WORLD TRADE ORGANIZATION

WT/DS244/R
14 August 2003

(03-4104)

Original: English

UNITED STATES – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM JAPAN

Report of the Panel

The report of the Panel on *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 14 August 2003 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/452). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

TABLE OF CONTENTS

Page

I. INTRODUCTION 1
A. COMPLAINT OF JAPAN 1
B. ESTABLISHMENT AND COMPOSITION OF THE PANEL 1
C. PANEL PROCEEDINGS 2
II. FACTUAL ASPECTS 2
III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS 3
A. JAPAN 3
B. UNITED STATES 4
IV. ARGUMENTS OF THE PARTIES 4
V. ARGUMENTS OF THE THIRD PARTIES 4
VI. INTERIM REVIEW 4
A. REQUEST OF JAPAN 5
B. REQUEST OF THE UNITED STATES 6
VII. FINDINGS 7
A. GENERAL ISSUES 7
1. Standard of Review 7
2. Burden of Proof 8
B. ISSUES RAISED IN THIS DISPUTE 8
1. Overview of the Panel's approach to consideration of Japan's claims 8
2. Evidentiary standards applicable to the self-initiation of sunset reviews 9
(a) US law as such 9
(i) Arguments of parties 9
(ii) Arguments of third parties 11
(iii) Evaluation by the Panel 11
(b) US law as applied in the instant sunset review 19
(i) Arguments of parties 19
(ii) Evaluation by the Panel 20
3. *De minimis* standard in sunset reviews 20
(a) US law as such 20
(i) Arguments of parties 20
(ii) Arguments of third parties 21
(iii) Evaluation by the Panel 21
(b) US law as applied in the instant sunset review 26
(i) Arguments of parties 26

(ii) *Evaluation by the Panel* *26*
4. Cumulation in sunset reviews **27**
(a) US law as applied in the instant sunset review 27
(i) *Arguments of parties* *27*
(ii) *Arguments of third parties* *27*
(iii) *Evaluation by the Panel* *28*
5. Use of dumping margins in sunset reviews **30**
(a) US Sunset Policy Bulletin as such 30
(i) *Arguments of parties* *30*
(ii) *Arguments of third parties* *31*
(iii) *Evaluation by the Panel* *31*
(b) US Sunset Policy Bulletin as applied in the instant sunset review 40
(i) *Arguments of parties* *40*
(ii) *Evaluation by the Panel* *40*
6. Basis of determination of likelihood of continuation or recurrence of dumping: order-wide or company-specific? **49**
(a) US Sunset Policy Bulletin as such 49
(i) *Arguments of parties* *49*
(ii) *Arguments of third parties* *50*
(iii) *Evaluation by the Panel* *50*
(b) US Sunset Policy Bulletin as applied in the instant sunset review 51
(i) *Arguments of parties* *51*
(ii) *Evaluation by the Panel* *51*
7. Obligation to determine likelihood of continuation or recurrence of dumping **53**
(a) US law and Sunset Policy Bulletin as such 53
(i) *Arguments of parties* *53*
(ii) *Arguments of third parties* *54*
(iii) *Evaluation by the Panel* *55*
(b) US law and Sunset Policy Bulletin as applied in the instant sunset review 60
(i) *Claims under Articles 6.1, 6.2 and 6.6 of the Anti-dumping Agreement* *60*
(ii) *Claim under Article 11.3 of the Anti-dumping Agreement* *65*
8. Article X:3(a) of GATT 1994 ..... **70**
(a) US law as such 70
(i) *Arguments of parties* *70*
(ii) *Evaluation by the Panel* *71*
(b) US law as applied in the instant sunset review 72
(i) *Arguments of parties* *72*

9. Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement* 75
(a) US law as such 75
(i) Arguments of parties *75*
(ii) Arguments of third parties *75*
(iii) Evaluation by the Panel *75*
VIII. CONCLUSIONS AND RECOMMENDATION 76
IX. JAPAN'S REQUEST FOR ESTABLISHMENT OF THE PANEL (WT/DS244/4) 78

ANNEX A

First Written Submissions by the Parties

Contents		Page
Annex A-1	Executive Summary of the First Written Submission by Japan	A-2
Annex A-2	Executive Summary of the First Written Submission by the United States	A-12

ANNEX B

Third Party Submissions

Contents		Page
Annex B-1	Third Party Submission of Brazil	B-2
Annex B-2	Third Party Submission of Chile	B-12
Annex B-3	Third Party Submission of the European Communities	B-17
Annex B-4	Third Party Submission of Korea	B-27
Annex B-5	Third Party Submission of Norway	B-35

ANNEX C

Second Written Submissions by the Parties

Contents		Page
Annex C-1	Executive Summary of the Second Written Submission by Japan	C-1
Annex C-2	Executive Summary of the Second Written Submission by the United States	C-12

ANNEX D

Oral Statements, First and Second Panel meetings

Contents		Page
Annex D-1	Executive Summary of the Oral Statement of Japan – First meeting	D-2
Annex D-2	Executive Summary of the Oral Statement of the United States – First meeting	D-7
Annex D-3	Third Party Oral Statement of Brazil	D-11
Annex D-4	Third Party Oral Statement of Chile	D-16
Annex D-5	Third Party Oral Statement of the European Communities	D-19
Annex D-6	Third Party Oral Statement of Korea	D-25
Annex D-7	Third Party Oral Statement of Norway	D-29
Annex D-8	Executive Summary of the Oral Statement of Japan – Second meeting	D-33
Annex D-9	Executive Summary of the Oral Statement of the United States – Second meeting	D-38

ANNEX E

Questions and Answers

Contents		Page
Annex E-1	Replies of Japan to Questions of the Panel – First meeting	E-2
Annex E-2	Reply of Japan to Question 27 of the Panel – Appendix I	E-46
Annex E-3	Replies of the United States to Questions of the Panel – First meeting	E-53
Annex E-4	Comments by Japan on US Replies to Panel Questions – First meeting	E-85
Annex E-5	Comments by the United States on Japan's Replies to Panel Questions – First meeting	E-94
Annex E-6	Third party replies by Brazil to Questions of the Panel	E-100
Annex E-7	Third party replies by the European Communities to Questions of the Panel	E-103
Annex E-8	Third Party replies by Norway to Questions of the Panel	E-114
Annex E-9	Replies of Japan to Questions of the Panel – Second meeting	E-117
Annex E-10	Replies of the United States to Questions of the Panel – Second meeting	E-133
Annex E-11	Comments by Japan on US Replies to Panel Questions – Second meeting	E-151
Annex E-12	Comments by the United States on Japan's Replies to Panel Questions – Second meeting	E-160

I. INTRODUCTION

A. COMPLAINT OF JAPAN

1.1 On 30 January 2002, Japan requested consultations[1] with the United States pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.2 of the *Agreement on Implementation of Article VI of GATT 1994* (the *Anti-dumping Agreement*), regarding the affirmative final determinations of both the United States Department of Commerce ("DOC") and the United States International Trade Commission ("ITC") on the full sunset review of Corrosion-Resistant Carbon Steel Flat Products from Japan issued on 2 August 2000 and 2 November 2000, respectively.

1.2 Consultations were held on 14 March 2002, but parties failed to settle the dispute.

1.3 On 4 April 2002, Japan requested the establishment of a panel[2] pursuant to Article XXIII of the GATT 1994, Articles 4.7 and 6 of the *DSU*, as well as Article 17 of the *Anti-dumping Agreement*.

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 The Dispute Settlement Body ("DSB") established a panel on 22 May 2002, with standard terms of reference. The terms of reference of the Panel are:

> To examine, in the light of the relevant provisions of the covered agreements cited by Japan in document WT/DS244/4, the matter referred by Japan to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.5 On 9 July 2002, Japan requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

1.6 On 17 July 2002, the Director-General accordingly composed the Panel as follows[3]:

Chairman: Mr. Dariusz Rosati

Members: Mr. Martin Garcia

Mr. David Unterhalter

---

[1] *See* WT/DS244/1.
[2] *See* WT/DS244/4.
[3] *See* WT/DS244/5.

1.7 Brazil, Canada, Chile, the European Communities, India, Korea, Norway and Venezuela[4] reserved their rights to participate in the Panel proceedings as third parties.

C. PANEL PROCEEDINGS

1.8 The Panel met with the parties on 5-6 November 2002, and on 9 January 2003. The Panel met with the third parties on 6 November 2002.

1.9 The Panel submitted its interim report to the parties on 31 March 2003. Comments were received from the parties on the interim report on 14 April 2003, and on each other's comments on 22 April 2003. The Panel submitted its final report to the parties on 22 May 2003.

II. FACTUAL ASPECTS

2.1 At issue in this dispute are certain aspects of the US sunset statute, regulations and Sunset Policy Bulletin -- as such, and/or as applied -- in respect of a sunset review carried out by the United States of an anti-dumping duty order on imports of corrosion-resistant carbon steel flat products from Japan. In August 2000, the DOC determined that revocation of the order "would be likely to lead to continuation or recurrence of dumping".[5] The DOC transmitted this determination to the ITC, along with a determination regarding the magnitude of dumping likely to prevail in case of revocation of the order – 36.41 per cent in the review at issue. In November 2000, the ITC determined that revocation of the order would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[6] Accordingly, the United States decided not to revoke the anti-dumping duty order under review on imports of the product in question.

2.2 Japan challenges aspects of the following as violating Articles VI and X of the GATT 1994, Articles 2, 3, 5, 6, 11, 12 and 18 of the *Anti-dumping Agreement*, and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (*"WTO Agreement")*:

1. the US Statute in respect of sunset reviews of anti-dumping duties[7] and, in conjunction with it, the *Statement of Administrative Action* ("SAA")[8];

2. the US Sunset Regulations[9];

3. the US Sunset Policy Bulletin[10]; and

4. their application in this instance, in the sunset review determination in respect of certain corrosion-resistant carbon steel flat products from Japan.[11]

---

[4] Venezuela subsequently indicated that it no longer wished to participate in the Panel proceedings as third party.

[5] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8d).

[6] *Certain Carbon Steel Products from Japan; Injury Determination*, USITC Pub. No. 3364, Inv. No. 731-TA-617 (Review) (November 2000) (Exhibit JPN-9b).

[7] The Tariff Act of 1930 ("Tariff Act"). Codified in 19 USC 1675(c) (Exhibit JPN-1d and e).

[8] Uruguay Round Agreements Act Statement of Administrative Action, accompanying P.L. 103-465 (1994) (Exhibit JPN-2).

[9] Implementing Regulations: Procedures for Conducting Five-Year ("Sunset") Reviews of Anti-dumping and Countervailing Duty Orders. Codified in 19 CFR part 351 (Exhibit JPN-3).

[10] Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Anti-dumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed. Reg. 18871 (16 April 1998) (Exhibit JPN-6).

[11] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8d); *Certain Carbon Steel Products from Japan; Injury Determination*, USITC Pub. No. 3364, Inv. No. 731-TA-617 (Review) (November 2000) (Exhibit JPN-9b).

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. JAPAN

3.1 Japan requests the Panel:

1. to find that the specific sunset statutory provisions, regulations, the Sunset Policy Bulletin and determinations made by the United States are inconsistent with various provisions of the *Anti-dumping Agreement*, *GATT 1994*, and the *WTO Agreement*, as follows:

   - The United States statute and regulations requiring automatic self-initiation of sunset reviews without sufficient evidence are, both on their face and as applied in this case, inconsistent with Articles 5.6, 11.1, 11.3, 12.1 and 12.3 of the *Anti-dumping Agreement*;

   - The specific DOC regulations imposing a "not likely" standard rather than appropriate "likely" standard is, both on its face and as applied in this case, inconsistent with Article 11.3 of the *Anti-dumping Agreement*;

   - The Sunset Policy Bulletin, both as a general practice and as applied in this case, establishes an irrefutable presumption that dumping is likely to continue where import volumes decline or where dumping margins remain after imposition of the order, which is inconsistent with the requirement in Article 11.3 of the *Anti-dumping Agreement* that authorities make a prospective determination that dumping is likely to recur or continue;

   - DOC's refusal to accept and consider additional information submitted by a Japanese respondent in this case is inconsistent with Articles 6.1, 6.2, and 6.6 of the *Anti-dumping Agreement*;

   - The DOC's use, both as envisaged in the Sunset Policy Bulletin as such and as applied in this case, of pre-*WTO Agreement* dumping margins to determine the likelihood of continued or recurring dumping in a sunset review context is inconsistent with Articles 2, 11.3, and 18.3 of the *Anti-dumping Agreement*;

   - The DOC's use, both as envisaged in the Sunset Policy Bulletin as such and as applied in this case, of dumping margins with zeroed negative margins in its sunset review analysis is inconsistent with Article 2.4 of the *Anti-dumping Agreement*;

   - The provision of US law establishing two different *de minimis* standards for original investigations and sunset reviews, both on its face and as applied by DOC in this case, is inconsistent with Articles 5.8 and 11.3 of the *Anti-dumping Agreement*;

   - DOC's making of its likelihood determination on an order-wide basis, both as envisaged in the Sunset Policy Bulletin as such and as applied in this case, is inconsistent with Article 6.10 and Article 11.3 of the *Anti-dumping Agreement*;

   - Both as envisaged in the Sunset Policy Bulletin as such and as applied in this case, the DOC's relying on and reporting to the ITC WTO-inconsistent dumping margins which DOC calculated in prior anti-dumping proceedings based on pre-WTO methodologies and/or on dumping margins with zeroed negative margins, is inconsistent with the

United States' obligations under Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement*;

- In this sunset review, by not considering whether imports were negligible before determining whether to cumulate subject imports, the ITC acted inconsistently with the US obligations under Articles 3.3, 5.8 and 11.3 of the *Anti-dumping Agreement*;

- The US statute and regulations, which mandate the DOC to administer sunset reviews in such a manner as to initiate the review automatically without any evidence, is an "unreasonable" and "partial" administration of US sunset laws, and are therefore, on their face and as applied in this case, inconsistent with the US obligations under Article X:3(a) of the GATT 1994;

- The application of DOC's administrative regulations requiring DOC to refuse to consider other evidence outside of the parties' substantive response is "unreasonable," and therefore, as applied in this case, inconsistent with the USG's obligations under Article X:3(a) of the GATT 1994;

- DOC's non-uniform approach to reviews conducted under Article 11.3 as compared with its approach to reviews conducted under Article 11.2 is, both as a general practice and as applied in this case, inconsistent with Article X:3(a) of the GATT 1994; and

- The US has maintained law and practices with respect to sunset reviews that are inconsistent with WTO obligations, and thus are inconsistent with Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-dumping Agreement*;

2. and to recommend that the Dispute Settlement Body request the United States to ensure, as stipulated in Article XVI:4 of the *WTO Agreement* and Article 18.4 of the *Anti-dumping Agreement*, the conformity of the above-listed elements of its anti-dumping laws, regulations, and administrative procedures with its obligations under the *Anti-dumping Agreement*, and to terminate the anti-dumping order on corrosion-resistant steel from Japan.

B. UNITED STATES

3.2 The United States requests that the Panel reject Japan's claims in their entirety.[12]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments, or summaries thereof, presented by the parties in their written submissions, oral statements, responses to questions, and comments on each other's responses to questions are attached to this report as Annexes (*See* List of Annexes, pages iv-v).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments presented by those third parties that made written submissions, oral statements and/or responded to questions – Brazil, Chile, the European Communities, Korea and Norway – are attached to this report as Annexes (*See* List of Annexes, pages iv-v). Certain third parties – Canada and India – submitted no arguments to the Panel.[13]

[12] First Written Submission of the United States, para. 224.

[13] As indicated, *supra*, note 4, Venezuela initially reserved its right to participate as third party in these Panel proceedings, but subsequently indicated that it did not wish to continue its participation.

VI. INTERIM REVIEW

6.1 On 31 March 2003, we submitted the interim report to the parties. Both parties submitted written requests for the review of precise aspects of the interim report. Parties also submitted written comments on the other party's comments. Neither party requested an interim review meeting.

6.2 We have outlined our treatment of the parties' requests below. We have also made certain necessary technical revisions to our report.

A. REQUEST OF JAPAN

6.3 **Japan** argues that our characterization of Japan's claim in para. 7.53 concerning self-initiation of sunset reviews to be distinct from whether US law gives the US administering authorities discretion to decide whether there is sufficient evidence to self-initiate a sunset review is incorrect. According to Japan, the point is that there must be "some evidence for moving forward" as Japan describes in its first written submission. In this context, the "on their own initiative" language means that the DOC must have discretion to determine whether there is "some evidence" to move forward with the sunset review. Automatic initiation prevents any evaluation, and thereby precludes the authorities from applying its discretion to move forward with "some evidence". It is in this light that Japan presented its response to question 84. Japan submits, therefore, that these two issues – automatic initiation and discretion to initiate -- are related and that they were both included in Japan's request for establishment.

6.4 The **United States** did not specifically respond to this comment.

6.5 The **Panel** notes once again that it was not until after the second meeting of the Panel – and in response to a Panel question -- that Japan raised the argument that US law was inconsistent with Article 11.3 also because it failed to give the US administering authorities discretion to decide whether to self-initiate a sunset review. We recall our observation, in para. 7.53 , that Japan's panel request, which defines our terms of reference, is clearly mute with respect to this issue. It is insufficient to provide the foundation sought by Japan to bring this allegation within our terms of reference.[14] We therefore decline to modify our finding in this respect.

6.6 We nevertheless supplemented footnote 56 of our report to clearly cite Japan's response to question 84 from the Panel, following the second meeting, where we understand Japan to have clearly asserted for the first time in these proceedings (in response to a Panel question) that US law was inconsistent with Article 11.3 also because it failed to give the US administering authorities discretion to decide whether to self-initiate a sunset review.

