ANNEX B

I. INTRODUCTION

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

Article 11.1 directs that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." The significant limitations established by Article 11.1 – on the duration of an anti-dumping measure, the permissible magnitude of the duty, and the purpose for which an anti-dumping measure can be imposed Implementation of Article VI of ( ) T

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

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

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

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

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

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

In the *Japan Sunset* case, the Appellate Body emphasized that the likelihood determination under Article 11.3 could not be based "solely on the mechanistic application of presumptions" but instead must be grounded on a "firm evidentiary foundation."[20] Contrary to the Appellate Body's unambiguous statement, the Department's likelihood determinations operate exclusively on the "mechanistic application of presumption." In all (227 out of 227) of the full and expedited sunset reviews, the Department determined that dumping was likely to continue or recur. In all of the sunset reviews for which the Department determined that dumping was likely to continue or recur, the Department failed to conduct a prospective analysis, as required by Article 11.3 of the Anti-D Con 8 TD -0.116 Tc 0.9c

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

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

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

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

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

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

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

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

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

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

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

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C. A CUMULATIVE INJURY ANALYSIS IS INCONSISTENT W

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

It is clear that the United States did not apply a "

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

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

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

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

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

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

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

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

case. In DS 268, the United States argued that if only the Argentine producer, Siderca, had continued to ship to the United States after the imposition of the measure, or if only the company had participated in the annual review process, the results might have been different. In this case, however, neither the Mexican companies'

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. C

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presented in this dispute.

ANNEX B-2

THIRD PARTY SUBMISSION OF CHINA

(28 April 2004)

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I. INTRODUCTION

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

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

– Inconsistency of the determination by the US Department of Commerce ("Department") of likelihood of continuation or recurrence of dumping with Article 2 and Article 11.3;

– Inconsistency of the determination by the US International Trade Commission ("Commission") of likelihood of continuation or recurrence of injury with Articles 3.1, 3.4, 3.5 and 11.3;

– Inconsistency of margin of dumping determined by the Department based on the zeroing methodology for determining "dumping" with Articles 2.1 and 2.4.

II. ARGUMENTS

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

duty) can apply. (emphasis added) The Appellate Body also agreed with the Panel's reasoning below[5]:

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

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

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

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

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

8. The first phrase "[f]or the purpose of this Agreement" demonstrates drafter's clear intent to

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> five-year period preceding the sunset review. If there is evidence that no dumping has existed since the order was imposed but import volumes have been adversely affected to a significant degree, Commerce may make an affirmative sunset determination because, if these conditions are found, Commerce may reasonably conclude that dumping would continue were the discipline of the duty removed."[10]

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

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

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

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

22. The Appellate Body in *USU S d u m p i n g 3 3 8 . 2 5 0 8*

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

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

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

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

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

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

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

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

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

54. The SAA's elaboration that the "'reasonably foreseeable time' ... normally will exceed the 'imminent"

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

62. Article 2.4 requires the authorities to make "a fair comparison" between the export price and

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

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

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

68. China therefore respectfully requests that the Panel carefully review the evidence to confirm if the Department adopted

ANNEX B-3

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

I. SUNSET REVIEW "AS APPLIED"

A. LIKELY RECURRENCE OF DUMPING

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

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

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

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

B. LIKELY RECURRENCE OF INJURY

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

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

II. SPB AND CONSISTENT PRACTICE "AS SUCH"

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

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

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

III. FOURTH PERIODIC REVIEW OF AMOUNT OF DUTY

A. ZEROING

1. Article 2.4 ADA

(a) Overarching and independent obligation

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

10. This is confirmed by the fact that the text of the Uruguay Round *ADA* contains an important and significant innovation by comparison with the text of the Tokyo9rdTc i asf 0.2528omparisotndent ý Tw ( ) Tjentuic 2.6925d -12.75 75 Tf 0.d5 TD75 Tw (39.3116 Tww12.7lif th upationstem,d -0.sot) T27.75 0(t2 val

(b) Simple zeroing

18. Just as an anti-dumping proceeding concerns "a product" (the subject product), so it also concerns a margin of dumping based on a comparison of sales made at as nearly as possible "the same time" (the investigation or review period). Just as the *ADA* contains no express rule governing the definition of the "subject product", so it contains no express rule governing the definition of the period of investigation or the period of review. The "same time" might be a shorter period or a longer period (such as a year). Just like product characteristics, time (along with geography) is typically a parameter by reference to which markets – that is, categories of goods or services with a certain competitive relationship or degree of comparability - are defined. Just as the US defined the "subject product", so the US defined the period of review

