

20, Before reaching its conclusion on likelihood of dumping, the USDOC referred to its previous finding regarding the declining import volumes of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order. The USDOC concluded that such declining volumes were "apparently resulting from" the imposition of the anti-dumping measure.

21. On the above basis, the USDOC found that there was likelihood of continuation or recurrence of dumping had the anti-dumping duty order on OCTG from Argentina been revoked in 2000, i.e., at the end of the original sunset review period.

B. THE USDOC'S FINDING OF LIKELY DUMPING

22. In the Section 129 Determination, USDOC compared the export price of Acindar with the prevailing US market price in reaching its finding of likely dumping in the sunset review period. Such an approach obviously contradicts with the basic concept of "dumping" in Article 2.1 of the *AD Agreement* which is also applicable to the word "dumping" in Article 11.3.

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[11] US Section 129 Determination, p. 9.
[12] US Section 129 Determination, p. 8-10.

23. In US Corrosion-Resistant Steel Sunset Review, the Appellate Body noted that:

> However, as we have already observed, the opening words of Article 2.1 ("[f]or the purpose of this Agreement") go beyond a cross-reference and indicate that Article 2.1 applies to the entire Anti-Dumping Agreement. By virtue of these words, the word "dumping" as used in Article 11.3 has the meaning described in Article 2.1. [footnote omitted][13]

24. Article 2.1 of the *AD Agreement* clearly provides for a definition of "dumping" which reads as follows:

> 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.

In addition, Article 2.2 further provides that normal value can be determined on the basis of export price to third country or so-called constructed value under certain specified circumstances. It is surprising to note that the US goes so far as to allege that "Article 2 does not contain a 'notion' of dumping but rather a methodology for calculating an actual dumping margin"[14]. The underlying logic of the US argument is that given the fact that the US is not calculating a dumping margin, it can then ignore the concept of dumping and determine "likely dumping" with whatever criteria it deems fit. In China's view, if one does not have a clear view of the concept of dumping or denies the existence of such a concept, he cannot reasonably make a finding of likely dumping.

25. Thus, the USDOC should have compared Acindar's export price with its domestic sale price in Argentina (or third-country export prices / constructed value) to determine whether Acindar dumped during the sunset review period. The improper comparison with the prevailing US market price led to a flawed finding of "likely dumping" which may not meet the requirement of making a reasoned and adequate determination on a sufficient factual basis as required by Article 11.3 of the *AD Agreement*.

C. THE USDOC'S FINDING OF DECLINING OCTG IMPORT VOLUMES

26. When making the Section 129 Determination, the USDOC also relied on its previous finding in 2000 sunset review regarding the import volume of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order.[15]

27. China submits that such reliance seems to be inconsistent with Article 11.3 of the *AD Agreement* for the following reasons.

28. **First**, the US argues that the USDOC can legitimately rely on its previous finding of declining import volumes in 2000 in that the original panel found no WTO-inconsistency with respect to such finding.[16]

29. China does not agree. China recalls that in the original dispute, the original panel found that the USDOC's reliance on the existence of the original dumping margin was inconsistent with

[13] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para 126.
[14] US First Submission, para. 46.
[15] US Section 129 Determination, at pages 4 and 6.
[16] US First Submission, para 23.

Article 11.3 of the *AD Agreement*, and therefore did not need to continue to address whether, as the second factual basis, the USDOC's reliance on declining import volumes was yet another action inconsistent with that article.[17] China does not believe the position held by the original panel can be understood to provide a safe haven to the US with respect to the said finding. Therefore, the original panel's lack of analysis on the issue of declining import volumes simply cannot be a valid defending argument for the US in this proceeding.

30. **Second**, China notes that in the Section 129 Determination, the USDOC simply stated, without any reasoning, that "[d]eclining import volumes after, and ***apparently*** resulting from, imposition of an anti-dumping order indicate that exporters would need to dump to sell at pre-order levels".[18] The USDOC did not explain why such decline of import volumes is attributable to the imposition of the order. The word "apparently" indicates that the USDOC reached this conclusion by assumption instead of reasoning.

31. China submits the USDOC erred in assuming such conclusion, in that the Appellate Body in *US Corrosion-Resistant Steel Sunset Review* has clearly pointed out that assumptions are not enough to support a determination under Article 11.3, and the decline in import volumes 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.[19]

32. Therefore, the USDOC should have conducted a case-specific analysis of the factors behind the decline in import volumes in order to determine that dumping will continue or recur if the duty is terminated. A simple assumption of such causation is not such positive evidence as to enable the USDOC to draw a reasoned and adequate affirmative likelihood determination as required by Article 11.3 of the *AD Agreement*.

D. THE USDOC'S CONSIDERATION OF THE FACTUAL FACTORS AND CONCLUSION ON LIKELIHOOD OF DUMPING

33. In the Section 129 Determination, the major factual bases that the USDOC relied on in making an affirmative likelihood-of-dumping determination are: (i) no findings regarding specific instances of likely dumping by Siderca during the original sunset review period; (ii) the finding of likely dumping by Acindar during the original sunset review period; and (iii) the previous finding regarding the import volumes of the subject merchandise for the period before and the period after the issuance of the anti-dumping duty order.

34. Even assuming, for the sake of argument, that the USDOC properly made a finding of likely dumping with respect to Acindar by the comparison between Acindar's export prices and the prevailing US market prices, such a finding, in combination with the finding of declining import volumes, cannot sufficiently support an affirmative determination of likelihood of dumping. The reasons are detailed below.

35. **At the outset**, in China's view, it should be distinguished between "likelihood of continuation or recurrence of dumping if the anti-dumping duty order is terminated" and "likelihood of dumping during the sunset review period". These two concepts respectively address events that will occur in the future and events that have occurred in the past.

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[17] Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, paras. 6.11 and 7.221 (adopted 16 July 2004) (*US – Oil Country Tubular Goods Sunset Reviews*).

[18] US Section 129 Determination, page 11.

[19] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 177.

36. According to Article 11.3 of the *AD Agreement*, the conclusion on likelihood of continuation or recurrence of dumping is one on future events that should be drawn from the past facts supported by positive evidence. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained that "the 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."[20]

37. On the other hand, the conclusion on likely dumping in the sunset review period is a speculation of the past facts. At the time of making the review determination, the sales by the respondent to the US market had been made and whether it had dumped the subject merchandise in the US was a matter of fact, rather than a possibility or likelihood of events that will occur. If the USDOC decides to rely on such a factual point, it has to make sure that the fact is supported by sufficient factual information. In other words, the USDOC can only draw a conclusion of "yes" or "no" instead of "likely yes". If the USDOC cannot satisfy itself with sufficient evidence that Acindar was dumping during the sunset review period, then it should not draw any conclusion on it at all.

38. **Second**, it is further noted that in its First Written Submission, the US submits that "[n]othing in Article 11.3 prevents authorities from looking at evidence of past behaviour, or past likely behaviour where respondents are unable to provide evidence of actual past behaviour".[21] The logic behind such an argument seems to be that if the respondents fail to provide specific evidence of actual past behaviour, then the authorities are free to look at evidence of likely past behaviour. But what the USDOC has done is not just "looking at". Rather, it ***relied*** on the finding of likely dumping in reaching its affirmative conclusion on likelihood of continuation or recurrence of dumping.