6.7 Secondly, in respect of our findings in paras. 7.198-7.208, **Japan** opines that the recent Appellate Body decision in *EC – Bed Linen (Article 21.5 – India)* – circulated to WTO Members following our issuance to the parties of our interim report in this dispute -- supports Japan's claim that Articles 11.4 and 6.10 of the Agreement require investigating authorities to carry out likelihood of continuation or recurrence of dumping determinations in sunset reviews on a company-specific – and not order-wide -- basis. In particular, Japan asserts that the Appellate Body found that imports from exporters that were not included in the sampling established for purposes of dumping determinations can not be considered "dumped imports" for purposes of injury determinations. According to Japan, upon confirming the requirement that the authorities make their determinations in an objective, unbiased, even-handed and fair manner, the Appellate Body found that Articles 2.1 and 6.10 require producer-

[14] Moreover, we have re-confirmed our understanding that the segment of Japan's first written submission referred to by Japan in its interim review comments also focuses exclusively upon the issue of sufficiency of evidence. For example, Japan observes, "...whether the authority starts out with evidence on its own, or whether the authority is evaluating the evidence provided by some petitioner, the legal obligation to evaluate that evidence for sufficiency remains" (Japan's first written submission, para. 69).

specific determinations, and that the examination of some producers cannot be assumed to apply to unexamined producers. Therefore, Japan requests us to change our finding regarding the basis on which determinations of likelihood of continuation or recurrence of dumping should be made in sunset reviews, on the basis of Japan's understanding of the Appellate Body's findings.

6.8 The **United States** disagrees with Japan's characterization of the Appellate Body's decision and asserts that the Panel correctly found that Article 6.10 of the Agreement does not impose substantive requirements – including a requirement to calculate company-specific dumping margins -- in sunset reviews conducted pursuant to Article 11.3. Therefore, the United States submits, for the same reason that we rejected Japan's earlier arguments on this issue the recent Appellate Body decision does not necessitate any reconsideration of our finding.

6.9 **We** disagree with Japan's characterization of the Appellate Body's decision in *EC – Bed Linen (Article 21.5 – India)* and decline to attach the significance attached to it by Japan with respect to our finding regarding the basis on which determinations of likelihood of continuation or recurrence of dumping should be made in sunset reviews.

6.10 At the outset, we note that the issue before the Appellate Body in that case was essentially whether imports from exporters that were not included in the sampling established for purposes of calculating the margins of dumping could be deemed to be "dumped imports" for purposes of injury determinations, within the meaning of Article 3 of the Agreement, in an investigation. The question we are dealing with in this case is whether Article 6.10 of the Agreement requires the investigating authorities to carry out their likelihood of continuation or recurrence of dumping determinations in sunset reviews on a company-specific basis. Therefore, it is clear that the factual circumstances and legal issues in the two cases are fundamentally different. In contrast to the *EC –Bed Linen (Article 21.5 – India)* case, in these proceedings we are dealing with the determinations of likelihood of continuation or recurrence of dumping in sunset reviews rather than the relationship between the obligations governing the establishment of margins of dumping and injury determinations in investigations. The relationship between Article 3.1 and 6.10 of the Agreement, which was a main focus of the Appellate Body in the mentioned case, is therefore not relevant in our case.

6.11 We have stated (*infra*, para. 7.207) that Article 11.3 concerns the authorities' determination of likelihood of continuation or recurrence of dumping in sunset reviews. It does not deal with a determination of dumping, let alone a particular margin of dumping. Our position has been reinforced by the statement of the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* that "Article 6.10 deals specifically with the determination of *margins* of dumping" (emphasis in original).[15]

6.12 We also note Appellate Body's statement that "the subparagraphs of Article 6 set out evidentiary rules that apply throughout the course of an anti-dumping investigation[.]"[16] This supports our finding (*infra*, para. 7.206) that Article 6.10 – by virtue of the cross-reference in Article 11.4 -- can not be construed so as to create substantive obligations in sunset reviews.

6.13 We therefore decline Japan's request to amend our findings regarding the basis on which determinations of likelihood of continuation or recurrence of dumping should be made in sunset reviews.

6.14 Finally, we have supplemented footnotes 135 and 137 at the request of Japan to cite Japan's arguments in its first written submission and responses to questions from the Panel.

---

[15] 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* ("*EC – Bed Linen (Article 21.5 – India*"), WT/DS141/AB/RW, adopted 24 April 2003, para. 137.

[16] *Ibid*, para. 136.

B. REQUEST OF THE UNITED STATES

6.15 The **United States** submits that the issue whether paragraphs of Article 3 other than the cumulation provision in paragraph 3 are applicable to sunset reviews is not within our mandate and requests the deletion of the last two sentences of paragraph 7.99 and the whole of paragraph 7.100.

6.16 **Japan** disagrees with the United States. According to Japan, the discussion of this issue by the Panel is necessary in order to respond to the arguments presented by the parties.

6.17 **We** note that our statements in the paragraphs concerned set out the structure of our text-based interpretation of the Agreement. Therefore, we decline to delete the sentences mentioned by the United States. However, in order to respond to the concern raised by United States, we have supplemented paragraph 7.101 of our report to clarify that we need not and do not decide the issue of whether the provisions of Article 3 are generally applicable to sunset reviews.

6.18 Secondly, the **United States** submits that the issue whether the margin of dumping has to be considered as an injury factor in sunset reviews is not within our terms of reference. The United States therefore requests that we terminate the third sentence of paragraph 7.188 with the words "challenging the ITC's injury determination" and the last sentence of paragraph 7.187 with the word "terminated".

6.19 **Japan** objects to the US request.

6.20 **We** note that, contrary to what Japan argues, our statements in these paragraphs are not intended to, and do not, recognize that the magnitude of the margin of dumping should or must be considered in likelihood of continuation or recurrence of injury determinations in sunset reviews. That issue is not properly before us here. Therefore, we decline to make the changes requested by the United States in this respect. We have, however, made a slight related modification to paragraph 7.187.

6.21 We have made the revisions requested by the United States in paragraphs 7.105 and 7.198.

VII. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

7.1 In light of the claims and arguments made by the parties in the course of these Panel proceedings[17], we recall, at the outset of our examination, the standard of review we must apply to the matter before us.

7.2 Article 11 of the *DSU*[18], in isolation, sets forth the appropriate standard of review for panels for all covered agreements except the *Anti-Dumping Agreement*. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

[17] For example, Second Oral Statement of Japan, para. 7.

[18] Article 11 of the *DSU*, entitled "Function of Panels", states: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements..."

7.3 Article 17.6 of the *Anti-dumping Agreement* sets forth the special standard of review applicable to anti-dumping disputes. It provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"
>
> "(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.4 Thus, together, Article 11 of the *DSU* and Article 17.6 of the *Anti-dumping Agreement* set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[19]

7.5 In light of this standard of review, in examining the claims under the *Anti-dumping Agreement* in the matter referred to us, we must evaluate whether the United States measures at issue are consistent with relevant provisions of the *Anti-dumping Agreement*. We may and must find them consistent if we find that the United States investigating authorities have properly established the facts and evaluated the facts in an unbiased and objective manner, *and* that the determinations rest upon a "permissible" interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor to substitute our judgment for that of the US authorities, even though we might have arrived at a different determination were we examining the record ourselves.

2. Burden of Proof

7.6 We recall that the general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim.[20] In these Panel proceedings, Japan, which has challenged the consistency of the United States' measures, thus bears the burden of demonstrating that the measures are not consistent with the relevant provisions of the Agreement. Japan also bears the burden of establishing that its claims are properly before us. Where a claim is not properly before us, we clearly have no mandate to examine it. We also note that it is generally for each party asserting a fact to provide proof thereof.[21] In this respect, therefore, it is also for the United States to provide evidence for the facts which it asserts. We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

---

[19] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/AB/R, adopted 23 August 2001, paras. 54-62.

[20] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/AB/R and Corr. 1, adopted 23 May 1997, DSR 1997:I, 323, p. 337.

[21] *Ibid.*

B. ISSUES RAISED IN THIS DISPUTE

1. Overview of the Panel's approach to consideration of Japan's claims

7.7 In examining Japan's claims in this dispute, we have identified some general themes. The approach we have developed addresses these consistently throughout our report.

7.8 First, several of Japan's claims have required us to examine the extent to which the rules set forth in the *Anti-dumping Agreement* in respect of anti-dumping *investigations* apply to sunset reviews. Such claims include Japan's allegations concerning evidentiary standards for self-initiation; *de minimis* standard; cumulation; the basis for a determination of likelihood of continuation or recurrence of dumping (order-wide or company-specific) and, to a certain extent, the nature of the determination of likelihood of continuation or recurrence of dumping. In this respect, we believe it is appropriate to point out at the beginning of our analysis that original investigations and sunset reviews are distinct processes with different purposes, and that the text of the *Anti-dumping Agreement* distinguishes between investigations and reviews. We base our view on several elements, not least that under the text of the *Anti-dumping Agreement*, the nature of the determination to be made in a sunset review differs in certain fundamental respects from the nature of the determination to be made in an original investigation. In a sunset review, the authorities are called upon to focus their inquiry on the *likelihood of continuation or recurrence* of dumping and injury in the event the measure were no longer imposed. In contrast, in an original investigation, the authorities must investigate the existence of dumping, injury and causal link in order to warrant the imposition of an anti-dumping duty. In light of the fundamental qualitative differences in the nature of these two distinct processes, we would observe, at the outset, that it would not be surprising to us that the textual obligations pertaining to each of the two processes may differ.

7.9 Second, several of Japan's "as such" claims are based entirely upon the Sunset Policy Bulletin. These concern: the consistency with Article 11.3 of the nature of the likelihood determination as envisaged in the Sunset Policy Bulletin; the consistency with Articles 2, 11.3 and 18.3 of the DOC's alleged reliance in making the sunset review determination of likelihood of continuation or recurrence of dumping upon dumping margins calculated in the original investigations and administrative reviews; the consistency with Articles 2, 11.3 and 18.3 of the DOC's reporting of the original margins to the ITC; the consistency with Articles 6.10 and 11.3 of making the sunset review likelihood determination on an order-wide basis; the consistency with Article X:3(a) of the GATT 1994 of the DOC's approach to reviews carried out pursuant to Articles 11.2 and 11.3; and the consistency of US law and the Sunset Policy Bulletin with Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement*. We have outlined our general approach to these claims, *infra*, para. 7.112 *et seq*.

7.10 Third, we understand that several of Japan's claims related to the substantive and procedural aspects of the obligation in Article 11.3 to determine likelihood of continuation or recurrence of dumping. We have consequently addressed those claims together, *infra*, para. 7.209 *et seq*.

2. Evidentiary standards applicable to the self-initiation of sunset reviews

(a) US law as such

(i) Arguments of parties

Japan

7.11 Japan submits that US law -- Section 751(c)(1) and (2) of the US Statute and Section 351.218(a) and (c)(1) of the Regulation -- violates Articles 11.1, 11.3, 12.1, 12.3, and 5.6 of the *Anti-dumping Agreement* in that it mandates automatic self-initiation of sunset reviews by the DOC without sufficient evidence. According to Japan, the text, context and object and purpose of the

relevant provisions prohibit investigating authorities[22] from self-initiating sunset reviews under Article 11.3 of the *Anti-dumping Agreement* without having sufficient evidence that justifies such initiation. Japan contends that Article 11.3 creates a presumption of termination of an anti-dumping order after five years of application. Therefore, the decision to continue the imposition of the order for another five years under Article 11.3 is equivalent to deciding to impose the order in an original investigation. It follows that the same evidentiary standards that apply to the self-initiation of original investigations also apply to the self-initiation of sunset reviews.

7.12 Japan submits that the provisions of Article 5.6 (which require the investigating authorities to have sufficient evidence before initiating an investigation without having received a written application) also apply to sunset reviews. This is by virtue of the cross-references in Article 12.3 to Article 11 and in Article 12.1 to Article 5.[23] According to Japan, the definition of "initiation" provided for in footnote 1 of the *Anti-dumping Agreement* also supports this proposition. Footnote 1 defines "initiation" in conjunction with Article 5. Therefore, the fact that Article 11.3 mentions the initiation of a sunset review establishes a link between Article 11.3 and Article 5, including paragraph 6 thereof, which contains evidentiary standards for the self-initiation of investigations.[24]

7.13 According to Japan, the object and purpose of the *Anti-dumping Agreement* also require that the authorities have sufficient evidence before self-initiating a sunset review. Given that, under Article 11, termination of the duty after five years is the rule, and continuation is the exception, the authorities have first to determine whether initiation itself is necessary. Automatic self-initiation turns the exception into a general rule.[25]

United States

7.14 The United States submits that Article 11.3 imposes no evidentiary standard for the self-initiation of sunset reviews. Cross-references contained in various paragraphs of Article 11 demonstrate that the drafters knew how to make certain rules applicable in the context of sunset reviews when they intended to do so. The fact that Article 11 contains no cross-reference to Article 5.6 demonstrates that the drafters intended not to apply the evidentiary standards of Article 5.6 to sunset reviews. Nor, argues the United States, does Article 5.6 expressly state that its "sufficient evidence" standard is also applicable to the self-initiation of sunset reviews. Article 5 deals with investigations only and therefore does not apply to sunset reviews.

7.15 According to the United States, by virtue of Article 12.3, the public notice and explanation provisions in Article 12.1 apply "*mutatis mutandis*" to reviews, but neither this, nor the reference in Article 12.1 to the "sufficient evidence" standard in Article 5, is a vehicle for making the evidentiary requirements of Article 5.6 for self-initiation of investigations applicable to sunset reviews. The word "initiate" in footnote 1 of the *Anti-dumping Agreement* applies only to "investigations" as provided in Article 5. The United States therefore submits that Japan's reliance on contextual and "object and purpose" considerations ignores the text of the *Anti-dumping Agreement*.

---

[22] Under the *Anti-dumping Agreement,* "investigations" and "reviews" are two distinct processes with different purposes (*See*, for example, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 87). Bearing this in mind, we use the terms "authority"/"authorities" and "investigating authority"/"investigating authorities" as referring generally to the authority that carries out investigations and all types of reviews provided for under the *Anti-dumping Agreement.*

[23] Second Written Submission of Japan, paras. 23-27.

[24] Second Written Submission of Japan para. 38.

[25] First Oral Submission of Japan, paras. 23-24.

(ii) Arguments of third parties

European Communities

7.16 The European Communities agrees with Japan that the US automatic self-initiation of sunset reviews unavoidably leads to a violation of Article 11.3. According to the European Communities, a proper analysis of the text, context, and object and purpose of Article 11.3 reveals that all provisions of the *Anti-dumping Agreement* are potentially applicable *mutatis mutandis* to sunset reviews, to the extent that they are relevant to sunset reviews and that their application to Article 11.3 does not create a situation of conflict or is not specifically excluded. The European Communities also argues that it is clear from the terms of Article 12.3 that the same guarantees that apply to the initiation of an original investigation apply to the initiation of a sunset review. In particular, when read in conjunction with Article 12.1, Article 12.3 clearly provides that, even in a sunset review, domestic authorities must have sufficient evidence before they self-initiate sunset reviews. According to the European Communities, the "duly substantiated" standard set forth in Article 11.3 for initiations of sunset reviews upon request also applies to self-initiations.[26] The European Communities also considers that "the term "initiate", as used in Article 11.3, means the same thing as in footnote 1 of the *Anti-dumping Agreement*."[27]

Korea

7.17 Korea argues that automatic self-initiation is contrary to the United States' obligations under Articles 11.3 and 12.1 of the *Anti-dumping Agreement*. The text of Article 11.3 is silent on the threshold of evidence that must be met for a self-initiated review, but does not provide that there must be a review in every case. By providing for automatic initiation of reviews in every case, US law makes the conduct of a review a *sine qua non* of termination and precludes the possibility of a measure terminating under the normal operation of Article 11.3.

Norway

7.18 Norway argues that, despite the silence of the text on this point, the object and purpose of the *Anti-dumping Agreement* and contextual considerations support the view that the standard in Article 5.6 applies equally to sunset reviews.

(iii) Evaluation by the Panel[28]

7.19 Japan argues that the same evidentiary standards that apply to the self-initiation of original investigations under Article 5.6 also apply to the self-initiation of sunset reviews under Article 11.3. According to the United States, however, no such requirement exists under the *Anti-dumping Agreement*.

7.20 Section 751(c)(1) of the US Statute requires that five years after the date of publication of an antidumping duty order, the administering authority and the Commission shall conduct a review to determine whether revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping and of material injury. Section 751(c)(2) provides: "Not later than 30 days before the fifth anniversary of the date described in paragraph (1), the administering authority shall publish in the Federal Register a notice of initiation of a review under this subsection…". Similarly, Section 351.218(a) of the Regulations provides that "…no later than once every five years, the Secretary must determine whether dumping … would be likely to continue or recur…", while

[26] Response of the European Communities to Question 2 from the Panel.

[27] Response of the European Communities to Question 3 (c) from the Panel.

[28] In this section, we address Japan's allegation that the US statute and regulations requiring automatic self-initiation of sunset reviews without sufficient evidence are, as such, inconsistent with Articles 5.6, 11.1, 11.3, 12.1 and 12.3 of the *Anti-dumping Agreement*.

section 351.218(c)(1) states that "…No later than 30 days before the fifth anniversary date of an order or suspension of an investigation…the Secretary will publish a notice of initiation of a sunset review…".

7.21 The United States does not contest that, under US law, the DOC must automatically self-initiate sunset reviews[29] and that it did so in the instant sunset review.[30] Consequently, the issue before us is whether, as Japan alleges, such automatic self-initiation of sunset reviews is inconsistent with Articles 11.1, 11.3, 12.1, 12.3, and 5.6 of the *Anti-dumping Agreement*.

7.22 We understand Japan's claim to be based on an alleged violation of Article 11.3 of the *Anti-dumping Agreement*, as the core legal obligation governing sunset reviews, as well as Articles 11.1, 12.1, 12.3, and 5.6. We understand Japan to have structured its arguments on the basis of the text of Article 11.3[31], in light of textual links and its context[32] and the object and purpose[33], as reflected in the other cited provisions. With this in mind, we therefore commence our analysis with Article 11.3, the core provision in the *Anti-dumping Agreement* governing sunset reviews.

7.23 Article 3.2 of the *DSU* indicates that Members recognize that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31.1 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')[34], which is generally accepted as reflecting such a customary rule, reads as follows:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7.24 It is clear that interpretation must be based, first and foremost, on the text of the treaty, while context and object and purpose may also play a role.[35] It is also well-established that these principles of interpretation "neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[36] Furthermore, panels "must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish rights and obligations provided in the *WTO Agreement*."[37]

7.25 With this in mind, we begin our analysis with the text of Article 11.3. It reads:

---

[29] The Statement of Administrative Action (Exhibit JPN- 2) and the Sunset Policy Bulletin (Exhibit JPN-6, p. 18872) both describe the initiation of sunset reviews pursuant to section 751(c)(1) as "automatic". In Response of the United States to Question 85 from the Panel, the United States states that the DOC generally "automatically self-initiates sunset reviews in every case, unless the U.S. domestic industry provides Commerce with written notice that the industry no longer had an interest in the maintenance of a particular antidumping duty order".