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

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

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

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

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

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

3. Articles 11.1 and 11.2 ADA

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

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

Table 3

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

ANNEX B-4

THIRD PARTY SUBMISSION OF JAPAN

(7 May 2004)

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

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

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

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

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

5. As also clarified by the Appellate Body in *US – CRS Sunset Review*, if the three scenarios in the Section II.A.3 of the *Sunset Policy Bulletin* are found to be determinative or conclusive of the likelihood of future dumping, they are, as such, inconsistent with Article 11.3. [2]

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

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

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[1] *See* WT/DS244/AB/R, paras. 87-88.
[2] *See* WT/DS244/AB/R, para. 178.

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

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

1. Provisions of Article 3 Apply to Article 11.3

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

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

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

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

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

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

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

[3] *See*, WT/DS122/AB/R, para.106.
[4] *See* WT/DS244/AB/R, para.109.

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

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

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

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

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

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

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

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

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

C. THE DOC'S DETERMINATION IN THE FOURTH REVIEW NOT TO REVOKE THE ANTI-DUMPING MEASURES BASED ON THE DUMPING MARGINS CALCULATED WITH ZEROING METHODOLOGY IS IGREEMTD TD /F09c 0 Tw (Z) Tj 6.75 0 T Tj 231.75 0 TD -0.08054345 T-240.12 Tc 01 26.25 0 TI

ANNEX B-5

THIRD PARTY SUBMISSION OF THE SEPARATE CUSTOMS

I. INTRODUCTION

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

- the ability of the Statement of Administrative Action (SAA) and the Sunset Policy Bulletin (SPB) to be challenged as such;

- the inconsistency of the SAA and the SPB with the ADA Article 11.3 obligation to terminate the duty no later than five years from the date of the imposition, unless the conditions set forth in the Article are met; and

- the applicability of Article 3 of the ADA in sunset reviews.

2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that the limited scope of this submission does not prejudice its position on the other claims raised by Mexico in this dispute. Accordingly, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu the ap74 Tariffs pohe tainj - Acc0 Tc 19 Tc 1.737 T58(;) Tj 0 (SPB)ordw, P an not prejudiTc 0.169 Tc 1.737 62

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

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

4. In reversing the Panel's conclusions that the SPB is not a mandatory legal instrument and therefore cannot be challenged as such under the WTO, the Appellate Body also faulted the Panel for concentrating too much on the mandatory/discretionary distinction[7], and failing to recognize the undue limitations the SPB has on the US Department of Commerce's determinations[8] and thus the "normative nature" of the provisions[9].

5. According to the Appellate Body, therefore, a "non

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

B. THE SAA AND THE SPB VIOLATE THE EXPLICIT OBLIGATION I

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

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

> the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question[28].

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

20. Article 11.3 simply does not allow such a shift of burden. As already discussed above, the obligation in Article 11.3 is the termination of the duty "no later than five years from its imposition." The exception, namely, the continuation of the duty, is allowed only if investigating authorities have properly determined, on the basis of sufficient evidence, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping[29].

21. By requiring the exporters to provide information that would warrant the consideration of other factors by the Department, the SPB, and by extension SAA and the statute, grants the authorities the discretion of examining only the historic dumping margin and import volumes, and re-assigns the burden on the exporters to produce information and to demonstrate good cause to examine other factors. The Department, as a result, can mechanically apply the three criteria, assuming a passive role and relinquishing the requirement of active information gathering by investigating authorities in Article 11.3. The conditions for the assertion of the exception under Article 11.3 cannot be met if the Department follows the SPB, and in the process, the United States ignores the obligation of termination pursuant to Article 11.3. Therefore, the United States violates Article 113 as such.

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

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

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[27] *Id.*
[28] *Id.*, at Section II.C, at 18874.
[29] *US – Sunset Review of Steel from Japan*, para. 158.
[30] First Written Submission of the United States of America, 21 April 2004, paras. 238-258.

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

23. In addition to the arguments Mexico has already presented in its first written submission[31], the Appellate Body ruled in *US – Sunset Review of Steel from Japan* that Article 2 applies to the calculation of dumping margins in Article 11.3 likelihood determination:

> Article 2 sets out the agreed disciplines in the *Anti-*