39. As articulated by the Appellate Body, under Article 11.3 of the *AD Agreement*, the authorities bear the treaty obligations to "arrive at a reasoned conclusion" on the basis of "positive evidence". The failure by the respondents to provide necessary information cannot simply discharge the authorities of such duties. Instead, under such circumstances, the authorities should follow an appropriate methodology and rely on positive evidence on the record to see if it can draw a permissible conclusion on the likelihood of continuation or recurrence of dumping.

49. **Third**, it is noted that in *US - Corrosion-Resistant Steel Sunset Review*, the Appellate Body held that,

> We would have difficulty accepting that dumping margins and import volumes are always "highly probative" in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping. Such a presumption might have some validity when dumping has continued since the duty was imposed (as in the first scenario identified in Section II.A.3 of the Sunset Policy Bulletin), particularly when such dumping has continued with significant margins and import volumes.[22] [emphasis added]

Therefore, in the view of the Appellate Body, even if dumping has ***continued*** with ***significant margins*** and ***import volumes*** after the imposition of anti-dumping measure, such facts might only ***have some validity*** in forming an affirmative likelihood conclusion. In this case, the findings made by the USDOC are far from reaching such a level of certainty. The USDOC was only able to conclude that Acindar was likely dumping during the sunset review period and it is not even clear whether the

[20] *Ibid*., para. 105.
[21] US First Submission, para 46.
[22] *Ibid*, para. 177.

import volume, after the declining following the imposition of the anti-dumping duty order, was still significant. Therefore, it is hard to accept that the likely dumping finding made on Acindar and the finding of declining import volumes, taken together, could permissibly form the factual bases upon which the USDOC relied in making a WTO-consistent and corrected sunset review determination.

41. In summary, China submits that the finding of likely dumping and that of declining import volumes do not seem to form a ***sufficient factual basis*** to reach an affirmative conclusion on likelihood of dumping.

V. CONCLUSION

42. In conclusion, China is of the following views on the key issues discussed above:

(i) In the revised sunset review, the authorities are permitted to collect new information so as to bring its measure into conformity with DSB recommendations and rulings;

(ii) The US's finding of likely dumping with respect to Acindar contradicts with the concept of dumping as provided for by Article 2 and therefore seems to fail to meet the requirement of making a reasoned and adequate determination on sufficient factual basis as required by Article 11.3 of the AD Agreement;

(iii) The USDOC assumed that the declining import volumes were due to the imposition of the anti-dumping duty order which does not seem consistent with Article 11.3;

(iv) The findings in respect of likely dumping and declining import volumes do not seem to constitute a sufficient factual basis for an affirmative determination.

ANNEX B-2

THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

26 April 2006

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I. INTRODUCTION

1. The EC makes these written observations because of its systemic interest in the correct interpretation of the *Anti-Dumping Agreement* and the GATT 1994.

2. Consistent with our submissions to the original panel, we explain why we believe that the Article 11.3 re-determination[1] is not consistent with the *Anti-Dumping Agreement*, and does not comply with the findings and recommendations of the DSB in the original dispute.

II. THE BALANCE ENSHRINED IN ARTICLE 11.3 AND THE SPECIAL CARE REQUIRED WHEN MAKING A PROSPECTIVE DETERMINATION

3. The EC re-iterates its submissions to the original panel. Article 11.3 of the *Anti-Dumping Agreement* must be interpreted as striking a *balance* between the *termination* of an anti-dumping measure and its *continuation*. It cannot be interpreted in an entirely *one-sided* manner. Neither Article 11.3, nor any other provision of the *Anti-Dumping Agreement*, provides that anti-dumping measures may remain in place *indefinitely or forever*, on the assumption that "*once a dumper, always a dumper*". To permit such an interpretation would be to conclude that the addition of Article 11.3 to

[1] Exhibit ARG-16: "Final Results of Sunset Review, Oil Country Tubular Goods from Argentina". This new sunset review was initiated (apparently out of time) on 2 November 2005 (Exhibit ARG-16, page 2, second para, penultimate sentence).

the *Anti-Dumping Agreement* following the Uruguay Round of negotiations in effect changed nothing, which would be to reduce the provision to *redundancy*, which would not be a permissible interpretation.

4. The European Communities would go further, agreeing with the Appellate Body that the centre of gravity of that balance lies with termination, rather than continuation. The termination obligation is in the nature of a *general rule*; continuation rather in the nature of an *exception*.[2]

5. Because the required determination is partly *prospective* in nature, investigating authorities inevitably have a certain leeway when assessing the facts. That cannot, however, render the provision *endlessly elastic*, since that would destroy the balance clearly enough enshrined within the provision. In fact, precisely the opposite is true. It is precisely because the determination is partly prospective that investigating authorities must exercise *special care* when making it. That is, they must be certain that they have a solid factual basis on which to proceed, and that no stone has been left unturned in the search for an objective finding. In this respect, Article 3.8 of the *Anti-Dumping Agreement* provides relevant context, confirming that when a prospective determination is to be made (in that case, threat of injury) "the application of anti-dumping measures shall be considered and decided with *special care*". Such determinations are not to be based on mere "allegation, conjecture or remote possibility"[3], still less on "intuition"[4] or "expectation".[5] In short, there is ample authority for the view that the standard of review to be applied by a panel in a given case is a function of the substantive provisions of the specific covered agreements that are at issue in the dispute; and ample support for the proposition that, in the case of a provision such as Article 11.3, a panel's review should be particularly searching and probative.[6]

III. ARTICLE 11.3 IN THE CONTEXT OF THE ANTI-DUMPING AGREEMENT: CONSEQUENCES OF TERMINATION AND CONSEQUENCES OF CONTINUATION

6. As we indicated in our submissions to the original panel, interpreting Article 11.3 in a balanced manner requires consideration of that provision in the context of the *Anti-Dumping Agreement* as a whole.

7. In this respect, it is relevant to take into consideration what the consequences of termination may be, and particularly how quickly a new measure could be put in place, should that prove necessary.

8. In that regard, the EC notes that there is no time requirement governing the filing of an application under Article 5.1: as soon as dumping occurs an application may be filed, where necessary based on a submission of threat of injury under Article 3.7 of the *Anti-Dumping Agreement*. Initiation of an original investigation may proceed forthwith, with measures being imposed 60 days

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[2] Appellate Body Report, *US – Carbon Steel*, para 88: "An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is at the heart of this provision. Termination of a countervailing duty is the rule and its continuation is the exception."

[3] *Anti-Dumping Agreement*, Article 3.7: "A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility".

[4] Article 11.3 re-determination, page 8, fourth para, rejecting Siderca's data on the grounds that it is "counter-intuitive".

[5] Article 11.3 re-determination, page 8, fourth para, rejecting Siderca's data on the grounds that it is not what "we would expect".

[6] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras 95 and 96.

later[7], or even, if there is a history of dumping, from the date of initiation.[8] Thus, if appropriate, anti-dumping measures can be imposed at *very short notice* indeed.

9. It is also relevant to take into consideration what the consequences of continuation of the measure are. In this respect, the EC recalls that the US operates a system of duty collection under Article 9.3.1 of the *Anti-Dumping Agreement* in which, at least according to the US, final liability for payment of anti-dumping duties can actually *increase* retrospectively. This means that, at the time of import, the exporter and importer will not know what the final liability might be, there being no cap, in place at the time of import, limiting such final liability. Given the complexity of the anti-dumping rules and thus the very many aspects of an investigation in which an authority may exercise discretion, and given the difficulty of ensuring effective judicial protection, there is no doubt that this has a substantial *chilling effect*. In fact, an exporter may be hard pushed to find any importer willing to take the risk of importing under the shadow of an uncertain and potentially very much increased liability; or indeed prepared to take such risk itself *via* a related importer.