[30] First Written Submission of the United States, para. 97.

[31] e.g. First Written Submission of Japan, Section III:A:1.

[32] e.g. *Ibid*., Section III.A.3. In this regard, Japan also refers to the textual and contextual indications in Articles 12 and 5.6 and footnote 1. *See*, for example, First Oral Submission of Japan, paras. 18-22.

[33] e.g. *Ibid.*, Section III.A.2.

[34] (1969) 8 *International Legal Materials* 679.

[35] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 11. The Appellate Body has recently emphasized the importance of the "ordinary meaning" of the terms used in the treaty text in, for example, Appellate Body Report, *United States – Continued Dumping and Subsidy Offset Act of 2000* ("*US – Offset Act (Byrd Amendment)*"), WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003.

[36] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para.45.

[37] *Ibid*, para. 46.

> "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." (footnote omitted)

7.26 As Japan concedes[38] Article 11.3, on its face, does not mention, either explicitly or by way of reference, any evidentiary standard that should or must apply to the self-initiation of sunset reviews. Article 11.3 contemplates initiation of a sunset review in two alternative ways, as is evident through the use of the word "or". Either the authorities make their determination in a review initiated "on their own initiative", or they make their determination in a review initiated "upon a duly substantiated request made by or on behalf of the domestic industry". Although Article 11.3 provides for a certain qualification regarding initiations based on complaints lodged by the domestic industry - that such requests be "duly substantiated" - the text clearly indicates that this qualification is germane only to that specific situation and does not apply to self-initiations. Consequently, since the drafters did not set forth any evidentiary requirements for the self-initiation of sunset reviews in the text of Article 11.3 itself, at first blush, it seems to us that they intended not to impose any evidentiary standards in respect of the self-initiation of a sunset review. However, our task does not end with this bare examination of the text.

7.27 We also note that the text of Article 11.3 does not contain any cross-reference to the evidentiary rules relating to initiation of investigations contained in Article 5.6 of the *Anti-dumping Agreement*. Therefore, Article 11.3 itself does not explicitly provide that the evidentiary standard of Article 5.6 (or any other evidentiary standard) is applicable to sunset reviews. Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles in the *Anti-dumping Agreement*, no such cross-reference has been made in the text of Article 11 to Article 5.6. These cross-references (as well as other cross-references in the *Anti-dumping Agreement*, such as, for example, in Article 12.3) indicate that, when the drafters intended to make a particular provision also applicable in a different context, they did so explicitly. Therefore, their failure to include a cross-reference in the text of Article 11.3, or, for that matter, in any other paragraph of Article 11, to Article 5.6 (or *vice versa*) demonstrates that they did not intend to make the evidentiary standards of Article 5.6 applicable to sunset reviews. The Appellate Body, in *US – Carbon Steel*, drew the same conclusion from the non-existence of a cross-reference in Article 21.3 of the *Agreement on Subsidies and Countervailing Measures* (the *"SCM Agreement")* to Article 11.6 of that Agreement, which contains the evidentiary standard for the self-initiation of countervailing duty investigations.[39]

7.28 However, "[s]uch silence does not exclude the possibility that the requirement was intended to be included by implication."[40] We therefore look to the context of Article 11.3. To us, the immediate context of Article 11.3 does not yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to

---

[38] First Written Submission of Japan, para. 51.

[39] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 105. Regarding the issue whether prior panel and Appellate Body decisions on countervailing measures can be taken into account by, and provide guidance for, panels dealing with disputes under the *Anti-dumping Agreement* (and *vice versa*), we note the *Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, in which Ministers recognized the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures. We find support in this declaration for the application of a similar interpretative analysis by this Panel in addressing analogous issues under the *Anti-dumping Agreement*.

[40] *Ibid.*, para. 65.

counteract injurious dumping. Articles 11.2 and 11.3 reflect the application of this general rule to reviews under different circumstances. Article 11.2 provides, in part:

> "The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits *positive information substantiating the need for a review*." (emphasis added, footnote omitted)

7.29 Article 11.2 thus sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. To trigger the authorities' obligation to conduct a review, a request must include "positive information substantiating the need for a review". Self-initiated reviews under Article 11.2 are not governed by the same standards that apply to initiation upon request of an interested party. This supports a reading of the text which clearly distinguishes between the evidentiary standards applicable to initiation in various specific circumstances.

7.30 Japan also argues that the cross-references in Article 12.3 to Article 11, and in Article 12.1 to Article 5, suggest that Article 5.6 is applicable to sunset reviews. Article 12 is entitled "Public Notice and Explanation of Determinations". It sets forth the investigating authorities' obligations relating to public notice and explanation of determinations throughout an investigation.

7.31 Article 12.1 states:

> "When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given."

7.32 Article 12.1 imposes certain notice obligations "when the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 5". Rather than itself establishing any evidentiary obligation, the text of Article 12.1 indicates that the reference to Article 5 in Article 12.1 is a reference to the evidentiary standard established in Article 5. This clause in Article 12.1 appears to us to serve a timing purpose: it explains *when* during an anti-dumping proceeding the public notice of initiation should be given.

7.33 Paragraph 3 of Article 12 states that the provisions of that Article apply *mutatis mutandis* to reviews under Article 11. Therefore, it is clear that the public notice requirements of Article 12 apply *mutatis mutandis* to sunset reviews. However, the use of the term "*mutatis mutandis*" demonstrates that the drafters foresaw that certain provisions of Article 12 could not be applied, at all, or at the very least not in an identical manner, in the case of sunset reviews. The provisions of Article 12 apply in sunset reviews, with whatever changes the nature of sunset reviews may necessitate. Thus, just as Article 12.1 imposes notice requirements on investigating authorities that have decided, in accordance with the standards established in Article 5, to initiate an investigation, Article 12.1 (by virtue of Article 12.3) imposes notice obligations on investigating authorities that have decided, in accordance with Article 11, to initiate a review. However, just as Article 12.1 does not itself establish evidentiary standards applicable to the initiation of investigations, so too it does not itself establish evidentiary standards applicable to the initiation of sunset reviews.

7.34 The Appellate Body, in *US – Carbon Steel*, also reached the same conclusion regarding the relationship between the analogous provisions - Articles 21.3 and 22 - of the *SCM Agreement*. The Appellate Body stated:

> "[I]n the same way that Article 22.1 does *not* itself establish evidentiary standards applicable to the initiation of an *investigation*, it does *not* itself establish

> evidentiary standards applicable to the initiation of sunset reviews. Such standards, if they exist, must be found elsewhere."[41] (emphasis in original)

7.35 Next, we turn to the text of Article 5.6 of the *Anti-dumping Agreement*. Article 5.6 contains evidentiary standards applicable to the self-initiation of investigations, which, in Japan's view, also apply to the self-initiation of sunset reviews. It states:

> "5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed *only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.*" (emphasis added)

7.36 The text of Article 5.6 gives no indication that its evidentiary standards apply to anything but the self-initiation of investigations.

7.37 Read in the context of the other provisions of Article 5, there also does not seem to be anything to suggest that evidentiary standards for the self-initiation of investigations also apply to sunset reviews. Article 5 is entitled "Initiation and Subsequent Investigation". It sets forth rules that govern the filing of an application by domestic producers and the steps to be taken by investigating authorities after the application has been received. The text of various provisions of Article 5 contain frequent references to "investigations". For example, Article 5.1 states that "… an *investigation* to determine the existence, degree and effect of any alleged dumping shall be initiated …" (emphasis added). Article 5.3 refers to "sufficient evidence to justify the initiation of an *investigation*" (emphasis added). Article 5.4 provides that, "[a]n *investigation* shall not be initiated…" (emphasis added). Article 5.5 contains three references to the term "investigation". Article 5.6 provides that, "If … the authorities concerned decide to initiate an *investigation* without having received a written application …for the initiation of such an *investigation*, they shall proceed only if they have sufficient evidence … to justify the initiation of an *investigation*"(emphasis added). Article 5.7 refers to the "decision whether or not to initiate an *investigation*" (emphasis added). Article 5.8 states: "An application … shall be rejected and an *investigation* shall be terminated promptly…". Article 5.10 refers to "investigations".

7.38 If original investigations and reviews existed for the same purposes and served the same functions, it would appear to us illogical that the same obligations did not apply to both processes. However, as we have already indicated *supra*, para. 7.8, original investigations and reviews are different processes which serve distinct purposes. These considerations underlie, and are apparent in, the text of the *Anti-dumping Agreement*. It is therefore unsurprising to us that the textual obligations applicable to the two are not identical. The Appellate Body, in *US – Carbon Steel*, acknowledged the differences between original investigations and sunset reviews, recognizing that they are "distinct processes" with "different purposes". The qualitative differences between the two processes may explain the differences in the specific WTO obligations that apply to each of them.[42]

7.39 This brief textual examination of the provisions of Article 5 reveals that nowhere in the text of Article 5 can one find language that suggests that the obligations therein apply generally (much less

---

[41] *Ibid.*, para. 112.

[42] *Ibid.*, para. 87. While an analysis on the basis of the ordinary meaning of the words "investigation" and "review" would also lead us to the conclusion that they are different, we did not deem it necessary in this case to rely on this consideration in light of the clear Appellate Body language, which unequivocally states that investigations and reviews are two distinct proceedings. In this respect, we note that investigations and reviews deal with two different substantive determinations. Article 5.6 requires "sufficient evidence" of dumping, injury and causal link in order to self-initiate an investigation in which dumping, injury and causal link must be established in order to make an affirmative determination. As Article 11.3 sunset reviews deal with determinations of "likelihood of continuation or recurrence of dumping", the substantive considerations surrounding initiation would logically also be different.

specifically) to sunset reviews.[43] Virtually all paragraphs of Article 5 refer to "investigation", while there is no mention in the text of the term "sunset review", nor "review" in general.

7.40 Japan submits that footnote 1 to Article 1 of the *Anti-dumping Agreement* suggests that the evidentiary standards of Article 5.6 apply to sunset reviews.[44] According to Japan, the word "initiate" has the same meaning under Article 11.3 that it has in footnote 1. Therefore, the cross-reference in footnote 1 to Article 5 implies that the evidentiary standards set forth in Article 5.6 also apply in sunset reviews.[45]

7.41 We disagree. Footnote 1 reads:

> "The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5."

7.42 We note that footnote 1 uses the word "investigation". The word "review" does not appear in this footnote. Secondly, the footnote refers only to Article 5. Therefore, there is no textual support for the view that the word "initiated" in footnote 1 necessarily means that the surrounding terms must have the same meaning in Article 11.3 of the *Anti-dumping Agreement*. In our view, the use of the word "review" before the word "initiated" in Article 11.3 also suggests that "initiated" as used in Article 11.3 refers to reviews, rather than investigations. As a matter of treaty interpretation based on the text of the treaty, we, as a treaty interpreter, are not permitted to find that the phrase "in a review initiated" in Article 11.3 is equivalent to the initiation of an "*investigation*" rather than the initiation of a "*review*". The duty of an investigating authority in an investigation is to determine the existence of dumping and injury whereas in a sunset review the inquiry is about whether the dumping and injury that once existed are likely to continue or recur in the future. The main differences between investigations and sunset reviews that we highlighted *supra*, para. 7.8 justify the fact that certain rules that apply to investigations do not apply in the context of sunset reviews.

7.43 Next, we address Japan's arguments based on the object and purpose of the *Anti-dumping Agreement*. Japan argues that sunset reviews and original investigations are functionally similar in that they both give rise to the imposition/continuation of an anti-dumping measure for a period of five years. According to Japan, therefore, the object and purpose of the *Anti-dumping Agreement* requires that the same evidentiary standard that applies to the self-initiation of investigations should also apply to the self-initiation of sunset reviews.

7.44 As stated above, under Article 31 of the *Vienna Convention*, interpretation should be based first and foremost on the text of the treaty. The *Vienna Convention* also permits recourse to context and the object and purpose of the treaty. The *Anti-dumping Agreement* itself does not contain provisions which specify its object and purpose. However, even assuming that Japan's argument about the object and purpose of the *Anti-dumping Agreement* is correct, that alone would not be sufficient to require or entitle us to change our analysis based on the text of the *Anti-dumping Agreement*. Article 31 of the *Vienna Convention* requires that the text of the treaty be read in light of the object and purpose of the treaty, not that object and purpose alone override the text. We therefore decline to accept Japan's object and purpose arguments.

---

[43] There is, however, language in Article 5 that would support the proposition that Article 5 does *not* apply generally to sunset reviews: Article 5.10 and Article 11.4 set forth different time frames for the conduct of investigations and sunset reviews, respectively. Under Article 5.10, investigations are to be carried out within one year and in no case are they to last more than 18 months. By contrast, Article 11.4 stipulates that sunset reviews should be carried out within one year. This would support the view that the obligations with respect to time frames for investigations do not apply to sunset reviews, and even more generally, that the drafters intended that the provisions of Article 5 do not generally apply to sunset reviews.

[44] Second Written Submission of Japan, paras. 37-39.

[45] Response of Japan to Question 12 (c) from the Panel.

7.45 On the basis of this textual analysis of the relevant provisions of the *Anti-dumping Agreement* cited by Japan, we do not agree with the view that the drafters intended to apply the evidentiary standards of Article 5.6 to the self-initiation of sunset reviews under Article 11.3. However, as the Appellate Body pointed out in *US – Carbon Steel*, this does not mean that the authorities are not bound by any evidentiary standard in deciding whether to continue the application of the measure for another five years in a sunset review.[46] Our finding applies exclusively to the *initiation* of the sunset review on an *ex officio* basis and has no bearing on the evidentiary basis of the subsequent sunset review determinations. We therefore do not agree with Japan's argument[47] that automatic self-initiation necessarily results in the continued application of the measure for another five years. Once the review is initiated, in order to properly decide to keep the measure in place the authorities are required to establish, on the basis of positive evidence[48], that there is a likelihood of continuation or recurrence of dumping and injury.

7.46 Finally in this respect, we note that, in its response to Question 84 from the Panel, Japan argues that its claim regarding the self-initiation of sunset reviews under US law is not limited to evidentiary standards applicable to self-initiation. Japan asserts that it has also alleged that US law is inconsistent with Article 11.3 in that it fails to give the DOC discretion to consider whether self-initiation is necessary in a particular case. That runs counter to the phrase "on their own initiative" in Article 11.3. According to Japan, this phrase implies that the authorities should be given the discretion to consider whether self-initiation is necessary on the basis of the particular circumstances surrounding a given case.

7.47 We recall that the claims – but not the arguments – of the complaining party should be specified in its request for panel establishment.[49] A complaining party who fails to raise a claim in its request for establishment of a panel cannot cure that deficiency by presenting additional arguments in its submissions to, or communications with, the Panel.[50]

7.48 The issue before us is whether Japan's Panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and therefore satisfies the standard set out in Article 6.2 of the *DSU*[51] with respect to Japan's allegation as to the consistency with the cited provisions of the *Anti-dumping Agreement* of the alleged preclusion under US law of the exercise by the DOC of any discretion as to whether or not to self-initiate a sunset review under certain circumstances.

---

[46] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 117.

[47] *See*, First Oral Submission of Japan, para. 16.

[48] Regarding the factual basis of an investigating authority's determinations, we recall and endorse the following statement of the panel in *US – DRAMS*: "[S]uch continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced." Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* ("*US – DRAMS*"), WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, para. 6.42. We also note the Appellate Body's statement that "a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry." Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 88.

[49] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 143.

[50] *Ibid.*

[51] Article 6.2 of the *DSU* provides, in relevant part:

> "The request for the establishment of a panel shall be made in writing. It shall …identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly…"

7.49 We must closely scrutinize the Panel request to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*.[52] In examining the sufficiency of the Panel request under Article 6.2 of the *DSU*, we must consider the text of the Panel request itself.[53] If necessary, we would also take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by any alleged lack of specificity in the text of the Panel request.[54]

7.50 Japan submits that it challenged this aspect of US law in addition to the evidentiary aspect of self-initiation in its request for establishment of the Panel. The section that Japan cites in its request for establishment in this respect, reads:

> "Article 11.1 of the AD Agreement sets forth the overriding principle that antidumping duties shall remain in force "only as long as and to the extent necessary" to counteract injurious dumping. Article 11.3 provides that antidumping duties must be terminated after five years, unless the authorities determine that their expiry would be likely to lead to the continuation or recurrence of dumping and injury. In this context, Article 12 calls on the authorities to satisfy themselves that sufficient evidence (as defined by Article 5) exists to justify an initiation of the review before notifying the public of such initiation. Notwithstanding these provisions of the AD Agreement, Section 751(c)(1) and (2) of the Act and the DOC regulation 19 C.F.R. § 351.218(a) and (c)(1) mandate the DOC to automatically self-initiate sunset reviews without sufficient evidence. This initiation standard does not require sufficient positive evidence that the above-mentioned provisions of the AD Agreement require to be shown. In this particular case, as in all others, the DOC automatically initiated the sunset review without presenting a scintilla of evidence of the likelihood of continued or recurrent dumping or injury. Therefore, Section 751(c)(1) and (2) of the Act and the DOC regulation 19 C.F.R. § 351.218(a) and (c)(1), on the face and as applied in this case, are inconsistent with Articles 5.6, 11.1, 11.3, 12.1, and 12.3 of the AD Agreement and Article X:3(a) of the GATT 1994."[55] (emphasis added)

7.51 In this part of its request for Panel establishment Japan starts by citing relevant provisions of the *Anti-dumping Agreement*. Japan then presents arguments to demonstrate that US law is inconsistent with the *Anti-dumping Agreement* in that it fails to require its investigating authorities to have sufficient evidence in order to self-initiate a sunset review. It is apparent on the face of the request that the only aspect of US law that Japan challenges in this respect relates to the evidentiary standards. Nowhere does Japan take issue with the US law's alleged failure to provide its investigating authorities with the discretion not to self-initiate a sunset review where appropriate. In particular, nowhere does Japan refer to the phrase "on their own initiative" in Article 11.3, which, in Japan's arguments submitted in these Panel proceedings, supports the proposition that Article 11.3 requires that the investigating authorities should be given the discretion *not* to self-initiate a sunset review. Indeed, we do not view this allegation as ever having been at the heart of Japan's submissions in this case. The first clear reference by Japan to this alleged claim based on the particular text of Article 11.3 in isolation (i.e. the reference to "on their own initiative" alone) was in response to a Panel question following the second Panel meeting.[56]

---

[52] We find support for this approach in Appellate Body Report, *EC – Bananas III*, *supra*, note 49, para. 142.