10. Taking these matters fairly into consideration, one can perfectly understand why an exporter that has not dumped for five years or more might reasonably hope and expect to have the "sword of Damocles" lifted from its head, and be given another chance to play by the rules – particularly an exporter whose original offence was to "dump" by a mere 1.36 per cent.[9]

11. On the other hand, it is something of a puzzle to understand why an investigating authority, which is under an obligation to conduct an objective and even-handed enquiry, might seek to maintain a measure in place at all costs and on the basis of the most brief and tenuous analysis, unless, of course, it were driven by purely protectionist considerations.

IV. RELIANCE ON ORIGINAL DUMPING MARGIN AND DECLINE IN IMPORTS INSUFFICIENT

12. As stated in our submissions to the original panel, the EC draws a distinction between *continued* dumping and *recurrent* dumping, the latter being a phenomenon necessarily interrupted at some point. Further, the EC takes the view that this is now a case of a determination of likely recurrent dumping. The only "dumping" determination that has ever been made is that made in the original investigation. There is no dumping determination made in relation to the sunset review period (1995 to 2000). Further, there is no objective attempt to gather all the information necessary to make any such determination, the USDOC questionnaires not covering all the matters set out in Article 2 of the *Anti-Dumping Agreement.*[10] The US appears to have simply made a prospective determination about what "will" happen after 7 November 2000 (a somewhat surreal finding, given that some 5 years have since passed), based only on other data from the years 1995 to 2000. Thus, there is simply no basis for a determination of likely *continuation* of dumping; or of likely recurrent dumping after 2 November 2005.

13. The EC agrees with Argentina that it is remarkable that the Article 11.3 re-determination makes no express reference at all to the original 1.36 per cent "dumping" determination from the

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[7] *Anti-Dumping Agreement*, Article 7.3: "Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.".

[8] *Anti-Dumping Agreement*, Article 10.6: "A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine …".

[9] A percentage that is actually less than the current *de minimis* rule of 2 per cent in Article 5.8 of the *Anti-Dumping Agreement*.

[10] See USDOC questionnaires to Acindar, Tubhier and Siderca, at Exhibit ARG-13.

original proceeding; and that this renders the countrywide determination of likely recurrence of dumping based only on the unsubstantiated assertion that a marginal producer and exporter (Acindar) was "likely" dumping during the sunset review period tenuous in the extreme.

14. However, consistent with its submissions to the original panel, the EC remains of the view that, even if in a sunset review an investigating authority does not re-determine the dumping finding made in the original investigation, nevertheless it cannot avoid but "rely" on such original determination. This is so whether or not the original determination is expressly mentioned in the sunset review determination. That this is so results directly from the use of the words "continuation or recurrence", both of which necessarily incorporate some historical element. If there is nothing in the past, then there is nothing that can continue or recur in the future. This may be seen most clearly if one would simply eliminate the original "dumping" determination, for example by assuming that it would never have been made, or by assuming that it would have been invalidated following judicial review. In such a case, there could simply be no sunset review. One cannot have a valid sunset review without at the very least having a valid determination of dumping in an original investigation. The EC concludes that, even if the US has studiously avoided any express reference to the original dumping determination, the fact remains it is a necessary pre-requisite for the Article 11.3 re-determination.

15. Consistent with its submissions to the original panel, the EC remains of the view that reliance on the original dumping margin and decline in imports (effectively the line taken in the Article 11.3 re-determination) is not sufficient to justify continuation of the measure. The minimum meaning of Article 11.3 of the *Anti-Dumping Agreement* is that some determination of dumping more recent than that made in the original proceeding is necessary in order to continue the measure.[11]

V. ZEROING

16. Consistent with its submissions to the original panel, the EC takes the view that it is impossible to conduct a sunset review, and make a finding of likely continuance or recurrence of dumping, without having in place and relying on as a basic foundation an historical determination of dumping. In this case that foundation is the 1.36 per cent calculated in the original proceeding. However, the EC recalls that it is not in dispute that that "dumping" determination was based on the use of zeroing, a methodology that the Appellate Body has repeatedly held to be inconsistent with the *Anti-Dumping Agreement* and with Article VI of the GATT 1994.[12] The Appellate Body has also held that if a sunset review is based on a past dumping determination that is inconsistent with the *Anti-Dumping Agreement*, the sunset review is itself also vitiated.[13] The original panel exercised judicial economy on this point because it found an inconsistency with Article 11.3.[14] However, to the extent that the US now alleges that it has complied with Article 11.3, this panel may now need to reconsider the zeroing issue.

17. As outlined in its submissions to the original panel, the EC considers that the fact that the original determination was made under the Tokyo Round Code affords no defence to the US, for two reasons. First, the Appellate Body has now made it clear that zeroing is and in fact was always inconsistent with Article VI of the GATT 1994, which is identical in this respect to the GATT 1947.

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[11] Appellate Body Report, *US – Carbon Steel*, para. 88: "Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient."

[12] Appellate Body Report, *US – Zeroing*, paras 123 to 135.

[13] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 127: "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."

[14] Panel Report, para. 7.223.

It is thus not the case that the original determination was consistent with the GATT or the Tokyo Round Code. Second, in any event, in the present case, the investigating authority is charged with making a determination about likely future dumping as that term is defined under the Uruguay Round *Anti-Dumping Agreement*, that is, without zeroing. The most that USDOC might be said to have demonstrated, even on its own logic, is that the phenomenon that arose in the original investigation period might again arise in the future. However, that phenomenon is simply not "dumping" within the meaning of Article 11.3 of the *Anti-Dumping Agreement*.

18. Finally, the EC is perplexed by the US reference to the results of the Acindar review for the 2000 to 2001 period.[15] First, this is not mentioned anywhere in the Article 11.3 re-determination. Second, this information falls outside the 1995 to 2000 investigation period fixed by USDOC for the purposes of its sunset review re-determination. The US thus appears to be "cherry picking" – erroneously ignoring vast amounts of data from the last 5 years[16], but nevertheless selecting particular data considered prejudicial to the interests of the exporters. These are not the actions of an even-handed investigating authority conducting an objective examination. Third, as the US perfectly well knows, that 2000 to 2001 determination for Acindar was itself vitiated by zeroing, a methodology that the Appellate Body has repeatedly held to be inconsistent with the *Anti-Dumping Agreement* and the GATT 1994. It could not therefore lawfully be relied on by the US for the purposes of the present sunset review re-determination.

VI. AUTOMATIC DUMPING IN A DEPRESSED MARKET CYCLE

19. One further aspect of the logic underlying the Article 11.3 re-determination appears to the EC to be at odds with the *Anti-Dumping Agreement*. That is the apparent assumption by the investigating authority that at a stage of the market cycle where global prices are relatively depressed, all producers, in Argentina, the US and elsewhere, will be selling below cost, with the consequence that there is an automatic assumption that dumping is occurring. This seems to explain why the investigating authority did not even attempt to examine domestic prices in Argentina, or the prices at which producers in Argentina may have been exporting to third countries.[17]

20. The problem with this approach is that it turns the *Anti-Dumping Agreement* from an instrument designed to respond to specific unfair practices by exporters, into a general protection for US industry whenever "times are bad". When times are good, everyone does well, and competition between producers is likely to be effectively reduced or even non-existent. It is precisely when times are bad that competition really bites and plays its necessary role in regulating market efficiency.