[53] Each of the treaty provisions we examine here is cited in the Panel request and therefore meets at least that minimum standard.

[54] We find support for this approach in Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:1, p. 3.

[55] WT/DS/244/4, p. 2, para. 1.

[56] See, Response of Japan to Question 84 from the Panel.

7.52 We, as a panel, have the mandate and the duty to manage the Panel proceedings and the ability to pose questions to the parties in order to clarify and distil the claims of the parties, as well as the legal arguments that are asserted by the parties in support of their claims. However, we are conscious that we may not relieve Japan of its task of delineating the parameters of its claims, as set out in its Panel request. In particular, we are aware that, in our questions posed to the parties, we must not "overstep the bounds of legitimate management or guidance of the proceedings … in the interest of efficiency and dispatch."[57]

7.53 We consider Japan's claim concerning the evidentiary standards applicable to the self-initiation of sunset reviews to be legally distinct from the issue of whether the US law gives the DOC the discretion to determine whether or not to self-initiate a sunset review under certain circumstances. Therefore, although these two claims have the same legal basis in the *Anti-dumping Agreement* – Article 11.3 – we find that the text of the Panel request limits Japan's claim in this dispute to the issue of the evidentiary standards applicable to the self-initiation of sunset reviews. The Panel request is not unclear and does not lack specificity: it is absolutely and clearly mute with respect to the issue of whether the US law gives the DOC the discretion to determine whether or not to self-initiate. It is thus insufficient on its face to provide the foundation sought by Japan. Under these circumstances, we do not believe it is necessary to examine the issue of prejudice to the United States by any alleged "lack of specificity" in the Panel request.[58] We therefore find that the alleged claim by Japan challenging the US law's alleged failure to give the DOC the discretion not to self-initiate a sunset review under certain circumstances is not before us. We thus decline to examine it.[59]

7.54 For these reasons, we find that Section 751(c)(1) and (2) of the US Statute and Section 351.218(a) and (c)(1) of the US Regulation are not inconsistent with Article 11.3 of the *Anti-dumping Agreement*, nor with the other provisions of the *Anti-dumping Agreement* invoked by Japan -- i.e. Articles 11.1, 12.1, 12.3, and 5.6 –- in respect of the evidentiary standards applicable to the self-initiation of sunset reviews.

(b) US law as applied in the instant sunset review

(i) Arguments of parties

Japan

7.55 Japan submits that the DOC, by self-initiating the sunset review at issue without any evidence, acted inconsistently with Articles 5.6, 11.1, 11.3, 12.1, and 12.3 of the *Anti-dumping Agreement*. In this respect, Japan refers to the language used by the DOC in the notice of initiation of this sunset review, in which the DOC explicitly stated that it was initiating this sunset review without reference to any evidentiary standard.

In response to Panel Questions 10-13 following the first meeting, we understand Japan to have continued to refer to the textual cross-references to Article 12.1 and footnote 1, and the concept of "without sufficient evidence" to support its argument, and we do not understand Japan to have focused on the Article 11.3 phrase "on their own initiative" in isolation.

[57] Appellate Body Report, *Korea – Dairy Safeguard*, *supra*, note 54, para. 149.

[58] We note, however, that Japan's response to Question 84 was not provided until two weeks *after* the second Panel meeting. Thus, the United States had virtually no opportunity to address this allegation by Japan in response to our question.

[59] Our finding here is without prejudice to the possible ramifications that the terms "on their own initiative" in Article 11.3 may have in terms of an investigating authority's discretion regarding the self-initiation of sunset reviews. In particular, in this respect, we take note of Japan's assertion, albeit tardy, that the US law is inconsistent with the alleged requirement in Article 11.3 that the investigating authorities initiate a sunset review "on their own initiative" because automatic initiation mandated by the US Statute precludes the US investigating authorities from exercising discretion in deciding whether or not to initiate a sunset review other than on the basis of a written application.

United States

7.56 The United States submits that the application of the US law in this sunset review was not inconsistent with the *Anti-dumping Agreement* as there is no evidentiary standard for self-initiation in Article 11.3 or elsewhere in the *Anti-dumping Agreement*.

(ii) Evaluation by the Panel[60]

7.57 On the basis of our finding above that the *Anti-dumping Agreement* does not impose any evidentiary standard in order to self-initiate a sunset review, we also find that the United States did not act inconsistently with the *Anti-dumping Agreement* by automatically self-initiating the instant sunset review as mandated by Section 751(c)(1) and (2) of the US Statute and Section 351.218(a) and (c)(1) of the US Regulation.

3. *De minimis* standard in sunset reviews

(a) US law as such

(i) Arguments of parties

Japan

7.58 According to Japan, section 351.106(c) of the US Regulation -- which requires the DOC to treat as *de minimis* only those dumping margins less than 0.5 per cent in sunset reviews -- is inconsistent with Articles 5.8 and 11.3 of the *Anti-dumping Agreement*. According to Japan, the 2 per cent *de minimis* standard in Article 5.8 of the *Anti-dumping Agreement* also applies to sunset reviews. The rationale for having the *de minimis* standard set out in Article 5.8 is the presumption that dumping below *de minimis* cannot cause injury to the domestic industry. Given that sunset reviews cover both dumping and injury determinations, no duty can be maintained for a further five years in cases where the dumping margin is *de minimis* because the injury element will be missing. Japan considers that the mandatory language of Article 5.8. and Article 11.1 – i.e. the use of words such as "shall" and "immediate" -- supports its proposition that the drafters intended the duty to terminate after five years if the dumping margin found is *de minimis*, as established in Article 5.8.

United States

7.59 The United States contends that no *de minimis* standard applies to sunset reviews under the *Anti-dumping Agreement*. Article 11.3 does not mention *de minimis*, nor is there any reference to Article 11.3 in the text of Article 5.8, which provides for a 2 per cent *de minimis* standard for investigations. Therefore, it is impermissible to maintain, on the basis of the object and purpose alone, that the 2 per cent *de minimis* standard set out in Article 5.8 for investigations also applies to sunset reviews. The United States also submits that footnote 22 to Article 11.3 makes it clear that the current margin of dumping is not relevant in determining likelihood of continuation or recurrence of dumping in a sunset review. According to the United States, the fact that the United States itself has a *de minimis* standard for sunset reviews does not change the obligations of WTO Members under the *Anti-dumping Agreement* because WTO Members are allowed to go beyond their obligations.

[60] In this section, we address Japan's allegation that the US statute and regulations requiring automatic self-initiation of sunset reviews without sufficient evidence are, as applied in this case, inconsistent with Articles 5.6, 11.1, 11.3, 12.1 and 12.3 of the *Anti-dumping Agreement*.

(ii) Arguments of third parties

Chile

7.60 Chile submits that dumping margins below *de minimis* cannot cause injury. This non-injurious rationale means that the 2 per cent *de minimis* standard in Article 5.8 that applies to investigations should also apply to sunset reviews under Article 11.3.

Brazil

7.61 Brazil submits that, under the *Anti-dumping Agreement*, a *de minimis* dumping margin means a margin that cannot cause injury. Therefore, the same *de minimis* standard in Article 5.8 that applies to investigations should also apply to sunset reviews under Article 11.3. According to Brazil, the requirement of immediate termination in Article 5.8 in cases where the dumping margin is below *de minimis* supports this view.[61]

European Communities

7.62 The European Communities agrees with Japan's view that the US requirement to treat as *de minimis* in sunset reviews only those margins that are less than 0.5 per cent is inconsistent with the 2 per cent *de minimis* rule contained in Articles 5.8 and 11.3 of the *Anti-dumping Agreement*. The European Communities considers generally that a coherent reading of the *Anti-dumping Agreement* calls for the application to sunset reviews of all of the provisions of the *Anti-dumping Agreement* set forth for original investigations.[62]

Korea

7.63 Korea supports Japan's view that the 2 per cent threshold for *de minimis* margins, applied under Article 5.8, also applies to Article 11.3.

Norway

7.64 According to Norway, the US Regulations are inconsistent with the *Anti-dumping Agreement* in that they provide for the application of a 0.5 per cent *de minimis* standard to sunset reviews, rather than the proper 2 per cent *de minimis* standard as provided for in Article 5.8. Norway argues that given that *de minimis* dumping is not countervailable [*sic*] in original investigations because it can not cause injury, it follows that it can not be countervailed [*sic*] in sunset reviews either.[63]

(iii) Evaluation by the Panel[64]

7.65 It is undisputed that US law -- Section 351.106(c) of the US Regulation[65] -- provides for a different (and lower) *de minimis* standard for sunset reviews than that applicable in investigations (0.5 per cent as opposed to 2 per cent). Therefore, the issue before us is whether the *Anti-dumping*

---

[61] Response of Brazil to Question 7 from the Panel.

[62] Response of the European Communities to Question 4 from the Panel.

[63] Response of Norway to Question 13 from the Panel.

[64] In this section, we examine Japan's allegation that the provision of U.S. law establishing two different *de minimis* standards for original investigations and sunset reviews, as such, is inconsistent with Articles 5.8 and 11.3 of the *Anti-dumping Agreement*.

[65] Section 351.106(c)(1)of the US Regulations states:

> "In making any determination other than a preliminary or final antidumping ... duty determination in an investigation ... the Secretary will treat as *de minimis* any weighted-average dumping margin ... that is less than 0.5 percent *ad valorem*, or the equivalent specific rate. "

Agreement requires that the same *de minimis* standard that applies to investigations under Article 5.8 also applies to sunset reviews.

7.66 We understand Japan's claim to be based on an alleged violation of Article 11.3 of the *Anti-dumping Agreement*, as well as Article 5.8. We understand Japan to have structured its arguments on the basis of the text of Article 11.3, in light of textual links and the context in which it operates and the object and purpose as reflected in the other cited provisions. With this in mind, we begin our consideration of this issue with the text of Article 11.3. We recall that Article 11.3 provides:

> "11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review." (footnote omitted)

7.67 On its face, Article 11.3 does not provide, either explicitly or by way of reference, for any *de minimis* standard in making the likelihood of continuation or recurrence of dumping determinations in sunset reviews.[66] Therefore, Article 11.3 itself is silent as to whether the *de minimis* standard of Article 5.8 (or any other *de minimis* standard) is applicable to sunset reviews. However, "[s]uch silence does not exclude the possibility that the requirement was intended to be included by implication."[67]

7.68 We therefore look to the context of Article 11.3. The immediate context of Article 11.3 does not, however, yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Articles 11.2 and 11.3 reflect the application of that general rule under different circumstances. Article 11.4 contains a cross-reference to Article 6, which sets forth rules relating to evidence and procedure applicable to investigations. Given that, similar to Article 6, Article 5 also contains rules applicable to original investigations, we consider the absence in Article 11.4 of a similar cross-reference to Article 5 to indicate that the drafters did not intend to have the obligations in Article 5 apply also to sunset reviews.

7.69 With that in mind, we next consider the text of Article 5.8, which contains the *de minimis* standard applicable to investigations. Article 5.8 states, in pertinent part:

> "5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price...." (emphasis in original)

7.70 Article 5.8 does not suggest that the *de minimis* standard set out for investigations also applies to sunset reviews. In particular, the text of paragraph 8 of Article 5 refers expressly to the termination of an *investigation* in the event of *de minimis* dumping margins. There is, therefore, no textual

[66] We understand Japan not to contest this, as Japan's arguments have focused on the textual linkages to Article 5.8, as well as contextual and "object and purpose" considerations.

[67] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 65.

indication in Article 5.8 that would suggest or require that the obligation in Article 5.8 also applies to sunset reviews. Nor is there any such suggestion or requirement in the other provisions of Article 5. In this respect, we refer to our earlier textual analysis of Article 5 (*supra*, paras. 7.35-7.39).

7.71 Furthermore, although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles of the *Anti-dumping Agreement*, no such cross-reference has been made to Article 5.8. We consider the existence of these cross-references in Article 11 to indicate that when the drafters intended to have certain provisions in a given article of the *Anti-dumping Agreement* also apply in different contexts, they did so in a clear manner. Therefore, the absence of a cross-reference that would make the *de minimis* standard of Article 5.8 also applicable to sunset reviews is a further indication that the drafters did not intend to make that standard applicable to sunset reviews. The Appellate Body, in *US – Carbon Steel*, drew the same conclusion from the non-existence of a cross-reference in Article 21.3 of the *SCM Agreement* to Article to Article 11.9, which contains the general *de minimis* standard for CVD investigations.[68]

7.72 Japan argues that the rationale for having a *de minimis* standard is the presumption that a *de minimis* margin of dumping is non-injurious. According to Japan, "Article 3 incorporates the *de minimis* standard into the injury determination."[69] Under Article 3, the margin of dumping is one of the injury factors. Article 3.5 requires the investigating authorities to determine whether the dumped imports are, through the effects of dumping, causing injury.

7.73 We fail to find any textual support in the *Anti-dumping Agreement* for the proposition that *de minimis* dumping is, by definition, non-injurious. The terms "dumping" and "injury" have different meanings in the *Anti-dumping Agreement*, independent from one another. Injury is not defined in the *Anti-dumping Agreement* in relation to any particular level of dumping.[70] Therefore, we consider Japan's argument to be unfounded.

7.74 In this respect, we find support in the following statements of the Appellate Body in *US – Carbon Steel*:

> Thus, in our view, the terms "subsidization" and "injury" each have an independent meaning in the *SCM Agreement* which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to *cause* "material" injury. Yet such a possibility is not, *per se*, precluded by the Agreement itself, as injury is not defined in the *SCM Agreement* in relation to any specific level of subsidization.[71] (emphasis in original)

> To us, there is nothing in Article 11.9 to suggest that its *de minimis* standard was intended to create a special category of "*non-injurious*" subsidization, or that it reflects a concept that subsidization at less than a *de minimis* threshold *can never* cause injury. For us, the *de minimis* standard in Article 11.9 does no more than lay down an agreed rule that if *de minimis* subsidization is found to exist in an original investigation, authorities are obliged to terminate their investigation, with the result that no countervailing duty can be imposed in such cases.[72] (emphasis in original)

---

[68] *Ibid.*, para. 69.
[69] Response of Japan to Question 20 from the Panel.
[70] Footnote 9 of the *Anti-dumping Agreement* states:
"Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3]".
[71] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 81.
[72] *Ibid.*, para. 83.

> Accordingly, we do not believe that there is a clear "rationale" behind the 1 percent *de minimis* rule of Article 11.9 that must also apply in the context of reviews carried out under Article 21.3.[73] (emphasis in original)

7.75 Considering that the relationship between the concepts of "dumping" and "injury" in the *Anti-dumping Agreement* is analogous to the relationship between "subsidization" and "injury" under the *SCM Agreement*[74], we find the ruling of the Appellate Body in *US – Carbon Steel* to be highly relevant for the present case in this respect.

7.76 Japan argues that the decision of the Appellate Body in *US – Carbon Steel* does not apply in this case for a number of reasons. First, according to Japan, the fact that the phrase "For the purpose of this paragraph" found in Article 11.9 of the *SCM Agreement* does not exist in Article 5.8 of the *Anti-dumping Agreement* makes the latter different from the former in this respect.[75] We note that the Appellate Body did not base its conclusion that the *de minimis* standard of Article 11.9 does not apply to sunset reviews on this phrase cited by Japan. Moreover, independently from the existence in Article 11.9 of the *SCM Agreement* of the phrase cited by Japan, the Appellate Body made it clear that "original investigations and sunset reviews are distinct processes with different purposes"[76]. We thus see no merit in this argument of Japan.

7.77 Secondly, Japan argues that another reason why that decision is not applicable to the present case is the existence of more than one *de minimis* standard in the *SCM Agreement*. The *Anti-dumping Agreement* contains only one such standard.[77] In this respect, Japan refers to the statement of the Appellate Body in para. 82, in *US – Carbon* Steel, which reads in relevant part:

> "To accept the Panel's reasoning—that *de minimis* subsidization is non-injurious subsidization—would imply that, for the same product, imported into the same country, and affecting the same domestic industry, the *SCM Agreement* establishes different thresholds at which the same industry can be said to suffer injury, depending on the origin of the product. This unreasonable implication casts further doubt on the "rationale" attributed by the Panel to Article 11.9's *de minimis* standard."[78] (emphasis in original)

7.78 The Appellate Body referred to the different *de minimis* rates set forth for developing countries in Article 27 of the *SCM Agreement* and opined that, if one accepts the proposition that *de minimis* subsidization is non-injurious, that would mean that the threshold at which imports of a certain product can cause injury on a domestic industry would depend on the origin of those imports. That, in the view of the Appellate Body, is indicative of why the panel's approach that tied *de minimis* to injury was wrong. In that case, the Appellate Body used the existence of more than one *de minimis* standard in the *SCM Agreement* as one of several elements supporting its finding that no *de minimis* standard applies to sunset reviews under the *SCM Agreement*.

7.79 By contrast to the *SCM Agreement*, the *Anti-dumping Agreement* contains only one *de minimis* standard. However, this distinction between the Agreements does not alone necessarily mean that the Appellate Body would have arrived at a different conclusion under the *Anti-dumping Agreement* on this issue. In this connection, we recall that the Appellate Body based its decision on a

---

[73] *Ibid.*, para. 84.

[74] We recognise that unlike the *Anti-dumping Agreement*, the amount of subsidisation has not been identified as an injury factor in the *SCM Agreement*. However, we consider this not to be determinative for purposes of the legal issue we are dealing with here. In our view, whether the amount of subsidization or the margin of dumping has been identified as an injury factor does not answer the question whether the same *de minimis* standard that has been set for original investigations also applies to sunset reviews.

[75] Second Written Submission of Japan, para. 134.

[76] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 87.

[77] Second Written Submission of Japan, para. 136.

[78] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 82.

textual analysis of the *SCM Agreement* and found that no *de minimis* standard applies to sunset reviews under the *SCM Agreement*. The Appellate Body's discussion concerning the existence of more than one *de minimis* standard in the *SCM Agreement* related specifically to the reasoning of the panel in that case that *de minimis* subsidization was non-injurious subsidization. Therefore, we consider that this consideration of the Appellate Body in *US – Carbon Steel* does not preclude us from finding that no *de minimis* standard was intended by the drafters to apply to sunset reviews under the *Anti-dumping Agreement*.