21. The key to this issue lies in the concept of the "extended period of time" in Article 2.2.1 of the *Anti-Dumping Agreement*. In a cyclical industry, such as that at issue in the present case, such period of time must be sufficient to cover at least one full cycle.[18] Otherwise, by simply focussing on a depressed part of the cycle, investigating authorities will always be in a position to find dumping, or assume that dumping will automatically occur, even if, in the longer term, pricing is above cost, and export prices not below normal value. It appears to the EC that the reasoning in the Article 11.3 re-

[15] US First Written Submission, para. 41, final sentence.
[16] Appellate Body Report, *Mexico – Beef and Rice*, paras 165 and 166.
[17] See USDOC questionnaires to Acindar, Tubhier and Siderca, at Exhibit ARG-13.
[18] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 80: "… we understand a POI to provide data collected over a sustained period of time, which period can allow the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation."

determination is vitiated by just such an assumption.[19] In fact, ironically, it appears to the EC that the depressed market situation could just as well explain the lack of exports during the sunset review period, as could the imposition of the original measures. Thus, all the indications are that this is an investigation in which the authority has arranged the facts to suit a pre-determined conclusion, rather than conduct an objective and even-handed analysis.

VII. CONCLUSION

22. In the light of the preceding observations, the EC invites the panel to agree with Argentina, and to conclude that the US has failed to comply with its obligations under Article 11.3 of the *Anti-Dumping Agreement*, and failed to take measures that comply with the findings and recommendations of the DSB in the original dispute.

[19] Article 11.3 re-determination, page 7: "… the financial statements of other significant OCTG producers … also were showing losses … These losses are an indication that the OCTG market was depressed."

ANNEX B-3

THIRD PARTY WRITTEN SUBMISSION OF JAPAN

26 April 2006

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I. INTRODUCTION

1. Japan welcomes this opportunity to present its views in the proceeding brought by Argentina over the consistency with the Agreement on Implementation of Article VI of the GATT ("AD Agreement") of the decisions by the United States of America (the "US") in sunset reviews of the anti-dumping duty on oil country tubular goods ("OCTG") from Argentina and the US statutory, regulatory, and administrative provisions on which such decisions were based.

2. Japan has a systemic interest in the interpretation and application of the AD Agreement with regard to sunset reviews. Also, Japan has a systemic interest in ensuring the proper compliance with the DSB recommendations. As a third party, Japan would like to address the following legal issues raised by Argentina's First Written Submission:

- Inconsistency of the US Department of Commerce (the "DOC")'s determination pursuant to Section 129 of the URAA ("Section 129 Determination") with its obligations under Article 11.3 of the AD Agreement;

- Inconsistency of the DOC's Section 129 Determination with its obligations under Article 6 of the AD Agreement;

- Inconsistency of the Section 751(c)(4)(B) of the Customs Act of 1930, and the amended Section 351.218(d)(2) of the DOC Regulations under Article 11.3 of the AD Agreement.

II. ARGUMENTS

A. THE DOC'S SECTION 129 DETERMINATION IS INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT *AS APPLIED*

1. Article 11.3 of the AD Agreement applies to proceedings under Section 129 of the URAA.

3. It is clear that Article 11.3 applies to procedures and determinations under Section 129. In order to comply with DSB recommendations and rulings, a respondent Member must abide by the provisions of the covered agreement, in this case the AD Agreement. The Panel in *US – EC Product (21.5)* reasoned as follows:

> 7.237 From the review of the findings of the Appellate Body and the panels in relevant previous cases, it is clear that under Article 21.3 of the SCM Agreement, the investigating authority has an obligation in sunset review proceedings to consider all evidence placed on its record to make a likelihood of subsidization and likelihood of injury determination. The Panel considers that the same obligation also applies to the Section 129 proceedings regarding the UK in the present dispute since it was designed to make revised sunset review determinations.
>
> 7.238 The Panel therefore concludes that an investigating authority has the obligation to consider all evidence placed on the record in making a likelihood of continuation or recurrence of subsidization re-determination. Without so doing, the investigating authority could not ensure that the new measure, that is, the likelihood-of-subsidization re-determination set out in the Section 129 determination, is based on a sufficient factual record and therefore satisfies the requirements of Article 21.3 of the SCM Agreement.[1]

References here to Article 21.3 of the SCM Agreement apply equally to Article 11.3 of the AD Agreement, in view of the Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.[2]

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[1] Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities - Recourse to Article 21.5 of the DSU by the European Communities*,WT/DS212/RW, adopted on 27 September 2005, paras. 7.237 and 7.238 (emphasis added).

[2] *Ibid*., para. 7.81.

4. Japan also recalls that an Article 21.5 proceeding is not confined to the claims of the original dispute. Because the Member subject to the DSB recommendations and rulings must make its re-determination in compliance with the WTO Agreements[3], the complaining Member may raise new claims if the re-determination does not comply with provisions of the WTO Agreements. The Appellate Body confirmed this aspect, stating "a complainant in Article 21.5 proceedings may well raise *new* claims, arguments, and factual circumstances different from those raised in the original proceedings, because a 'measure taken to comply' may be *inconsistent* with WTO obligations in ways different from the original measure".[4]

5. Therefore, in order to determine whether the re-determination of the likelihood of dumping is consistent with the AD Agreement, the Panel is required to review whether the re-determination satisfies all requirements for the determination under Article 11.3 and other relevant requirements under the AD Agreement.

2. The DOC's determination of the likelihood of dumping is inconsistent with Article 11.3, due to the lack of an objective examination of positive evidence

6. Japan respectfully requests that the Panel carefully review whether the DOC's reliance on the "previous finding" in re-determining the likelihood of dumping is consistent with Article 11.3 of the AD Agreement. As shown by the US's First Written Submission, the DOC determined the order-wide likelihood of dumping on the basis of two findings: first, that Acindar is likely to dump, and second, that the decline in import volumes indicates the likelihood of dumping if the duty were revoked.[5] The Unites States argues that the DOC's finding also referenced "its finding from the original proceeding that the decline in import volumes was evidence of likelihood of continuation or recurrence of dumping".[6]

7. As mentioned above, the Member subject to the DSB recommendations and rulings is required to make its re-determination in compliance with the WTO Agreement, including issues that were not raised in the original Panel. The authorities of the anti-dumping proceeding are required to review all the evidence on the record objectively[7], and reach a reasoned conclusion.[8] In its Section 129 proceeding, the DOC collected several kinds of new information. The evidence on the record of the proceeding, therefore, is different from the evidence on the record of the original sunset review. The DOC is therefore required to make its-determination based on the objective evaluation of all evidence on the record of the Section 129 proceeding, including newly collected information, so that it will be in compliance with the WTO Agreement.[9]

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[3] Article 21.5 of DSU provides that an Article 21.5 proceeding covers "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" (emphasis added).

[4] The 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 by India*, WT/DS141/AB/RW, adopted on 24 April 2003, para. 79.

[5] Decision Memorandum of the Section 129 Determination, at 11; US First Written Submission, paras. 42, 46-48.

[6] US First Written Submission, para. 44.

[7] Panel Report, para. 7.211.

[8] The Appellate Body confirmed this obligation of the authorities, stating "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." The 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 on 9 January 2004, para. 111.

[9] Japan makes this statement without prejudice to the primary argument made by Argentina in paragraph 39 of Argentina's First Written Submission.