7.80 Thirdly, Japan argues that the Appellate Body was not required to discuss the significance of footnote 37 of the *SCM Agreement* (corollary of footnote 1 of the *Anti-dumping Agreement*) in *US – Carbon Steel*. Here, Japan repeats its argument that the use of the word "initiated" in footnote 1 and Article 11.3 indicates that the provisions of Article 5, including paragraph 8 thereof, apply to sunset reviews.[79] For the same reasons stated above in this respect (*supra*, paras. 7.40-7.42) we consider that we are not permitted to derive that meaning from the text of footnote 1.

7.81 Fourthly, Japan refers to the finding of the panel in *US – DRAMs* (that the term "case" in Article 5.8 does not encompass duty assessment procedures under Article 9.3 of the *Anti-dumping Agreement*), coupled with the following statement:

> "[I]n the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty."[80]

7.82 For Japan, the *US-DRAMs* panel's reasoning implies that the word "case" in Article 5.8 is sufficiently broad to also cover sunset reviews and, therefore, the *de minimis* standard of Article 5.8 also applies to sunset reviews. However, we recall that that panel was called upon to decide whether the *de minimis* standard of Article 5.8 applied to duty assessment procedures under Article 9.3 of the *Anti-dumping Agreement*. That panel found that it did not.[81] In the present case, the issue is the application of that standard in sunset reviews. Therefore, we do not find it appropriate to draw Japan's conclusion from the above statement of the panel in *US – DRAMs*.

7.83 Finally, Japan refers to the negotiating history of Article 5.8. Japan points out that the phrase "for purposes of this paragraph" (or certain similar phrases), that would tend to limit the scope of application of that paragraph which had appeared in draft texts proposed earlier by different Members, was finally not included in the final text of the provision. It follows, asserts Japan, that the drafters intended to apply the *de minimis* standard of Article 5.8 to sunset reviews. In this respect, we recall that Article 32 of the *Vienna Convention* on the Law of Treaties, which deals with supplementary means of treaty interpretation including the negotiating history of the treaty, reads:

> Article 32
> Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

[79] Second Written Submission of Japan, para. 137.
[80] Panel Report, *US – DRAMS*, *supra*, note 48,para. 6.90.
[81] *Ibid.*, para. 6.89.

7.84 This provision of the *Vienna Convention* limits recourse to the negotiating history of a treaty to two instances: (i) to confirm the meaning of the treaty's provisions or in cases where either a meaning cannot be derived from the treaty; or (ii) where the interpretation would lead to absurd results. Neither is the case here. Therefore, there is no need to have recourse to the negotiating history of the *Anti-dumping Agreement*. Nevertheless, we consider that none of the various phrases cited by Japan as intending to limit the scope of application of Article 5.8 mentions sunset reviews, or reviews in general. Even if one had to take these documents into account, one would not be required to reach the legal conclusion, on the basis of these documents alone, that the drafters intended to have the *de minimis* standard of Article 5.8 apply to sunset reviews. As stated above, various cross-references found throughout the *Anti-dumping Agreement*, including, in particular, those in Article 11, reveal that when the drafters desired to have certain provisions also apply in different contexts, they did so clearly. The historical documents cited by Japan relate to the provisions of Article 5 of the *Anti-dumping Agreement*, which, as we have already found, generally do not apply to sunset reviews (*supra*, paras. 7.35-7.39). Japan has not pointed to any document in the negotiating history of Article 11 of the *Anti-dumping Agreement* which shows the drafters' intent to have a *de minimis* standard for sunset reviews, or to have the *de minimis* standard of Article 5.8 apply in the context of sunset reviews.

7.85 On the basis of this textual analysis of the relevant provisions of the *Anti-dumping Agreement*, we conclude that the 2 per cent *de minimis* standard of Article 5.8 does not apply in the context of sunset reviews. In this context, we again observe that, in light of the qualitative differences between sunset reviews and investigations, it is unsurprising that the obligations applying to these two distinct processes are not identical.[82] We therefore find that Section 351.106(c) of the US Regulation is not inconsistent with Article 11.3, or Article 5.8, of the *Anti-dumping Agreement* in respect of the *de minimis* standard applicable in sunset reviews.

(b) US law as applied in the instant sunset review

(i) Arguments of parties

Japan

7.86 According to Japan, since the DOC failed to apply the 2 per cent *de minimis* standard of Article 5.8, the application of US law in the instant sunset review was also inconsistent with Articles 5.8 and 11.3 of the *Anti-dumping Agreement*.

United States

7.87 The United States presents no additional argument about the application of US law in the instant sunset review in respect of this claim.

(ii) Evaluation by the Panel[83]

7.88 On the basis of our finding above that the *de minimis* standard of Article 5.8 does not apply to sunset reviews, we also find that the United States did not act inconsistently with Articles 5.8 and 11.3 by not applying that standard in the instant sunset review.

[82] See, *supra*, para. 7.42

[83] In this section, we examine Japan's allegation that the provision of US law establishing two different *de minimis* standards for original investigations and sunset reviews, as applied in this case, is inconsistent with Articles 5.8 and 11.3 of the *Anti-dumping Agreement*.

4. Cumulation in sunset reviews

(a) US law as applied in the instant sunset review

(i) Arguments of parties

Japan

7.89 According to Japan, footnote 9 to Article 3 of the *Anti-dumping Agreement* suggests that any injury determination under the Agreement should conform to the provisions of Article 3, including paragraph 3 thereof, which deals with cumulation. Japan further argues that the quantitative negligibility standards of Article 5.8 are incorporated into Article 3.3 by virtue of the cross-reference to Article 5.8 contained in the latter. The drafters' failure to include, in Article 11, a cross-reference to Article 3.3 is not dispositive because the term "injury" has been defined in Article 3 for purposes of the *Anti-dumping Agreement*, including for purposes of sunset reviews under Article 11.3. It follows that an investigating authority in a sunset review must demonstrate that imports from a particular country are not negligible before it can cumulate those imports with imports from other countries. Otherwise, the determination of likelihood of continuation or recurrence of injury will be inconsistent with the *Anti-dumping Agreement*.

7.90 Japan contends that, in the instant sunset review, the ITC acted inconsistently with Articles 3.3, 5.8 and 11.3 by cumulating imports from Japan with those from other subject countries without applying the negligibility standard of Article 5.8. According to Japan, the ITC record showed not only that imports from Japan were "negligible" under this standard, but also that the total share of countries individually accounting for less than 3 per cent was below 7 per cent. Under Articles 5.8 and 11.3, therefore, the United States was under an obligation to terminate the review and repeal the measure with respect to Japan.

United States

7.91 The United States submits that the investigating authority in a sunset review is not required to carry out a quantitative cumulation analysis. No such requirement can be found in Article 11.3. Nor is it stated in Article 3.3 or 5.8 that the rules governing cumulation in investigations also apply to sunset reviews. Articles 3 and 5 apply to investigations only. Footnote 9 of the *Anti-dumping Agreement*, which defines the term "injury", does not refer to a particular level of dumping as an element of injury. Therefore, the fact that this footnote to Article 3 states that the term "injury" should be interpreted in accordance with Article 3 does not make the quantitative negligibility criteria in Article 3.3 or 5.8 directly applicable to sunset reviews.

(ii) Arguments of third parties

European Communities

7.92 While the European Communities does not comment on the appropriateness of the inclusion of imports from Japan in the US cumulative analysis in the instant sunset review, it agrees with Japan's view that the requirements of Articles 3.3 and 5.8 for the cumulation of imports in an injury determination also apply within the context of a sunset review under Article 11.3. The European Communities submits that negligible imports must not be included in a cumulative assessment of injury unless the authorities have determined that these imports are likely to become non-negligible upon revocation of the duty.

(iii) Evaluation by the Panel[84]

7.93 It is undisputed that the US law does not provide for the application in sunset reviews of the negligibility standard set out in Article 5.8 as cross-referenced in Article 3.3 (the provision in the *Anti-dumping Agreement* concerning cumulation in an injury analysis) for investigations. Accordingly, the United States did not apply such a negligibility standard in its cumulative analysis in the instant sunset review. Therefore, the issue before us is whether the obligation relating to the negligibility standard under Article 5.8 for the purposes of a cumulative injury assessment under Article 3.3 in investigations also applies to sunset reviews under Article 11.3.

7.94 We naturally begin our examination with the text of the core treaty provision governing sunset reviews. Article 11.3 provides:

> "11.3 Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review." (footnote omitted)

7.95 Article 11.3 speaks of a review to determine, *inter alia*, the likelihood of continuation or recurrence of injury. On its face, Article 11.3 does not mention, either explicitly or by way of reference, any negligibility standard that applies to the likelihood of continuation or recurrence of injury determinations in sunset reviews. Nor does the immediate context of Article 11.3 yield a different result. Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Article 11.2[85] and 11.3 reflect the application of that general rule under different circumstances. Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles of the *Anti-dumping Agreement*, no such cross-reference has been made to Articles 3.3 or 5.8.

7.96 We next turn to the text of Article 3.3 of the *Anti-dumping Agreement*, which reads:

> "Where imports of a product from more than one country are simultaneously subject to anti-dumping <u>investigations</u>, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product." (italics in original, underline emphasis added)

7.97 Paragraph 3 of Article 3, which contains a cross-reference to Article 5.8, explicitly refers to the term "investigations". At first blush, this appears to us to be an explicit textual limitation of the scope of application of the obligations contained in paragraph 3 to "investigations", suggesting that they are not also applicable to "sunset reviews".

---

[84] In this section, we examine Japan's allegation that in this sunset review, by not considering whether imports were negligible before determining whether to cumulate subject imports, the ITC acted inconsistently with the US obligations under Articles 3.3, 5.8 and 11.3 of the *Anti-dumping Agreement*.

[85] We refer to the text of Article 11.2, cited *supra*, para. 7.28.

7.98 Turning to the immediate context of Article 3.3, we note that, by contrast, nowhere else in the text of any other paragraph of Article 3 is the word "investigation" mentioned. This supports our preliminary conclusion that the obligations contained in Article 3.3 pertain to cumulative analysis in "investigations", and that they are not also applicable to "sunset reviews". In particular, the immediate context of Article 3.3 indicates to us the following.

7.99 First, Article 3 is entitled "Injury". This title is linked to footnote 9 of the *Anti-dumping Agreement*, which indicates that: "[u]nder this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article." This seems to demonstrate that the term "injury" as it appears throughout the *Anti-dumping Agreement* – including Article 11 -- is to be construed in accordance with this footnote, unless otherwise specified. This would seem to support the view that the provisions of Article 3 concerning injury may be generally applicable throughout the *Anti-dumping Agreement* and are not limited in application to investigations. Article 11 does not seem to explicitly specify otherwise in the case of sunset reviews.

7.100 There are other textual indications that the Article 3 injury obligations may generally apply throughout the Agreement. For example, the use of the language "for purposes of Article VI of GATT 1994"[86] in Article 3.1 also suggests that, in general, the obligations in Article 3 pertaining to injury may apply throughout the *Anti-dumping Agreement*, i.e. they are not limited to investigations.

7.101 However, even assuming *arguendo* that the provisions of Article 3 may be generally applicable throughout the *Anti-dumping Agreement*, an issue we need not and do not decide, this would not necessarily make every single provision in that article applicable throughout the Agreement. An article that has been found generally to apply throughout the Agreement may well contain certain specific provisions whose scope of application is limited, by their own terms, in certain respects. In our view, Article 3.3 is such a specific provision, which limits its scope of application by its own terms.

7.102 As stated above, even if the provisions of Article 3, including the definition of injury in footnote 9, are generally applicable throughout the *Anti-dumping Agreement*, paragraph 3 of Article 3 is exceptional, in that it alone explicitly refers to the term "investigations". Nowhere else in the text of any other paragraph of Article 3 is the word "investigation" mentioned. Therefore we are of the view that Article 3.3, by its own terms, is limited in application to investigations and does not apply to sunset reviews. It follows that the cross-reference in Article 3.3 to the negligibility standard in Article 5.8 does not apply to sunset reviews.

7.103 Furthermore, such a textual interpretation of Article 3.3 allows an examination consistent with our examination relating to the alleged application to sunset reviews of the *de minimis* standard in Article 5.8. That is, on the basis of our textual analysis of Article 5 made in reaching our finding that the *de minimis* standard of Article 5.8 does not apply to sunset reviews (*supra*, para. 7.70), we consider that the text of Article 5 similarly fails to support the proposition that the negligibility standard of Article 5.8 applies to sunset reviews.

7.104 According to Japan, the logical consequence of the US proposition that the quantitative criteria set out in Article 3.3 do not apply in sunset reviews is that the US administering authorities cannot cumulate in sunset reviews. However, Japan clarified that it is *not* arguing before us that

[86] We note that in accordance with the provisions of Article 1 of the *Anti-dumping Agreement*, the reference to Article VI of GATT 1994 in Article 3 is also a general reference to the *Anti-dumping Agreement* itself.

cumulation cannot be used at all in the injury component of a sunset review.[87] For this reason, we do not address the more general issue of whether or not cumulation is permitted in sunset reviews.

7.105 For these reasons, we conclude that the United States did not act inconsistently with Articles 11.3, 3.3 or 5.8 in the instant sunset review by cumulating imports from Japan with imports from other countries without applying the negligibility standard set out in Article 3.3 and 5.8 for original investigations.

5. Use of dumping margins in sunset reviews

(a) US Sunset Policy Bulletin as such

(i) Arguments of parties

Japan

7.106 Japan submits that Article 2 of the *Anti-dumping Agreement* contains general rules on dumping calculations which apply throughout the Agreement. It follows that likelihood of continuation or recurrence of dumping determinations in sunset reviews must also conform to these rules. The US Sunset Policy Bulletin requires the DOC to base its likelihood of continuation or recurrence of dumping determinations in a sunset review on past dumping margins obtained in original investigations and subsequent administrative reviews. It does not, however, contain any provision that allows the DOC to adjust pre-WTO dumping margins in accordance with the provisions of the present *Anti-dumping Agreement*. It follows that the DOC's likelihood of continuation or recurrence of dumping determinations in sunset reviews are inconsistent with Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement* to the extent that they are based on pre-WTO original margins and past administrative review dumping margins. Japan provides certain examples of the inconsistencies between pre-WTO rules and the provisions of the present *Anti-dumping Agreement*, one of which is the so-called practice of zeroing that has been found to be inconsistent with Article 2.4.2 of the *Anti-dumping Agreement*.[88] Japan is not challenging the dumping determinations made in the original investigations or administrative reviews, *per se*. Rather, it challenges the use of these pre-WTO original margins and post-WTO administrative review margins in sunset reviews conducted after the entry into force of the *WTO Agreement*.

7.107 Secondly, Japan submits that the Sunset Policy Bulletin[89] as such is inconsistent with Article 11.3 also because it directs the DOC in a sunset review to report to the ITC the dumping margin found in original investigations as the margin that is likely to continue or recur should the duty be terminated. Japan considers DOC's duty to determine the likelihood of continuation or recurrence of dumping in a sunset review under US law as being legally distinct from its duty to report to the ITC the likely dumping margin to be used by the ITC in its injury determinations.

---

[87] *See* Second Oral Submission of Japan, para. 51; Response of Japan to Question 22 from the Panel.

[88] Other inconsistencies cited by Japan in respect of the original (pre-WTO) dumping margins are the calculation of the dumping margin on the basis of a comparison of individual US transactions to weighted average home market prices; use of home market sales of the exporting country to determine normal value only when fewer than 10 per cent of those sales are below cost of production (as opposed to the current "20 per cent" level Japan points to in Article 2.2.1); and application of statutory minimum 10 per cent for SG&A expenses and statutory minimum 8 per cent for profit in constructing normal value. *See* First Written Submission of Japan, paras. 14, 172 and 181; Response of Japan to Question 27 from the Panel.

[89] In this context, Japan also cites the following language in the SAA:

> "In providing information to the Commission, the Administration does not intend that Commerce calculate future dumping margins or net countervailable subsidies . . . Only under the most extraordinary circumstances should Commerce rely on dumping margins or net countervailable subsidies other than those it calculated and published in its prior determination." SAA, at 891 (Exhibit JPN-2 at 4214)

United States

7.108 United States argues that Japan cannot challenge the Sunset Policy Bulletin as such in respect of the use of past dumping margins as Japan has not established that it is mandatory and, therefore, binding upon the DOC in its dumping determinations in a sunset review in this respect.[90] According to the United States, Article 11.3 does not impose a particular methodology for the determination of the likelihood of continuation or recurrence of dumping in a sunset review. Therefore reliance on the evidence of dumping and volume of imports over the life of the order is not inconsistent with Article 11.3.

(ii) Arguments of third parties

Brazil

7.109 Brazil submits that the US law and practice which fails to take into account any margin comparisons that do not result in a positive margin, *i.e.*, the practice of zeroing, violates Articles 2.4 and 2.4.2 of the *Anti-dumping Agreement*. According to Brazil, investigating authorities in sunset reviews are required to re-calculate dumping margins.[91]

Korea

7.110 Korea submits that the practice of "zeroing" that is prohibited under Article 2.4 is also prohibited under Article 11.3 of the *Anti-dumping Agreement*.

Norway

7.111 According to Norway, the United States is under an obligation to apply Article 2-consistent dumping margins in its sunset reviews. The DOC's use of dumping margins including the "zeroing" methodology is therefore inconsistent with Articles 2.2.1, 2.2.2, 2.4.2, 11.3 and 18.3 both as a general practice and as applied in this case.

(iii) Evaluation by the Panel[92]

7.112 Japan challenges what it refers to as the "US general practice" as such regarding the use of old dumping margins as part of the likelihood of continuation or recurrence of dumping determinations in sunset reviews. According to Japan, since the dumping margins in the original investigation and the administrative reviews were calculated in accordance with methodologies which do not conform to

[90] First Written Submission of the United States, para. 126.
[91] Response of Brazil to Question 16 (c) from the Panel.
[92] In this section, we examine the following allegations of Japan:

> the DOC's use, as envisaged in the Sunset Policy Bulletin, as such, of pre-WTO Agreement dumping margins to determine the likelihood of continued or recurring dumping in a sunset review context is inconsistent with Articles 2, 11.3, and 18.3 of the *Anti-dumping Agreement*;
>
> the DOC's use, as envisaged in the Sunset Policy Bulletin, as such, of dumping margins with zeroed negative margins in its sunset review analysis is inconsistent with Article 2.4 of the *Anti-dumping Agreement*;
>
> as envisaged in the Sunset Policy Bulletin, as such, the DOC's relying on and reporting to the ITC WTO-inconsistent dumping margins which DOC calculated in prior antidumping proceedings based on pre-WTO methodologies and/or on dumping margins with zeroed negative margins, is inconsistent with the United States' obligations under Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement*;

the provisions of the *Anti-dumping Agreement*, DOC's likelihood of continuation or recurrence of dumping determinations in sunset reviews, which make use of these old determinations, are also inconsistent with the *Anti-dumping Agreement*. The United States argues that the legal instruments cited by Japan to support its claim are not binding under US law. Therefore, the United States argues that these legal instruments are not susceptible to give rise to WTO violations.

7.113 Although Japan cited certain provisions of the SAA in this respect[93], it then made it clear that "[it] is not challenging the WTO-consistency of the SAA itself."[94] Therefore, we shall limit our analysis of Japan's "as such" claim to the Sunset Policy Bulletin. Before proceeding to the merits of Japan's claim, we consider it necessary to consider whether or not the Sunset Policy Bulletin is a measure in itself susceptible to challenge, as such, under the *WTO Agreement*.

7.114 It is now well established that a WTO Member's law as such can be challenged before a WTO panel if the law mandates WTO-inconsistent behaviour. WTO panels have found that a law is WTO-inconsistent if they find that it *mandates* WTO-inconsistent behaviour.[95] If, on the other hand, the law provides the executive branch of a Member's government with discretionary authority to act in a WTO-consistent manner, then WTO panels have generally found that the law is not WTO-inconsistent.[96] This test has been generally applied by GATT/WTO panels.[97]

---

[93] First Written Submission of Japan, footnote 207 to para. 168.

[94] Response of Japan to Question 6 from the Panel.

[95] For example, the panel in *US – Section 301 Trade Act*, recognized the "classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions". Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 ("US- Section 301 Trade Act")*, WT/DS152/R; adopted 27 January 2000, DSR 2000:II, 815, para. 7.54. See also the decision of the panel in *US – Steel Plate*, in which the panel stated:

> "The Appellate Body has recognized the distinction, but has not specifically ruled that it is determinative in consideration of whether a statute is inconsistent with relevant WTO obligations. However, it did state, in *United States – Anti-Dumping Act of 1916*:
>
> "88. As indicated above, the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations. The practice of GATT panels was summed up in *United States – Tobacco* as follows:
>
> > "… panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the *executive authority* of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge." (emphasis added)

Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002, para. 7.88.

The Appellate Body has recently stated the following in connection with an examination as to whether a statutory provision was inconsistent *per se* with WTO obligations because it *mandated* an inconsistency: "We are not, by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation. We make no finding in this respect...". *See*, Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities* ("*US – Countervailing Measures on Certain EC Products*"), WT/DS212/AB/R, adopted 8 January 2003, para. 159 and note 334.

[96] *See* for example, Panel Report, *United States – Measures Treating Exports Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R and Corr.2, adopted 23 August 2001, para. 8.131.

[97] See *supra*, note 95.

7.115 There are two issues to be considered in a case where a WTO Member's law is being challenged before a panel: first, whether the Member's law mandates a certain course of action; and second, whether that course of action is inconsistent with the WTO provision cited by the complainant.

7.116 As regards the sequence in which these two issues are to be addressed, we note that previous WTO panels have followed different approaches. Some panels[98] examined the meaning of the particular WTO provision first and then decided whether the Member's law *mandated* behaviour that would be inconsistent with that provision; while others[99] first examined whether the challenged law *mandated* a particular course of action and, if so, whether or not the mandated action constituted a violation. However, as the panel in *US – Section 129(c)(1) URAA* stated, the sequence in which these two issues are considered will not change the ultimate conclusion of the panel.[100] That is because whatever sequence a panel follows, in order to conclude that certain aspects of a WTO Member's law are inconsistent with the WTO provisions, the panel has to conclude that both elements are present, i.e. that the challenged provision under US law mandates WTO-inconsistent behaviour.

7.117 We find the circumstances underlying this particular claim of Japan to be similar to the circumstances in *US – Section 129(c)(1) URAA*. In that case, the panel decided to inquire first whether the law under challenge mandated a particular course of action or not and if so, whether that course of action was WTO-inconsistent. The panel followed this analytical approach because there was a dispute between the parties as to whether the challenged law mandated certain action. The panel found it more practical to resolve this disagreement first.[101]

7.118 In the instant case, there is also a disagreement between the parties as to whether the legal instruments relied upon by Japan mandate a certain course of action, i.e. whether they can give rise to a violation of WTO obligations. We shall, therefore, resolve the issue whether the legal instrument cited by Japan in support of its claim here, i.e. the Sunset Policy Bulletin, is binding under US law and therefore can mandate WTO-inconsistent behaviour. If we find that the Bulletin is not a mandatory legal instrument containing legally binding obligations under US law, we will not need to go on to analyze what is required under the WTO provision that Japan alleges to have been violated by the United States in connection with the Sunset Policy Bulletin alone. In that case, we will conclude that there is no "as such" WTO-inconsistency. If, however, we find that the Bulletin is a mandatory legal instrument containing legally binding obligations, we will analyze the Bulletin's provisions in light of the requirements set forth in the WTO provisions cited by Japan and then decide whether US law as such is WTO-inconsistent or not.

7.119 On the basis of this analytical framework, we proceed with our analysis as to whether the US Sunset Policy Bulletin mandates WTO-inconsistent behaviour.[102,103] We underline that the purpose of

---

[98] The first approach was followed by the Panel in *US – Export Restraints*. *See* Panel Report, *US – Export Restraints*, *supra*, note 96, para.8.14.

[99] The Panel in *US – Section 129(c)(1) URAA*, followed the second approach. *See* Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* ("*US – Section 129(c)(1) URAA*"), WT/DS221/R, adopted 30 August 2002, para. 6.25.

[100] *Ibid.*, footnote 72 to para. 6.25.

[101] *Ibid.*

[102] Regarding the question of whether, and under what circumstances, the Sunset Policy Bulletin could, as such, violate the United States' WTO obligations, we recall that the *US – Export Restraints* panel has considered that the essential question is whether it operates, in some concrete way, independently and in its own right:

> "In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i. e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations." (emphasis in original)

our examination of the structure and design of the Sunset Policy Bulletin, and its function within US municipal law, is to discern whether the Sunset Policy Bulletin, in and of itself, mandates WTO-inconsistent behaviour.[104]

7.120 According to Japan, the Bulletin has its own operational life under US law, independently from other legal instruments, *i.e.* the Statute and the Regulations.[105] Japan argues that the best evidence of the binding nature of the Bulletin is the consistent result that it has created in the sunset reviews carried out by the DOC thus far. Although the use of the words such as "normally" in the text of the Bulletin seems to make it discretionary, given the large number and proportion of sunset reviews in which the Bulletin has given rise to a determination of "likelihood" (and thus to a continuation of the measure) Japan asserts that the Bulletin is, in fact, binding.[106] Japan characterizes the Bulletin as a "*de facto* mandatory" legal instrument.[107] Japan distinguishes the Bulletin from the practice discussed in *US – Export Restraints* and *US – Steel Plate* in that the Bulletin "is an actual written codification of [DOC]'s concrete practice".[108]

7.121 The United States counters Japan and argues that the Bulletin is not a "codification" and is not binding under US law. In this respect the United States asserts:

> Under U.S. law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing evidence of Commerce's understanding of sunset-related issues not

---

Panel Report, *US – Export Restraints*, *supra*, note 96, para.8.85.

The focus of our examination is whether the Sunset Policy Bulletin, in and of itself, *mandates* certain behaviour.

[103] We consider that the nature of a "measure" that is challengeable in WTO dispute settlement is a fundamental matter relating to our mandate and jurisdiction in this case. In this regard, we recall that previous panels and the Appellate Body have discussed the nature of "measures" that may form part of the "matter" referred to the DSB under the DSU. See, for example, Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland* Cement *from Mexico* ("*Guatemala – Cement I*"), WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, para. 64 and footnote. 43 to para. 64.

[104] We recall the Appellate Body's statement in Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9 that "municipal law may ...constitute evidence of compliance or non-compliance with international obligations", and that an examination of the relevant aspects of a WTO Member's municipal law may be necessary in order to determine whether that Member has complied with its obligations under the WTO Agreement. We further recall that the Appellate Body has stated, in *US – Carbon Steel*, *supra*, note 22, para. 157, that:

> "...a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion.... The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."

[105] Response of Japan to Question 1 from the Panel.

[106] *Ibid.*

[107] Response of Japan to Questions 2 and 4 from the Panel. Japan explains the notion of "*de facto* mandatory" as follows:

> "Japan uses the term "*de facto*" to mean a situation where the domestic "administrative procedures," as those codified in the *Sunset Policy Bulletin*, appear to be discretionary, but in reality the administering authority consistently follows the directives of the *Sunset Policy Bulletin* as if they were mandatory. In the present case, USDOC has followed the directives of the *Sunset Policy Bulletin* in every single sunset review -- 228 times. It is hard to imagine a better example of a measure that functions as a mandatory rule, regardless of the label applied." (emphasis in original, footnote omitted)

[108] Response of Japan to Question 2 from the Panel.

> explicitly addressed by the statute and regulations. In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so. The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case, and in conjunction with U.S. sunset laws and regulations, the *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.[109] (italic emphasis in original, underline emphasis added, footnotes omitted)

7.122 The United States asserts that the Bulletin only provides guidance to the public as to how the DOC will behave regarding certain issues in sunset reviews.

7.123 We note that the legal status of the Sunset Policy Bulletin under US law has not been directly addressed by a WTO panel or the Appellate Body before.[110]

7.124 We commence our analysis of whether the Bulletin mandates certain behaviour under US law, independently from other legal instruments such as the Statute and the Regulations, with the text of the Bulletin itself. In this respect, we note the following language in the text of the Bulletin:

> Sunset Review Policies
>
> I. Overview
>
> …Sunset reviews of anti-dumping … duty orders … will be conducted pursuant to the provisions of the act, including sections 751(c) and 752 of the act, and the Department's regulations … These policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.[111] (emphasis added)

7.125 This general introductory language found in the Bulletin itself indicates that, as far as the conduct of sunset reviews under US law is concerned, the Bulletin operates on the basis of, and within the parameters set by, the Statute and the Regulations. The Bulletin provides guidance on certain methodological issues regarding the applicable statutory and regulatory provisions. In our view, this text indicates that the Bulletin, in and of itself, does not mandate any obligatory behaviour. On its face, the Bulletin clearly states that sunset reviews are to be carried out in accordance with the provisions of the Statute and the Regulations. Japan has pointed to no other provision in the US legislation that would suggest that the Bulletin can in fact operate independently from other legal instruments under US law in such a way as to mandate a particular course of action.

7.126 We therefore find that the Sunset Policy Bulletin, in and of itself, is not a legal instrument that operates so as to mandate a course of action. It follows that the Bulletin can not constitute a measure that can be challenged in WTO dispute settlement proceedings.

---

[109] Response of the United States to Question 1 from the Panel.

[110] In *US – Carbon Steel*, the Panel and the Appellate Body both referred to the Bulletin, but did not need to make a determination as to its legal nature and status in order to resolve the claims before them in that dispute. The Appellate Body noted, in passing, that "the United States indicated that the Sunset Policy Bulletin represents a statement of existing USDOC practice. The United States explained that the Sunset Policy Bulletin, as such, is not binding upon USDOC, but that USDOC may not depart from it in an arbitrary or capricious manner ." *See* Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, note 45.

[111] *Sunset Policy Bulletin*, 63 FR at 18872 (Exhibit JPN-6)

7.127 In our view, the fact that the DOC may depart from the Sunset Policy Bulletin under US law under certain conditions further supports our finding that it is not a binding legal instrument under US law.

7.128 The implication of our finding regarding the status of the Bulletin under US law is that we will disregard any argumentation by Japan based exclusively on the Bulletin in its claims challenging US "practice" as such. Therefore, in the absence of any direct invocation of binding legal instruments -- such as the Statute or the Regulation -- we will find that Japan's claims challenging US "general practice" "as such" fail. If, however, in addition to the Bulletin, Japan also refers to other legal instruments in its "as such" claims, then we will address such claims on the basis of these other legal instruments.

7.129 That is not to say that we will completely disregard the provisions of the Bulletin in our inquiry. Rather, we will take into account the provisions of the Bulletin alongside the SAA in interpreting the other legal instruments that do have independent operational status under US law. In particular, given the status of the SAA as an authoritative interpretative tool for the interpretation of the US Statute, we will certainly consider it in interpreting the Statute. However, in cases where the sole ground for a claim targeting US general practice *as such* is the Bulletin, we will find that that claim fails because it does not rest on legal instruments that can independently give rise to a WTO violation.

7.130 We further believe that an instrument can be *either* mandatory *or* not mandatory. Conceptually, an instrument must fall within one of these two categories. We see no justification for the creation of a "*de facto*" mandatory category, as advocated by Japan, that would transform an otherwise non-mandatory instrument into a mandatory one on the basis of a record of past actions. If an instrument is not binding, a record of past conduct thereunder cannot alter that status, as it will not necessarily determine future behaviour.

7.131 We note that initially Japan characterized the Bulletin as "practice" regarding the conduct of sunset reviews under US law.[112] However, given that the Sunset Policy Bulletin was promulgated before any sunset review was initiated under US law, we find it difficult to accept the proposition that the Bulletin contains or reflects the US practice regarding sunset reviews. In our view, "a practice is a repeated pattern of similar responses to a set of circumstances."[113] Given that, at the time the Bulletin was promulgated, the United States had not yet carried out any sunset reviews, we find that it can not possibly be characterized as "practice". However, even assuming *arguendo* that the Bulletin constitutes practice, we find that practice as such can not be challenged before a WTO panel. We find support for our view in the reports of previous panels.[114]

---

[112] First Written Submission of Japan, paras. 215-216.

[113] Panel Report, *US – Steel Plate, supra*, note 95, para. 7.22.

[114] The panel in *US – Export Restraints* stated:

> "[P]ast practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action…US "practice" therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada." Panel Report, *US – Export Restraints*, *supra*, note 96, para.8.126.

The same issue was also raised before the panel in *US – Steel Plate*, *supra*, note 95 where the panel stated:

> "That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by

7.132 Japan also describes the Bulletin as an "administrative procedure" within the meaning of Article 18.4 of the *Anti-dumping Agreement*.[115] According to Japan, that Article deals with administrative procedures that are not only explicitly, but also implicitly, mandatory in nature.[116] In Japan's view, this confirms that the Bulletin is a measure that, as such, may be subject to WTO challenge. Article 18.4 of the *Anti-dumping Agreement* provides:

> "Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question."

7.133 We understand Japan to argue that the characterization of the Bulletin as an "administrative procedure" within the meaning of this provision makes the Bulletin challengeable under the Agreement. We do not agree. Even assuming *arguendo* that Article 18.4 were a provision that determines the measures that can give rise to a WTO violation, we are not convinced that the reference to "administrative procedure" in Article 18.4 embraces the Bulletin.

7.134 We understand the phrase "administrative procedure" in Article 18.4 to refer to a pre-established rule for the conduct of an anti-dumping investigation. We find support for our view in the following finding of the panel, in *US – Steel Plate*:

> In particular, we do not agree with the notion that the practice is an "administrative procedure" in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations.[117]

7.135 Japan's argument that the Sunset Policy Bulletin is an "administrative procedure" rests, at least in part, on its observation that DOC has "applied" the Bulletin in all 227 sunset reviews conducted by DOC in which petitioners have participated.[118] According to Japan, it is notable that in all of those reviews, the DOC has made an affirmative determination of likelihood of continuation or recurrence of dumping. Japan recalls the statement of the Appellate Body in *US – Carbon Steel*, that the Appellate Body,

> ".... [was] not persuaded that the conduct of a single sunset review can serve as conclusive evidence of USDOC practice, and, thereby, of the meaning of United States law. This is particularly so in the absence of information as to the number of sunset reviews that have been conducted, the methodology employed by USDOC in other reviews, and the overall results of such reviews."[119]

7.136 For Japan, this statement leaves open the possibility to establish that the Sunset Policy Bulletin is binding through the submission of evidence as to the number of sunset reviews (227) and the fact that an affirmative determination of likelihood has been made in each review. The United States, however, argues that since the DOC is allowed to depart from the provisions of the Sunset Policy Bulletin as long as it provides an explanation for such departure this argument of Japan fails. According to the United States, the figures stated by Japan in this respect are not correct because they do not reflect the completed sunset reviews, i.e. sunset reviews in which both the DOC and the ITC

> repetition, a Member becomes obligated to follow its past practice." Panel Report, *US – Steel Plate*, *supra*, note 95, para. 7.22.

Both panels thus concluded that practice, as such, could not independently give rise to a WTO violation. We find these reports relevant in our analysis of the Bulletin in the present case.

[115] Response of Japan to Question 6 from the Panel.

[116] Response of Japan to Question 4 from the Panel.

[117] Panel Report, *US – Steel Plate* , *supra*, note 95 , para 7.22.

[118] See Response of Japan to Question 79(b) from the Panel.

[119] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 148.

have made their likelihood determinations.[120] The United States submits that out of 321 sunset reviews of anti-dumping and countervailing duty orders initiated between July 1998 and December 1999 (including the instant sunset review), 150 resulted in determinations under which orders were revoked.[121]

7.137 We are not convinced by this argument of Japan. In particular, we do not agree that the Sunset Policy Bulletin is a pre-established rule that mandates certain conduct for sunset reviews. That a particular response to a particular set of circumstances has been repeated, and may even be predicted to be repeated in the future on the basis of a single written document, does not, in our view have the effect of transforming the Sunset Policy Bulletin into an "administrative procedure".