8. The lack of a specific finding by the original Panel on the inconsistency of the DOC's finding on the decline in import volumes in the original sunset review cannot be a ground for arguing that the DOC has no obligation to review the original finding in light of evidence on the record of the Section 129 proceeding, as the DOC appears to argue in the Decision Memorandum of Section 129 Determination.[10] Since Japan takes part in this proceeding based on a systemic interest in the interpretation and application of the AD Agreement, Japan does not take any specific position on the factual aspect of this issue. Japan respectfully requests the Panel to review carefully whether the DOC objectively found the fact of the decline in volume and reasonably reached its conclusions in the re-determination, giving due considerations to all evidence on the record of the Section 129 proceeding.

B. THE DOC'S SECTION 129 DETERMINATION IS INCONSISTENT WITH ARTICLE 6 OF THE AD AGREEMENT AS APPLIED

1. Article 6 of the AD Agreement applies to the proceedings under Section 129 of the URAA

9. The logic for the application of Article 11.3 in conducting the Section 129 procedure, as discussed above (in paragraphs 3-4), applies equally to the application of Article 6 of the AD Agreement.

10. In this case, the original Panel and Appellate Body found that the DOC's determination in the sunset review is inconsistent with Article 6.2 of the AD Agreement. The original Panel found that "the fact that certain exporters do not participate in a sunset review can not justify depriving cooperating exporters of their procedural rights under Article 6.2", in respect of hearings.[11] The Panel accordingly found that the DOC acted inconsistently with Article 6.2. The Appellate Body also stated that "in respect of respondents to which [waiver] provisions cannot be applied, the USDOC will continue to make automatically an affirmative company-specific determination and to deny the rights afforded by Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*" in respect of waiver provisions.[12]

11. Article 6.2 guarantees the fundamental due process of the anti-dumping proceedings.[13] This general due process requirement is an overarching provision, which includes specific due process requirements in other paragraphs of Article 6. These specific requirements include, among other requirements, a timely opportunity to see all information in Article 6.4, and the disclosure of essential facts under Article 6.9.

12. In the implementation procedures, therefore, the US must give "a full opportunity" to interested parties to present their views in accordance with Article 6.2, including specific due process requirements, take the views presented into account, and reach a reasoned conclusion. Without these procedures, any re-determination would not be consistent with the requirements for a sunset review determination.

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[10] Decision Memorandum; Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina (16 December 2005) ("Decision Memorandum") (Exhibit ARG-16), pages 2 [fn.4] and 6 [fn.12]; *see* Argentina's First Written Submission, para. 60.

[11] Panel Report, para. 7.235.

[12] Appellate Body Report, para. 269.

[13] The Panel in *Guatemala - Cement II* similarly stated that "We interpret the first sentence of Article 6.2 of the AD Agreement as a fundamental due process provision." *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, 17 November 2000, para. 8.179.

13. It should be noted, however, that compliance with the due process requirements did not require the DOC to conduct another full sunset review in the Section 129 proceeding. The DOC had to ensure due process to the extent it made a re-determination pursuant to Section 129 to implement the DSB recommendations and rulings.

2. The DOC's determination of the likelihood of dumping is inconsistent with Article 6 of the AD Agreement, due to inadequacies in due process procedures

14. Argentina argues that the DOC failed to disclose the essential facts which formed the basis of the re-determination.[14] Article 6.9 of the AD Agreement requires that the authorities must disclose the essential facts to interested parties before the final determination. It also requires that the disclosure must take place in sufficient time for the parties to defend their interests. These explicit provisions recognize that the disclosure of the essential facts is an indispensable element to ensure that interested parties have a full opportunity for defence of their interests under Article 6.2.

15. As discussed above, it is clear that the DOC must conduct the present Section 129 proceeding in accordance with the requirements of Article 6. It appears that the DOC did not make a disclosure of essential facts in accordance with Article 6.9. The US, therefore, appears to have failed to provide a full opportunity to responding parties in the proceeding, and thus acted inconsistently with Article 6.9, and consequently with Article 6.2.

16. Argentina also argues that the DOC failed to make certain information available to responding parties during the re-determination process.[15] Article 6.4 of the AD Agreement requires that the authorities provide "timely opportunities for all interested parties to see all information that is relevant to the presentation of these cases". As discussed above, this procedural requirement is part of the fundamental due process requirement under Article 6.2. Thus, any proceeding inconsistent with Article 6.4, therefore, is also inconsistent with Article 6.2.

17. Japan does not take any specific position whether the memoranda cited by Argentina in its First Written Submission[16] in fact contain information that was not made available to responding parties. Japan respectfully requests that this Panel closely review these memoranda in deciding whether DOC made all information available to responding parties in compliance with Articles 6.2 and 6.4.

18. Argentina also made the following arguments: DOC's failure to provide explanation of reasons in rejecting evidence submitted by the interested parties[17] and DOC's recourse to the facts available are inconsistent with Article 6.8 and Annex II.[18] Again, Japan does not take any specific position on the actual facts in this proceeding. Japan, however, respectfully request that the Panel carefully review the facts of the 129 proceeding relating to the DOC's compliance with the due process requirements under Article 6.2 and its subsequent provisions.

19. The US's attempts to justify such failures in its First Written Submission do not constitute a removal of defects made in the course of Section 129 procedures. The arbitrator has set the reasonable period of time for the implementation, upon reviewing all necessary elements for the implementation argued by the US. Members have an obligation to respect and abide by the

[14] Argentina's First Written Submission, paras. 187-193.
[15] *Ibid*., paras. 153-163.
[16] *Ibid.*, paras.157-163.
[17] *Ibid*., paras. 171-173.
[18] *Ibid*., paras. 174-186.

arbitrator's decision. A Member should not be allowed to disregard the timeframe set by the arbitrator, because its argument was not fully accepted by the arbitrator.[19]

20. In addition, a failure to let the interested parties know the availability of a hearing constitutes another procedural defect in this particular case. The US argued that there was no request for a hearing. Upon simple reading of provisions of Article 6.2, the argument by the US might appear correct. What is problematic, however, is the failure of the DOC to provide interested parties an opportunity for requesting a hearing. As the original Panel explained in paragraph 7.235 of the Panel Report, it is the general practice of the DOC not to hold hearings in expedited sunset reviews; and the original Panel found such practice inconsistent with Article 6.2. With this practice, the interested parties may well be made unaware of their rights and the administrative procedures under US laws to request hearings in the course of the Section 129 proceeding. Considering that the Panel specifically found the DOC's failure to hold a hearing inconsistent with Article 6.2, the DOC should have notified the interested parties their right of and the procedures necessary to request a hearing. Under this particular situation, the fault is not the inaction of the interested parties but inaction of the DOC that made the present Section 129 proceeding short of meeting the due process requirement. Therefore, Japan supports the argument made by Argentina in Section IV.D.2, in particular paragraph 151, in its First Submission.

C. THE IMPLEMENTATION BY THE UNITED STATES OF THE WAIVER PROVISIONS REMAINS INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT AS SUCH

21. The original Appellate Body found that "Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*".[20] This finding was made because the "statutorily-mandated *assumption* about a company's likelihood of dumping…is inconsistent with the obligation of an investigating authority under Article 11.3 to 'arrive at a reasoned conclusion' on the basis of positive evidence"[21] (emphasis in original).

22. To comply with the DSB's recommendations and rulings, the US amended Section 351.218(d)(2)(iii) of the DOC regulation. The amended Section 351.218(d)(2)(iii) of the DOC Regulation requires the respondent who applies for a waiver to submit a statement that such respondent is likely to dump. When submitted, these provisions oblige the DOC to determine the likelihood of dumping with respect to the exporter.