7.138 A conclusion that at some point, certain behaviour could transform the Bulletin into an "administrative procedure", does not allow for the fact that the DOC is not bound to follow the Bulletin and indeed may, at some future point, choose to depart therefrom. Moreover, we do not consider that merely by repetition, the DOC would somehow become compelled to follow the Bulletin. We find support for our view in the panel decision in *US – Steel Plate from India.*[122] We note the United States' assertion that under its governing laws, the DOC may change a practice provided it explains its decision.[123]

7.139 Furthermore, we are of the view that the *form* in which the Sunset Policy Bulletin is maintained does not transform it into a mandatory legal instrument. The fact that the contents of the Bulletin have been compiled in a single instrument does not affect our view as to its nature or function. In this respect, we note that in *US – Export Restraints* and *US – Steel Plate*, the "practice" at issue had not been reduced to writing. That is, parties were unable to prove on the basis of a single, integrated instrument the existence and substance of the challenged practice. Had the contents of the Sunset Policy Bulletin in the instant case remained similarly uncompiled, we would more comfortably share the view of these previous panels in deciding that the Bulletin can not give rise to a WTO violation.

7.140 We find it neither appropriate nor legally justifiable to infer that the Bulletin obligates the investigating authority to follow its provisions in sunset reviews, from the mere fact that it has been reduced to writing in a single instrument. Such a conclusion should rather be based on the nature, operation and discernable substance of the practice, considered in the overall context of the legal framework of the Member concerned. In particular, had the substance of the Sunset Policy Bulletin not been reduced to a single, integrated document, it would be more difficult for a WTO panel to discern – with even a minimum degree of certainty - their nature, operation and substance. We do not believe that we should discourage efforts by WTO Members to provide transparency, certainty and

---

[120] Response of the United States to Question 81 from the Panel.

[121] *Ibid*. According to the United States, 163 orders have been continued as a result of sunset review based on affirmative likelihood determinations by both DOC and ITC. Japan submits that the differences in the numbers cited by the parties are due to the fact that the United States refers to both AD and CVD sunset reviews, whereas Japan focuses upon AD sunset reviews, and that the US figures include only those reviews completed by December 2000, whereas Japan's include reviews through August 2002. Because of the nature of our findings here, we do not believe that these "differences" in the cited data are material.

[122] Panel Report, *US – Steel Plate* , *supra*, note 95, para 7.22.

[123] In this respect the United States stated:

"An interested party would expect Commerce to not be arbitrary and capricious in Commerce's application of the law and in its analysis of identical or similar factual situations. If Commerce determined to change its analysis and to do so would represent a change from past practice, Commerce would explain its determination in the case and normally provide parties an opportunity to comment on the change before issuing a final determination. In the final determination, Commerce would then address comments made by a party on that issue." Response of the United States to Question 9 (d) from the Panel.

We do not consider that Japan has effectively refuted this.

predictability in the conduct of sunset reviews. This would run counter to the objectives of the WTO dispute settlement system as laid down in Article 3.2 of the *DSU*, which states: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system."

7.141 As Japan has cited no language elsewhere in the applicable US legal instruments to suggest that the Bulletin is binding on the US administrative authorities, we conclude that the Bulletin does not, in and of itself, mandate certain conduct and therefore can not be challenged as such under WTO law.

7.142 Finally in this respect, we note the following statement by the Appellate Body in *US – Carbon Steel*:

> Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[124] (footnote omitted, emphasis in original)

7.143 Japan argues that the above statement of the Appellate Body stands for the proposition that the Sunset Policy Bulletin as such can be challenged before a WTO panel.[125] According to the United States, however, this statement cannot be interpreted to mean that the Sunset Policy Bulletin as such is challengeable under WTO law. The United States argues that the Appellate Body explains the type of evidence that can be introduced by the party that challenges a WTO Member's law as such before a WTO panel or the Appellate Body in its effort to establish its case.[126] We agree with the United States that the above statement of Appellate Body can not be interpreted to mean that the Sunset Policy Bulletin "as such" can be challenged under WTO law. It rather sets out the type of evidence that can be introduced by the complaining party in cases where the law of a WTO Member is challenged. Therefore, this decision does not affect our finding that the Sunset Policy Bulletin as such cannot be challenged before a WTO panel.

7.144 In this regard, we also note that the Appellate Body, in *US – Countervailing Measures on Certain EC Products*, reviewed that panel's finding regarding the consistency with the US' WTO obligations of a certain methodology used by the DOC in CVD investigations.[127] The Appellate Body reviewed the panel's finding as to the WTO-consistency of the methodology, on the basis of the panel's characterization thereof. There is no indication, in either the panel or the Appellate Body report, that the threshold issue of whether the methodology "as such" could be challenged before a WTO panel was raised in that case. In our view, in the absence of such discussion on the part of the Appellate Body, the mere fact that the Appellate Body made a finding as to the "as such" consistency of a certain methodology with certain WTO provisions cannot be taken to mean that the Sunset Policy Bulletin as such is necessarily challengeable.

---

[124] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 157.

[125] Response of Japan to Question 79 (b) from the Panel.

[126] Response of Japan to Question 79 (a) from the Panel.

[127] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, *supra*, note 95, paras. 129 and 146.

7.145 For all of these reasons, we find that Japan's "as such" claim fails because the Sunset Policy Bulletin is not a mandatory legal instrument obligating a certain course of conduct and thus can not, in and of itself, give rise to a WTO violation.

(b) US Sunset Policy Bulletin as applied in the instant sunset review

(i) Arguments of parties

Japan

7.146 Japan alleges that, in the instant sunset review: i) the DOC acted inconsistently with Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement* by relying on pre-*WTO Agreement* dumping margins, based upon WTO-inconsistent methodologies, in making its determination of continuation or recurrence of dumping; ii) the DOC acted inconsistently with Article 2.4 in relying upon dumping margins calculated in the original investigation and administrative reviews on the basis of "zeroing"; and iii) the DOC acted inconsistently with Articles 2, 11.3 and 18.3 in reporting the dumping margins calculated in the original investigation to the ITC to be used by the latter in its sunset likelihood of continuation or recurrence of injury determination.

United States

7.147 The United States contends that the methodologies used in the calculation of pre-WTO dumping margins can not be challenged under the present *Anti-dumping Agreement* because Article 18.3 provides that the *Anti-dumping Agreement* applies only to investigations and reviews initiated on the basis of petitions filed after the entry into force of the Agreement, 1 January 1995 for the United States. Given that the original investigation in question was carried out before that date DOC's determinations made in that investigation can not be challenged before this Panel.

7.148 The United States submits that all that Article 11.3 requires the DOC to do in a sunset review is to determine the likelihood of continuation or recurrence of dumping should the order be terminated after five years of application. It does not require the quantification of the margin that is likely to continue or recur, nor does it set out any particular methodology to be followed in making such a determination. It follows that the DOC's reliance on old dumping margins, including the administrative review margins, as part of its likelihood analysis in this sunset review is not inconsistent with the requirements of Article 11.3.

7.149 With respect to the dumping margins reported by the DOC to the ITC, the United States asserts that the fact that the DOC reports to the ITC the margin at which dumping is likely to continue or recur is irrelevant because no such obligation has been imposed by the *Anti-dumping Agreement* on WTO Members. The United States points out that under US law[128] in a sunset review the DOC reports the original dumping margin to the ITC unless the DOC determines that dumping has been eliminated or the dumping margin has declined and the volume of imports remained steady or increased after the imposition of the anti-dumping order. Since these two conditions were not met in the instant review, the DOC reported the original margin to the ITC.

(ii) Evaluation by the Panel

7.150 We recall the following facts that are relevant for the consideration of Japan's allegations: the original investigation was carried out and the original measure was imposed before the entry into force of the *WTO Agreement*, and thus the present *Anti-dumping Agreement*. Four administrative reviews were carried out after the imposition of the original anti-dumping measure and following the

[128] In this respect the United States refers to sections 752(a)(6) and 752(c)(3) of the Statute, to the SAA and the Sunset Policy Bulletin. *See*, First Written Submission of the United States, para. 139.

entry into force of the *WTO Agreement*. In the first two of these administrative reviews[129], the DOC calculated new dumping margins for the review periods. At levels of approximately 12 per cent and 2 per cent, respectively, these dumping margins were considerably lower than the original margin of approximately 36 per cent. The last two such administrative reviews[130] were rescinded. Thus, no calculation was made in these reviews. In the instant sunset review, the DOC opined that since dumping was found in all administrative reviews carried out after the imposition of the order and since import volumes declined after the imposition and remained at relatively low levels, dumping was likely to continue or recur should the duty be terminated.[131]

7.151 On this basis, we examine each of Japan's three allegations in turn.

i) DOC's Alleged Reliance upon Dumping Margins Established in the Original Investigation

7.152 Japan alleges that in its affirmative determination of likelihood of continuation or recurrence of dumping in this sunset review, the DOC used margins calculated in the original investigation in accordance with the pre-WTO rules because the present Agreement had not yet entered into effect at that time. Given that certain practices used in dumping determinations before the entry into force of the present Agreement are now WTO-inconsistent, reliance on those margins infected the likelihood determinations made in this sunset review.

7.153 Before addressing this issue, we identify what we are *not* asked to examine. It is undisputed that the DOC did *not* engage in the calculation or re-calculation of any dumping margins in this sunset review. Nor does Japan claim that the now WTO-inconsistent techniques it cites were used by the DOC in this sunset review. Rather, Japan's claim is that the DOC acted inconsistently with its obligations under the cited provisions by using pre-WTO dumping margins calculated in accordance with certain methodologies that are WTO-inconsistent. Japan is *not* arguing that the use in sunset reviews of dumping margins calculated in original investigations is *per se* WTO-inconsistent. In Japan's view, it is the now-WTO-inconsistent methodologies used in the calculation of these pre-WTO margins that renders the US sunset determination inconsistent with Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement*.

7.154 The first issue before us is to determine whether, in this sunset review, the DOC in fact relied upon the original margins as a basis for its determination of likelihood of continuation or recurrence of dumping. We therefore look to the DOC's determination to discern whether the DOC relied upon the original margins in this way.

7.155 It is apparent to us from the face of the DOC Final Determination that the DOC did not rely upon the original margins of dumping in order to make its determination as to whether there was a likelihood of continuation or recurrence of dumping. Rather, the DOC's determination makes it clear that the DOC relied *solely* upon the dumping margins calculated in the *administrative reviews* in order to make its determination as to whether there was a likelihood of continuation or recurrence of dumping.[132]

---

[129]For the initiation of the first administrative review, see, 62 FR 50292 (25 September 1997) (Exhibit JPN-14a at p. 50292). For the initiation of the second administrative review, see, 63 FR 51893 (29 September 1998) (Exhibit JPN-15a at p. 51893).

[130] For the initiation of the third administrative review, see, 64 FR 53318 (1 October 1999) (Exhibit JPN-16a at p. 53318). For the initiation of the fourth administrative review, see, 65 FR 58733 (2 October 2000) (Exhibit JPN-17a at p. 58733).

[131] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e at p. 5).

[132] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e at pp. 5 and 6): "As stated in our preliminary results, and, as domestic interested parties observe, margins have remained above *de minimis* in every administrative review since the issuance of the order." The Determination also states: "...the Department

7.156 We therefore find that the DOC did not rely upon the original determinations of dumping as a basis for its determination of likelihood of continuation or recurrence of dumping in the instant sunset review. It is therefore not necessary for us to address whether such alleged reliance on the determination of dumping in an original pre-WTO investigation would have been inconsistent with Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement*.[133]

ii) DOC's Reliance upon Dumping Margins Established in Administrative Reviews since the Imposition of the Original Measures in This Sunset Review

7.157 We understand Japan to challenge the DOC's reliance upon dumping margins established in administrative reviews following the imposition of the original measure, and after the entry into force of the *WTO Agreement*, because they were calculated on the basis of "zeroing".[134] To be clear, Japan is not arguing that the use in sunset reviews of dumping margins calculated in administrative reviews is *per se* WTO-inconsistent. Nor is Japan claiming before us that duties collected pursuant to the administrative review determinations were inconsistent measures. Rather, Japan alleges that the DOC's reliance upon the administrative review margins, which had been calculated on the basis of "zeroing", is inconsistent with Article 2.4 of the *Anti-dumping Agreement* as the DOC did not ensure that such margins were WTO-consistent before it relied upon them as a basis for its likelihood determination.[135]

7.158 The DOC applied a weighted average-to-transaction methodology in establishing the dumping margins in administrative reviews. We understand that Japan is not contesting the US use of this methodology, in and of itself.[136] Rather, Japan alleges that the DOC's reliance, in this sunset

---

finds that the existence of dumping margins after the issuance of the order is highly probative of the likelihood of continuation or recurrence of dumping."

[133]The inconsistencies cited by Japan in respect of the DOC's alleged reliance upon the original margins of dumping are: the use of "zeroing"; the calculation of the dumping margin on the basis of a comparison of individual US transactions to weighted average home market prices; use of home market sales of the exporting country to determine normal value only when fewer than 10 per cent of those sales are below cost of production (as opposed to the current "20 per cent" level Japan points to in Article 2.2.1); and application of statutory minimum 10 per cent for SG&A expenses and statutory minimum 8 per cent for profit in constructing normal value. *See* First Written Submission of Japan, paras. 14, 172 and 181; Response of Japan to Question 27 from the Panel.

[134] Fourth Administrative Review (Exhibit. Japan 14(c) and (d)); Fifth Administrative Review (Exhibit Japan 15(c) and (d)).

[135] The Appellate Body has consistently stated that a panel's terms of reference is a fundamental issue – "going to the *jurisdiction* of a panel"-- that a panel must consider. We recall the framework for our analysis of the scope of our terms of reference under Article 6.2 *DSU*, *supra*, 7.49. We would point out that Japan's Panel request (WT/DS244/4) refers only to a claim in this connection under Article 2.4 (particularly 2.4.2) and *not* under Article 11.3. It states, in pertinent part:

> "The dumping margins that the DOC used in its sunset reviews ... are inconsistent with the WTO obligations as follows: ....
>
> (ii) The DOC has a traditional practice of zeroing negative margins when calculating dumping margins. The DOC applied this practice in its calculation of dumping margins in the original investigations and the administrative reviews in this case. The Appellate Body found this practice of zeroing to be inconsistent with Article 2.4 of the AD Agreement in the *EC – Bed-Linen* case (WT/DS141). The United States' general practice and its application of the practice in this case are therefore inconsistent with Article 2.4 (particularly 2.4.2) of the AD Agreement and Article X:3 of the GATT 1994."

Furthermore, in response to Questions 27 and 33 from the Panel, Japan identified Article 2.4 as the legal basis that allegedly precludes the use of zeroed-out margins as a basis for a sunset review determination. We therefore consider that Japan's claim in this respect is based upon an alleged violation of Article 2.4. Nevertheless, because Japan also refers to Article 11.3 in its Panel request generally, we also take into account the obligations in that Article in examining this allegation of Japan.

[136] Japan's responses to Panel Questions following the first Panel meeting.

review, upon administrative review dumping margins calculated on the basis of "zeroing" is inconsistent with Article 2.4 of the *Anti-dumping Agreement*.

7.159 We are aware that the zeroing methodology has the potential of increasing the dumping margin – in relation to a dumping methodology that gives full credit to negative dumping margins -- because it does not allow for an offset for negative dumping margins in the calculation of the overall margin. Perhaps more importantly here, zeroing may affect the finding as to the very *existence* of dumping, i.e. it may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing. Japan alleges in this case that there would have been no finding of dumping in at least the most recent administrative review in question had the DOC not "zeroed".[137] That, in turn, could have changed the outcome of the subsequent sunset review where the DOC relied upon affirmative dumping determinations in the administrative review as one of the factual bases to establish the likelihood of continuation or recurrence of dumping.

7.160 Therefore, the issue before us is whether the reliance by the DOC in this sunset review on the dumping margins that were calculated in the administrative reviews on the basis of "zeroing" is inconsistent with Article 2.4.

7.161 In our view, two fundamental threshold questions arise in our consideration of this issue: first, whether Article 2.4 *requires* the calculation in a sunset review of a likely future margin of dumping in order to make a determination of likelihood of continuation or recurrence of dumping; and second, whether Article 2.4 applies to an Article 11.3 likelihood determination so as to *require* that a determination of likelihood of continuation or recurrence of dumping in a sunset review must be based on a determination of dumping or a dumping margin calculated in conformity with Article 2.4.

7.162 With respect to the first issue, while Japan submits that a likelihood determination involves quantification[138], Japan does not dispute that there is no need to make a precise calculation of the likely future dumping margin as a basis for a determination of likelihood of continuation or recurrence of dumping. Japan concedes[139] that investigating authorities are *not* required to engage in the same type of dumping margin (re-)calculation in a sunset review that they are required to conduct in an original investigation. Nor did the United States do so. There is, therefore, no need for us to examine whether a violation of Article 2.4 exists with respect to any calculation of a likely future margin of dumping in order to make a determination of likelihood.

7.163 With respect to the second issue, Japan does not contest that evidence relating to the existence of dumping since the imposition of the measure may constitute relevant evidence which may be taken into account by an authority in making a determination of likelihood of continuation or recurrence of dumping. Rather, we understand Japan to allege that, if an authority relies upon evidence relating to the existence of dumping in the form of past dumping margins, the provisions of Article 2 are relevant and the investigating authority must ensure the consistency of those margins with the obligations in Article 2.4 of the *Anti-dumping Agreement*.

7.164 We therefore consider whether the DOC acted inconsistently with Article 2.4 in relying upon the administrative review dumping margins in the instant sunset review.

7.165 We believe that this examination requires us first to examine the text of Article 11.3, as that Article provides the core obligations applicable to sunset reviews. We once again recall that Article 11.3 provides:

---

[137] Second Written Submission of Japan , para. 113. See also First Written Submission of Japan , para. 183 and footnote 226.

[138] For example, Second Oral Statement of Japan, para. 28. Japan refers in this context to a need to assess the magnitude of the probable margin of dumping.

[139] First Written Submission of Japan, para. 170.

> "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." (footnote omitted)

7.166 We recall our analysis of Article 11.3 in respect of Japan's claims concerning the evidentiary standards for the self-initiation of sunset reviews (*supra*, paras. 7.25-7.27) and the *de minimis* standard applicable in sunset reviews (*supra*, paras. 7.67-7.68). Similarly, we observe that Article 11.3 is silent as to how an authority should or must establish that dumping is likely to continue or recur in a sunset review. That provision itself prescribes no parameters as to any methodological requirements that must be fulfilled by a Member's investigating authority in making such a "likelihood" determination. It does not explicitly require that an authority consider evidence of dumping since the imposition of the order, nor that any dumping determinations used in sunset reviews should or must be made in accordance with the requirements of Article 2, entitled "Determination of Dumping". Although paragraphs 4 and 5 of Article 11 contain several cross-references to other articles of the *Anti-dumping Agreement*, no such cross-reference has been made to the determination of dumping under Article 2. These cross-references indicate that, had the drafters intended to make the disciplines of Article 2 on the calculation of dumping margins also applicable in sunset reviews, they would have done so explicitly.