23. The implementation by the US does not comply fully with Article 11.3 of the AD Agreement. While the waiver statement would have certain probative value in many cases as argued by the US[22], the authorities can assess the value of such evidence only after examination of all other evidence on the record of the individual proceeding. Section 751(c)(4)(B) of the Tariff Act of 1930 and the amended Section 351.218(d)(2)(iii) leave no room for the DOC to review any other evidence that reaches a different conclusion, even if the other evidence have more probative value than the exporter's statement. For example, even where importers effectively demonstrate that they will not import any dumped products in the future, the DOC is still obliged to find that the dumping is likely to occur with respect to the exporter.

24. As stated above, the Appellate Body explicitly stated that the affirmative waiver provision is "inconsistent with the obligation of an investigating authority under Article 11.3 to 'arrive at a

[19] See *e.g.*, US First Written Submission, paras. 53, 65 and 78.
[20] Appellate Body Report, para. 235.
[21] *Ibid*., para. 234.
[22] US Submission, paras. 17-19.

reasoned conclusion' on the basis of 'positive evidence'".[23] The Appellate Body's statement is based on the fundamental obligation of the authorities to make its determination on objective assessment of all evidence on the record under Article 11.3. In connection with this presumption, the Appellate Body clarified that "[p]rovisions that create 'irrebuttable' presumptions, or 'predetermine' a particular result, run the risk of being found inconsistent with this type of obligation".[24] These statements clarify the fact that the predetermined result based on single evidence without examination of any other evidence on the record would be inconsistent with Article 11.3.

25. Japan, therefore, respectfully submit that Section 751(c)(4)(B) of the Tariff Act of 1930, in combination with the amended Section 351.218(d)(2)(iii) of the DOC Regulation, is inconsistent with Article 11.3 of the AD Agreement.[25] Japan accordingly supports the argument made by Argentina in Section V.B, in particular paragraphs 203 and 207, of its First Written Submission.

III. CONCLUSION

26. For the foregoing reasons, Japan respectfully requests the Panel to find that the US acted inconsistently with Articles 6 and 11.3 of the AD Agreement.

[23] Appellate Body Report, para. 234.
[24] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 191.
[25] This does not assume these two provisions are necessarily "taken together" as argued by the US.

ANNEX B-4

THIRD PARTY WRITTEN SUBMISSION OF THE REPUBLIC OF KOREA

26 April 2006

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I. INTRODUCTION

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the first Panel submission by Argentina dated 5 April 2006 in *United States - Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods From Argentina*, WT/DS268 (Recourse to Article 21.5 of the DSU by Argentina).

2. Korea has systemic interests in the interpretation and application of provisions of Articles 6 and 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), which regulate various aspects of sunset reviews of existing anti-dumping duty orders, and Section 751(c)(4)(B) of the US Tariff Act of 1930 as amended and Section 351.218 of the Regulation of the United States Department of Commerce ("USDOC"), both of which were challenged "as such" in the original dispute and are being challenged again by Argentina in the present proceeding. Therefore, Korea reserved its third party rights pursuant to Article 4.11 of the Understanding on Rules and Procedures Governing the Settlement of Dispute ("DSU"). Korea appreciates this opportunity to present its view to the Panel.

3. The original Panel in this dispute found that the United States violated its obligations under Article 11.3 when it extended the anti-dumping duty order on oil country tubular goods ("OCTG") from Argentina in 2001. The United States did not appeal that finding. The United States now claims to have complied with the recommendations and rulings of the Dispute Settlement Body ("DSB"), in part by conducting proceedings under Section 129 of *the Uruguay Round Agreements Act ("URAA")*. The resulting Section 129 determination was issued on 16 December 2005, in which the USDOC

found that "revocation of the anti-dumping duty order would be likely to lead to continuation or recurrence of the dumping".[1]

4. In Korea's view, however, the new determination still fails to abide by the terms and conditions of Article 11.3 of the AD Agreement. Setting aside the "timing" issue being vehemently challenged by Argentina in its first submission, where it points out that the determination was issued more than five years after the date when the order was supposed to expire and nearly eleven years after the imposition of the original order, Korea notes that the United States continues to fail to prove that its OCTG anti-dumping sunset review is supported by positive evidence and sufficient factual bases as provided in Article 11.3 of the AD Agreement. Korea also shares the view of Argentina that the 129 determination constitutes violation of various provisions of Article 6 of the AD Agreement

5. Article 11.3 of the AD Agreement unequivocally states that the unambiguous intent of the drafters at the Uruguay Round was to impose a five-year temporal period on any anti-dumping order. In Korea's opinion, the 2005 US attempt to "comply" with its Article 11.3 obligations in this case by resorting to information which could never have been possibly available to it during the original sunset review in 2000 would render a nullity the temporal limitation on anti-dumping orders. If this is allowed, an investigating authority could arbitrarily justify an otherwise illegitimate extension of existing anti-dumping orders. This would constitute direct violation of the principle of "effective" interpretation which has been consistently adopted and applied by the Appellate Body.[2]

6. Simply put, Korea reiterates the obvious: (i) if, as in this case, the likelihood of dumping determination undertaken at the required time was not supported by positive evidence, then the Member has no right to extend the measure, and (ii) if the Member cannot justify its original sunset review determination based on information and data reasonably available at that time, the only way to remedy its WTO-inconsistent sunset review is to terminate the underlying anti-dumping order as soon as possible.

7. Korea therefore generally supports the arguments raised by Argentina in its first submission. Rather than covering all the arguments, however, Korea will address in this submission certain critical issues.

II. LEGAL ARGUMENTS

A. USDOC'S SECTION 129 DETERMINATION STILL FAILS TO IMPLEMENT THE RECOMMENDATIONS AND RULINGS OF THE DSB AND THE COMPLIANCE CAN BE ONLY ACHIEVED THROUGH REVOCATION OF THE ORDER

8. Neither the USDOC's sunset review determination on Argentine OCTG in 2000 nor its 2005 re-determination complies with Article 11.3 of the AD Agreement.

9. In Korea's view, in making the 2005 Section 129 determination the USDOC did not establish a sufficient factual basis of positive evidence necessary to support a WTO-consistent finding of likely dumping. Nor did the USDOC objectively assess the information collected in this regard. Its

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[1] United States Department of Commerce, *Issues and Decision Memorandum, Section 129 Determination: Final Results of Sunset Review, Oil Country Tubular Goods from Argentina*, A-357-810 (16 Dec. 2005).

[2] For example, the Appellate Body applied this principle by stating that an interpretation that renders "inutile" a provision of a covered agreement would be "abhorrent to the principles of interpretation we are bound to apply." *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 121.

conclusions, therefore, are not reasoned, and the evidence it developed does not support a WTO-consistent determination that dumping would be likely.

10. Article 11.3 of the AD Agreement provides as follows:

> 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.

On the other hand, Article 11.4 of the AD Agreement provides that:

> The review conducted under Article 11.3 shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

As such, these two provisions show the following: Article 11.3 provides that, notwithstanding the provisions of Articles 11.1 and 11.2, Members "shall" terminate an anti-dumping duty order "unless" the authorities make an affirmative likelihood determination in a sunset review; and Article 11.4 contemplates that the sunset review process may take up to one year.

11. These phrases in the Articles have been interpreted by the Appellate Body as follows:

> The text of Article 11.3 contains an obligation "to determine" likelihood continuation or recurrence of dumping and injury….[I]t 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 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*.[3]

In fact, this principle was reaffirmed by the Appellate Body in the present dispute, where it stated that:

> The plain meaning of the terms "review" and "determine" in Article 11.3, therefore, *compel* an investigating authority in a sunset review to undertake an examination, on the basis of *positive evidence*, of the likelihood of continuation or recurrence of dumping and injury. In drawing conclusions from that examination, the investigating authority must arrive at *a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture*.[4]

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[3] *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, para. 114 (emphasis added).

[4] *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 180 (emphasis added) ("US-OCTG from Argentina (AB)").

Korea notes that the decisions of the Appellate Body use the terms "has to" and "compel" in describing the nature of obligations imposed on Members' investigating authorities engaged in sunset reviews. As such, an investigating authority "must" conduct a sunset review based on positive evidence and sufficient factual information. In other words, any sunset review determination derived from assumption or conjecture must fail.

12. Korea brings the Panel's attention to the following underlying facts. In the original 2000 sunset review proceeding, the USDOC sent out no questionnaires and limited itself to a review of the information submitted by the parties. The USDOC simply remained as a passive regulator rather than active investigator/adjudicator as contemplated by Article 11.3. This inadequate information gathering/analysis process was one of the key consideration factors of the original panel when it ultimately concluded that:

> The purpose of a sunset review is to examine whether the facts continue to justify the imposition of an anti-dumping measure. The USDOC, however, *did not engage in that inquiry because it simply relied on the existence of the dumping margin from the original investigation*.[5]

In short, the panel's finding was simply that the USDOC continued the anti-dumping measure in 2001 without having engage[d] in [the] inquiry required by Article 11.3. This could be characterized as an incident of sunset review based on "assumption and conjecture."

13. In Korea's view, the USDOC repeats its error yet again in the 2005 Section 129 determination by simply relying on its earlier findings. Excluding information that would not have been reasonably available to it in 2000, the USDOC did not add anything concrete to overcome the concern of the original panel. One could argue, therefore, that the 2005 determination simply constitutes continuation of the existing errors. The new determination is still based on "assumption and conjecture" which the Appellate Body has warned against. Such being the case, Korea stresses that the United States has failed to implement the recommendations and rulings of the DSB. Under the circumstances, the only alternative for the USDOC to bring its sunset determination on the Argentine OCTG into conformity with relevant provisions of the AD Agreement would be to revoke the anti-dumping order.

14. In this respect, Korea also requests the Panel to take into consideration the fact that the United States was given a 12-month implementation period in this dispute. During the arbitration under DSU Article 21.3(c) on the reasonable period of time for the implementation, the United States offered an extensive list of procedural steps to develop and refine relevant information. Given the information and data contained in the 129 determination, however, Korea has serious reservation whether such proposed procedures have been duly taken by the USDOC. For instance, unlike its original proposal in the 21.3 arbitration, the USDOC did not issue any draft or preliminary determination, as it routinely does in other Section 129 procedures.

B. USDOC'S SECTION 129 DETERMINATION VIOLATES VARIOUS "DUE PROCESS" PROVISIONS CONTAINED IN ARTICLE 6 OF THE AD AGREEMENT

15. Furthermore, the way the Section 129 proceeding was implemented by the USDOC constitutes a violation by the United States of various provisions of Article 6 of the AD Agreement.

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[5] United *States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 7.219 (emphasis added).

16. It is uncontested that the obligations of Article 6 of the AD Agreement also apply to sunset reviews. Article 11.4 of the AD Agreement provides that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article". The Appellate Body has also confirmed that "claims under Article 6 may be made in relation to sunset review determinations on the basis of the cross-reference to Article 6 found in Article 11.4".[6] Accordingly, the obligations of Article 6 of the AD Agreement apply to the Section 129 determination in the Argentine OCTG sunset review.

17. Korea notes that various aspects of the USDOC's 129 proceeding constitute violation of provisions of Article 6. First, the USDOC failed to provide the interested parties with meaningful opportunities to present in writing all evidence which they considered relevant, which constitutes violation of Article 6.1; the USDOC also failed to provide interested parties with a full opportunity for the defense of their interests, which in turn constitutes violation of Article 6.2; the USDOC also failed to provide timely opportunities for interested parties to review all information that was relevant to the presentation of their cases, which constitutes violation of Article 6.4; the USDOC also failed to satisfy the requirements of Article 6.5.1 regarding the provision of non-confidential summaries of confidential information; the USDOC failed to satisfy the requirements of Article 6.6 by not ensuring the accuracy of information that was relied on to the exclusion of other more probative evidence; the USDOC also failed to follow the requirements of Article 6.8; and the USDOC also failed to inform interested parties of the essential facts under consideration that formed the basis for the decision, which constitutes violation of Article 6.9. As to the specific factual background for these claims, Korea requests the Panel to refer to the first submission of Argentina.

18. All these obligations contained in Article 6 collectively stand for the proposition that fundamental due process rights must be ensured at all times in an anti-dumping order sunset review.[7] Yet, the USDOC did not conduct the Section 129 proceeding in a manner consistent with the requirements of Article 6. As such, Korea believes that the United States still fails to implement the recommendations and rulings of the DSB, and the only way to bring the measure into conformity with relevant provisions of the covered agreements is to revoke it.

C. THE UNITED STATES HAS FAILED TO IMPLEMENT THE DSB RECOMMENDATIONS AND RULINGS WITH RESPECT TO THE "AS SUCH" VIOLATIONS OF SECTION 751(C)(4)(B) AND SECTION 351.218.

19. Section 751(c)(4)(B) of the Tariff Act of 1930 as amended provides as follows:

> (B) Effect of waiver
>
> In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.[8]

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[6] *US – OCTG from Argentina (AB)*, para. 239.

[7] *US – OCTG from Argentina (AB)*, para. 241; *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, para. 8.119; *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/R, adopted 9 January 2004, para. 7.255.

[8] 19 USC. § 1675(c)(4)(B).

In the underlying dispute, the Appellate Body found that Section 751(c)(4)(B) and its implementing regulation were inconsistent, as such, with US obligations under Article 11.3 of the AD Agreement. The Appellate Body noted that:

> Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence…. [E]ven assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to "arrive at a reasoned conclusion" on the basis of "positive evidence."
>
> Therefore, we *uphold* the Panel's findings...that Section 751(c)(4)(B) of the Tariff Act of 1930 and Section 351.218(d)(2)(iii) of the USDOC Regulations are inconsistent, as such, with Article 11.3 of the *Anti-Dumping Agreement*.[9]

20. Therefore, the Appellate Body was clear and unambiguous as to the WTO-inconsistency of Section 751(c)(4)(B) and its implementing regulation. Despite the unambiguous conclusion of the Appellate Body, however, it is uncontested that Section 751(c)(4)(B) of the Tariff Act has neither been repealed nor amended. Therefore, Korea is of the opinion that the United States has failed to bring Section 751(c)(4)(B) into conformity with the recommendations and rulings of the DSB and with US obligations under Articles 11.1 and 11.3 of the AD Agreement and Article XVI:4 of the WTO Agreement.

21. In addition, Korea further notes that Section 351.218 of the Regulation of the USDOC, as amended, is WTO-inconsistent. Section 351.218 of the Regulation, as amended, requires respondent interested parties that waive their right to participate in a USDOC sunset review to make an affirmative statement that it is likely to dump if the order is revoked. The amended Regulations provide in part as follows:

> Contents of statement of waiver. Every statement of waiver must include a statement indicating that the respondent interested party waives participation in the sunset review before the Department; a statement that the respondent interested party is likely to dump or benefit from a countervailable subsidy (as the case may be) if the order is revoked or the investigation is terminated; in the case of a foreign government in a CVD sunset review, a statement that the government is likely to provide a countervailable subsidy if the order is revoked or the investigation is terminated; and the following information….[10]

22. Korea requests the Panel to focus on what would actually happen under this provision. When a party affirmatively waives its participation in a sunset review, the Regulation basically prevents the USDOC from developing the requisite factual information. The systematic inability of USDOC to gather the necessary information therefore is "as such" inconsistent with the obligation of the United States to conduct a sunset review and the need to make the requisite determination under Article 11.3. Under the revised Regulation, therefore, it is simply impossible for the USDOC to carry out its obligation under Article 11.3 to "arrive at a reasoned conclusion" on the basis of "positive evidence".

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[9] *US – OCTG from Argentina (AB*), paras. 234-235.

[10] *Procedures for Conducting Five-Year ("Sunset") Reviews for Anti-Dumping and Countervailing Duty Orders*: Final Rule, 70 Fed. Reg. 62,061, 62,064 (28 Oct. 2005).

23. Korea thus points out that Section 351.218 of the Regulation, as amended, remains inconsistent with US obligations under Article 11.3 of the AD Agreement.

III. CONCLUSION

24. For the foregoing reasons, Korea respectfully submits that the Panel finds that the United States has failed to implement the recommendations and rulings of the DSB, and remains in violation of its WTO obligations. Korea appreciates this opportunity to present its view to the Panel.

ANNEX B-5

THIRD PARTY WRITTEN SUBMISSION OF MEXICO

26 April 2006

Page

I. INTRODUCTION

1. Mexico welcomes this opportunity to submit its paper on the implementation of the rulings and recommendations of the DSB and to present to the Panel its views on the facts and legal aspects of *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268) – *Recourse to Article 21.5 of the DSU*. This case once again concerns the improper implementation by the United States of the obligations established in Articles 2, 6 and 11 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement).

2. Mexico considers that the United States has failed to implement the DSB's rulings and recommendations in this dispute. The United States maintains in force an anti-dumping order against Argentine products even though the DSB established that the measure was inconsistent with WTO legislation. It has been more than five years since the United States extended the anti-dumping duties. Although it has had sufficient time and a fresh opportunity to comply, the United States still refuses to bring its measure into conformity.

II. THE SECTION 129 DETERMINATION IS INCONSISTENT WITH WTO OBLIGATIONS AND DOES NOT IMPLEMENT THE DSB RECOMMENDATIONS

3. Let us turn to certain worrying aspects of the determination by the United States Department of Commerce (USDOC). We repeat that Mexico reserves its right to elaborate on these comments or to submit new comments on this determination.

A. THE USDOC'S DUMPING DETERMINATION RELIED ON A STANDARD THAT WAS INCONSISTENT WITH ARTICLE 11.3 AND ON A DUMPING SCENARIO WHICH IS NOT PROVIDED FOR IN THE ANTI-DUMPING AGREEMENT

4. The United States based its determination of continuation or recurrence of dumping on the following reasoning: it is probable that one of the Argentine exporters engaged in dumping in the past, and it is therefore also probable that the said exporter will engage in dumping in the future if the anti-dumping order is revoked. The above premise (that it is probable that Acindar engaged in dumping in the past) is itself based on the alleged fact that Acindar exported to the United States during the investigation period at prices lower than United States domestic market value.

5. In other words, the only fact that has been proven by the USDOC (assuming that the prices published by Preston Pipes accurately reflect the United States domestic market prices for the product in question) is that Acindar's export prices were lower than the United States domestic market prices. Mexico would therefore like to express its concern at the USDOC's approach, in particular:

- At the fact that, as in the case of the measure applied against Mexico, the United States did not base its determination on what was "likely" to happen. This is clearly inconsistent with the standard set forth in Article 11.3 of the Anti-Dumping Agreement;

- at the fact that the United States relied on a dumping scenario that is not provided for in Article 2 of the Anti-Dumping Agreement.

B. ALTHOUGH THE USDOC BASED ITS DETERMINATION ON A DECLINE IN THE VOLUME OF EXPORTS, THE UNITED STATES ERRONEOUSLY SUBMITS THAT THE PANEL SHOULD NOT ANALYSE THIS FACT

6. During the Panel proceedings, Mexico pointed out to the Panel the decisive weight attached by the USDOC in the Sunset reviews to volumes exported following the imposition of the anti-dumping order. Much has happened in this respect since Mexico's third party submission. The Panel and the Appellate Body in *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (DS282) determined that the USDOC had relied solely on the decline in volume to justify the continuation of the measure for oil country tubular goods from Mexico. The Panel pointed out that the use by the USDOC of the decline in volume to the exclusion of other evidence violated Article 11.3 of the Anti-Dumping Agreement, while the Appellate Body determined that the investigating authority must analyse the causes of the decline in volume rather than simply inferring the likelihood of dumping.[1]

[1] Mexico would like to recall what was said by the Panel *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (DS282):

> "The United States argues that the inference that dumping would continue or recur based on declines in import volumes following the imposition of the anti-dumping order is "an exercise in logic."[1] We do not dispute that an investigating authority may draw inferences in support of its conclusions, through the exercise of logic, based on the evidence presented. However, where information is presented that suggests that the inference is not appropriate in a particular case, then the investigating authority is obligated, under Article 11.3, to at least consider that information and take it into account before making its determination. In our view, information regarding changes in the financial circumstances of a company previously found to have been dumping, and changes in the overall economic situation of the exporting country, would appear to be relevant to whether the inference relied upon by USDOC is reasonable. This is particularly true where, as here, intervening reviews had resulted in findings of zero dumping margins. Thus, in our view, consideration of such evidence is

7. Argentina clearly explained this in its first submission. The United States, for its part, responded with its only argument by asking the Panel to refrain from considering the volume element as a measure taken to comply. However, the United States expressly states in its Section 129 determination that it relied on the decline in volume to support the likelihood of dumping: "[t]he Section 129 Determination was based on the findings of likely dumping by Acindar and the decreased volumes".

8. The United States cannot purport, on the one hand, to base its determination on what it has inferred from the volume, and at the same time state that Argentina "has offered no argument as to why the finding regarding import volumes, which is an incorporation of an element of the original determination, is a measure taken to comply". The decline in the volume of imports is a fundamental part of the determination. In this connection, Mexico would respectfully draw the attention of the panel to two facts in particular:

- The record in the determination does not contain any analysis or explanation of the causes of the decline in volumes;

- The USDOC should have considered the evidence voluntarily submitted by the exporters explaining the causes of the decline in volume.

III. CONCLUSION

9. Under Article 19.1 of the DSU, the Panel has the authority to suggest to the United States ways in which it could implement the DSB's recommendations in this dispute. When there are WTO obligations with a time element, as is the case here, a Member's options for bringing its measure into conformity with its WTO obligations are naturally limited.

10. Mexico agrees with and supports Argentina in its request to the Panel that "the measure be revoked", and asks the Panel to "suggest" to the United States that it revoke the measure. This is based on the fact that anti-dumping measures cannot last longer than five years unless, according to the interpretation of several panels, the authority applying the measure "determines" on the basis of "objective facts" that the dumping is likely to recur or continue, something which the United States did not do either in the original Sunset review of 2000, or in the new determination. This is why Argentina is justified in asking that the measure which the United States has applied in an inconsistent manner for the past five years be terminated.

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necessary in order to satisfy the requirements of Article 11.3. USDOC did not do so in this case." (Paragraph 7.79)