7.167 As we have stated, the text of Article 11.3 sets out no precise methodology that must be followed in reaching a determination of likelihood of continuation or recurrence. In this respect, we recall our statements (*supra*, para. 7.24) concerning the provisions of the *Vienna Convention*, which require us to base our interpretation of the *Anti-dumping Agreement* on its text. We, as a treaty interpreter, are not allowed to read into the text words and concepts which are not there, nor to read out of the text terms that *are* there. We see a substantial difference between the textual reference in Article 11.3 to a *determination* of *likelihood of continuation or recurrence* of dumping and the textual reference to a *determination* of dumping under Article 2. Article 11.3 certainly does *not* require a *determination of dumping*, as set forth in Article 2.

7.168 We thus do not believe that the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of* dumping apply in making a *determination of likelihood of continuation or recurrence of* dumping under Article 11.3. To hold otherwise would mean that a new and full determination regarding the existence of dumping since the imposition of the order would be necessary in a sunset review. We find no such obligation in the text of Article 11.3 nor in Article 2 of the *Anti-dumping Agreement*.

7.169 We therefore do not believe that it is necessary to examine further Japan's claims based on the allegation that the use of margins obtained in the administrative reviews calculated on the basis of zeroing rendered the DOC's determination of likelihood of continuation or recurrence of dumping inconsistent with Article 2.4.[140]

7.170 For these reasons, we find that the United States did not act inconsistently with its obligations under Article 2.4 in this respect.

---

[140] Accordingly, we need not decide, and express no view as to, whether "zeroing" in an "administrative review" would be inconsistent with the "fair comparison" requirement in Article 2.4.

7.171 We understand Japan's claim concerning the DOC's use of the dumping margins established in the administrative reviews – on the basis of a weighted average-to-transaction methodology applying zeroing – to be predicated on an inconsistency with Article 2.4.[141]

7.172 We do not understand Japan to have alleged that, even in the absence of a violation of Article 2.4, reliance by the DOC on the existence of dumping as established in the administrative reviews in order to reach its affirmative likelihood determination had the effect of tainting or undermining the factual basis of that determination so as to preclude the possibility that the DOC had before it sufficient positive evidence on which to base its determination, in violation of Article 11.3.[142] To the extent they involve Article 11.3, Japan's arguments in support of its claim appear to us to allude *exclusively* to a potential consequential violation of Article 11.3, resulting from an Article 2.4 violation.[143] Nevertheless, in the event that we have construed Japan's claims and arguments and our terms of reference in an overly restrictive manner, we believe that it would also be constructive to examine, in the alternative, whether, even if Japan made this allegation on the basis of Article 11.3 (in the absence of a violation of Article 2.4), the United States acted inconsistently with this aspect of Article 11.3. We are of the view that the United States did not act inconsistently with Article 11.3, for the following reasons.

7.173 Article 11.3 refers to a determination of "likelihood of continuation or recurrence of *dumping*" (emphasis added). Article 11.3 itself does not, however, contain any specific or special definition of that term for the purposes of sunset reviews alone.

7.174 We thus consider the meaning and effect of the reference to the term "dumping" in the text of Article 11.3. In our view, the "dumping" referred to in Article 11.3 corresponds to the type of situation governed by the *Anti-dumping Agreement* and Article VI of the *GATT 1994.* Article 2 of the *Anti-dumping Agreement* sets out rules pertaining to the "determination of dumping", where such a determination is required.[144] In clarifying the requirements of a determination of dumping, we believe that Article 2 also provides guidance as to the *type* of information that may be relevant to a sunset review examination of the presence or absence of dumping since the imposition of the order.

---

[141] See, *supra*, note 135.

[142] See, *supra*., note 135. Indeed, we understand Japan's claims relating to the "likelihood determination" under Article 11.3 to concentrate upon those allegedly relevant factors that the DOC *failed* to take into account, rather than possible flaws within those factors that the DOC actually *took* into account in this sunset review.

[143] For example, second oral statement of Japan, para. 42: "[A] dumping determination using a zeroing methodology is not consistent with the obligations of Article 2. Because USDOC continues to use dumping margins that "zero out" negative margins in its original investigations and administrative reviews to determine "dumping" and its magnitude in sunset reviews, the United States acts inconsistently with its obligations under Article 11.3."; first written submission of Japan, para. 179: "The provisions of Article 2.4, 2.4.2 and the rationale of the Appellate Body in *EC – Bed Linens* must be applied with equal force to "dumping" determinations under Article 11.3."; first written submission of Japan, para. 175: "Articles 2.4 and 2.4.2 are therefore incorporated into the "dumping" determination in sunset reviews under Article 11.3."

[144] We find support for this view in the text of Article 2, entitled "Determination of Dumping". Article 2.1 provides:

> "*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)

The first paragraph of Article 2.1 begins with the phrase "For the purpose of this Agreement …". This introductory language suggests that this provision describes a concept which is generally relevant throughout the *Anti-dumping Agreement.*

7.175 We recall again the difference between the textual reference in Article 11.3 to a determination of *likelihood of continuation or recurrence* of dumping and the textual reference to a *determination* of dumping under Article 2. We believe that this difference is also critical in determining the nature of the obligation of an investigating authority in terms of the evidence relating to dumping (or absence thereof) since the imposition of the order upon which it may rely in reaching a sunset review likelihood determination.

7.176 Indeed, this textual difference leads us to conclude that evidence relating to the existence (or absence) of dumping during the period of imposition of the duty that may be examined by an investigating authority in a sunset review under Article 11.3 is not limited to a full-blown determination of dumping made pursuant to Article 2. That Article 2 may inform the *type* of information that an investigating authority may consider relevant for the purposes of an Article 11.3 sunset review likelihood determination does not, in our view, impose an obligation upon an investigating authority in a sunset review that relies upon evidence relating to dumping since the imposition of the order to rely *only* upon a determination of dumping that fully conforms to the dictates of Article 2.[145]

7.177 By this, we do not mean to say that the *Anti-dumping Agreement* is devoid of any obligation governing the requisite nature of a sunset review likelihood determination.[146] The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping. The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year imposition period, it is clear that the investigating authority has to determine, on the basis of positive evidence[147], that termination of the duty is likely to lead to continuation or recurrence of dumping. 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.

7.178 As for the nature of the "likelihood of continuation or recurrence of dumping" determination under Article 11.3, we believe that "likelihood" is an inherently prospective notion. It involves a probabilistic judgment that must necessarily involve less certainty and precision than would be attainable under a purely retrospective analysis. Arithmetic certainty is not required, but the

---

[145] We find support for our view in Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico* ("*Guatemala – Cement II*"), WT/DS156/R, adopted 17 November 2000, para. 8.35. In that case, the panel was faced with the question of the relationship between the evidence necessary to form the basis for initiation of an anti-dumping investigation under Article 5.3, and the definition of dumping in Article 2 of the Agreement. That panel stated:

> "... reading Article 5.3 in the context of Article 5.2, the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation. We further observe that the only clarification of the term "dumping" in the AD Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. This analysis is done not with a view to making a determination that Article 2 has been violated through the initiation of an investigation, but rather to provide guidance in our review of the Ministry's determination that there was sufficient evidence of dumping to warrant an investigation. We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation."

[146] We discuss the nature of the likelihood determination in Article 11.3 in more detail *infra*.

[147] See, *supra*, note 48.

conclusions reached by an investigating authority must be reasonably demonstrable on the basis of the evidence adduced. In this respect, we endorse the view of the *US-DRAMs* panel that, "analysis involving prediction can scarcely aspire to a standard of inevitability".[148] There is thus a considerable difference in the degree of certainty and precision required in a determination of likelihood of continuation or recurrence of dumping under Article 11.3 and a determination of dumping under Article 2, which involves a calculation of dumping margins in accordance with the rules set out therein.

7.179 Moreover, in order to make a determination of likelihood of continuation or recurrence, it is not necessary for dumping to have been found to exist or continue since the imposition of the measure. We derive this from the reference to "recurrence", which we understand to refer to the re-commencement of a phenomenon that has ceased. We note that in some circumstances the imposition of the order may have resulted in the cessation of dumping.[149] As we have already said, the text of Article 11.3 does not require a *determination* of dumping. Rather, it requires a determination of the *likelihood of continuation or recurrence* of dumping.

7.180 Nevertheless, evidence relating to "dumping" (or absence thereof) since the imposition of the order, while perhaps not mandated by Article 11.3, may well be a relevant fact to take into account in determining likelihood of continuation or recurrence of dumping in the future.[150] It is logical to us that evidence relating to dumping (or the absence thereof) since the imposition of the order could well be instructive in a likelihood of continuation or recurrence of dumping determination. In our view, this evidence could be drawn from the results of administrative or other review procedures, or on the basis of other evidence gathered by the investigating authority during the sunset review itself and indicating the existence of dumping during the relevant period. Evidence of the existence of dumping in another jurisdiction might also be potentially relevant. We see no reason to believe, however, that the only evidence relating to the existence of dumping during the period of imposition of the order that can be considered is a full-blown determination of dumping made pursuant to Article 2. It must, however, be evidence which a reasonable mind would consider relevant to establishing the existence of dumping since the imposition of the order.

7.181 We note that, in the instant sunset review, the evidence that the DOC had before it included the dumping margins calculated in the administrative reviews since the imposition of the original order.

7.182 If any interested party in the underlying sunset review had been of the view that the administrative review dumping margins were flawed such that they were not probative as to the existence of dumping during the period of imposition of the anti-dumping order, they could have brought that to the attention of the DOC. We therefore look to the record of the underlying review in order to discern whether the DOC was made aware of any such concerns - in particular, with respect to the use of margins calculated on the basis of "zeroing" by a weighted average-to-transaction methodology -- regarding the facts pertaining to dumping before the DOC.

---

[148] Panel Report, *US – DRAMS*, *supra*, note 45, para. 6.43. Although that panel was addressing obligations under Article 11.2, we consider that its treatment of the nature of a prospective analysis to be relevant.

[149] In this context, we note that the provisions of Article 9.3 of the *Anti-dumping Agreement* are designed to ensure that the amount of the anti-dumping duty collected corresponds to the actual margin of dumping at the time of importation and that any excess payment is refunded to the importer(s).

[150] We observe that the imposition of an anti-dumping measure may affect the behaviour of exporters, and that, even if an authority conducted a full-blown dumping determination with respect to the period since the imposition of the order, the result, while perhaps relevant, may not, in and of itself, necessarily be determinative as to the likelihood of continuation or recurrence of dumping if the order were revoked. We need not decide, and express no view, as to whether evidence relating solely to the existence of dumping since the imposition of the order would be a sufficient basis for the purposes of an Article 11.3 likelihood determination.

7.183 We are unable to find, in any of NSC's submissions to the DOC in this sunset review, any indication that the NSC asked the DOC to question or scrutinize the validity of the administrative review dumping margins because they had been calculated on the basis of "zeroing". Rather, these submissions indicate that the NSC itself *relied upon* the decrease in the margins that had been found to exist in the administrative reviews in order to support its sunset review argument to the DOC that there was no likelihood of continuation or recurrence of dumping in the event the order would be revoked.[151] Such positive reliance by the NSC itself upon the administrative review dumping margins as a "fact" – without questioning the methodology by which they had been calculated – leads us to conclude that it would not have been unreasonable for the DOC, in the particular circumstances of this case, to have considered that these administrative review dumping margins could properly be taken into account in considering whether likelihood of continuation or recurrence of "dumping" existed. Japan has not demonstrated before us that, in the particular circumstances of this case, an objective and unbiased authority could not reasonably have made the likelihood determination made by the DOC on the basis of the facts that were before it at that time.

7.184 For these reasons, we find, in the alternative, that the United States has not acted inconsistently with Article 11.3 in this respect.[152]

iii) DOC's Reporting to the ITC the Likely Dumping Margin

7.185 Japan argues that the DOC acted inconsistently with Article 11.3 by reporting to the ITC the original dumping margins as the margins that were likely to continue or recur.[153] This, in Japan's view, does not conform to the prospective nature of sunset reviews. The United States asserts that nothing in the text of the *Anti-dumping Agreement* prevents the DOC from determining the likely margin on the basis of the original dumping margin. Given that dumping continued after the imposition of the order and that import volumes decreased, the DOC did not find it appropriate to report to the ITC a more recently calculated margin.[154]

7.186 It is clear that, in this case, the DOC reported to the ITC the dumping margins calculated in the original investigation as the margins that were likely to continue or recur if the order were to be terminated. It is also clear that the DOC did not report these margins to the ITC because they were (re-)calculated in this sunset review. Rather, the DOC points out that it reported the original margins because it found that there was dumping after the imposition of the original measure and that import volumes had decreased. On the basis of this reasoning, the DOC decided to report the original margins -- as the margins that were likely to continue or recur if the order were to be terminated -- to the ITC although it was in the possession of more recent margins, i.e. margins calculated in the subsequent administrative reviews.

7.187 We note Japan's statement that the only injury claim Japan is making in the present case relates to cumulation.[155] Therefore we need to clarify the legal basis of this allegation of Japan. As we have stated above (*supra*, para. 7.162), Japan does not argue that Article 11.3 requires

---

[151] For example, NSC's substantive response to the notice of initiation (Exhibit JPN-19a), stated: "...NSC has reduced its margin in the two recent administrative reviews ..." (at p. 5); and, referring to the SAA: "The unambiguous meaning of that statement is that a declining *trend* in dumping margins ....will support a determination to revoke the antidumping order under review" (at p. 6). NSC's rebuttal comments (Exhibit JPN-19b) indicate that the NSC did have concerns about the validity of some of the "facts" before the DOC, and that the NSC complained about incorrectly compiled *import volume* data. However, NSC nowhere contested the validity of the administrative review dumping margins on the grounds that they were possibly flawed due to "zeroing". Similarly, NSC's case brief (Exhibit JPN-19c) contains no indication of any possible flaw in the administrative review dumping margins due to "zeroing".

[152] We examine *infra*, para. 7.278 ff, Japan's remaining arguments concerning the sufficiency of the factual basis before the DOC in reaching its likelihood determination.

[153] First Written Submission of Japan, para. 225.

[154] First Written Submission of the United States, para. 140.

[155] Response of Japan to Question 92 from the Panel.

investigating authorities to calculate precisely the likely future margin of dumping in sunset reviews. Also as stated above (*supra*, para. 7.162), it is undisputed between the parties that the DOC did not calculate a likely future margin in this sunset review. The DOC did, however, report margins from the original investigation to the ITC as the margins that would prevail if the duty were terminated.

7.188 It is clear that reporting of these margins to the ITC is not part of DOC's determination of *likelihood* of continuation or recurrence of dumping. Rather, such reporting occurs as a result of the finding of likelihood. At most, it seems to us that this element could be raised as part of a claim challenging ITC's injury determinations, since the margin of dumping is one of the injury elements set out in Article 3.4, which may arguably have to be considered in the likelihood of continuation or recurrence of *injury* determinations in sunset reviews (an issue which we need not resolve here). However, Japan has confirmed to us that the only injury claim that Japan raised in its request for establishment relates to cumulation. Thus, we must consider whether the claim Japan is making is properly before us in this dispute.

7.189 As we stated above (*supra*, para. 7.49) concerning our terms of reference, we must closely scrutinize the Panel request to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*.[156] In examining the sufficiency of the Panel request under Article 6.2 of the *DSU*, we must consider the text of the Panel request itself.[157] If necessary, we would also take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by any alleged lack of specificity in the text of the Panel request.[158]

7.190 Japan's request for the establishment reads in relevant part:

> The ITC does not consider whether imports were negligible as defined in Article 5.8 of the AD Agreement when determining whether to cumulate imports in a five-year "sunset" review. In addition, the ITC, in this case, never examined whether imports were negligible and therefore whether they should, or should not, be cumulated. In light of footnote 9 of the AD Agreement, the United States has acted inconsistently with Articles 3.3, 5.8, 11.3, 12.2 and 12.3 of the AD Agreement and Article X:3 of the GATT 1994.[159]

7.191 The cited section of Japan's Panel request only refers to the ITC's alleged failure to consider the quantitative criterion of Article 5.8 before deciding to apply the cumulation methodology. It does not mention any other aspect of the ITC's likelihood of continuation or recurrence of injury determinations in this sunset review. Thus, it is clear that Japan's only injury-related claim concerns cumulation. Therefore, we do not believe it is necessary to examine the issue of prejudice to the United States by any alleged "lack of specificity" in the Panel request. We therefore find that the alleged claim by Japan challenging the DOC's reporting of the original dumping margins to the ITC to be used by the latter in its likelihood of continuation or recurrence of *injury* determinations is not properly before us. We thus decline to examine it.

6. Basis of determination of likelihood of continuation or recurrence of dumping: order-wide or company-specific?

(a) US Sunset Policy Bulletin as such

(i) Arguments of parties

---

[156] We find support for this approach in Appellate Body Report, *EC – Bananas III*, *supra*, note 49, para. 142.

[157] Each of the treaty provisions we examine here is cited in the Panel request and therefore meets at least that minimum standard.

[158] We find support for this approach in Appellate Body Report, *Korea – Dairy*, *supra*, note 54.

[159] WT/DS244/4, p. 5, para. 4.

Japan

7.192 According to Japan, Article 6.10 -- which is expressly incorporated into Article 11 by virtue of the cross-reference in paragraph 4 thereof to "[t]he provisions of Article 6 regarding evidence and procedure" -- requires an investigating authority in a sunset review to determine likelihood of continuation or recurrence of dumping for each known exporter. Japan submits that all provisions of Article 6 are procedural in nature. The fact that some of these procedural provisions might have substantive implications does not make them inapplicable in sunset reviews. The Sunset Policy Bulletin[160], however, directs the DOC to make its determination of likelihood of continuation or recurrence of dumping on an order-wide basis in sunset reviews. Therefore, submits Japan, this aspect of the Sunset Policy Bulletin is inconsistent with Articles 6.10 and 11.3 of the *Anti-dumping Agreement*.

United States

7.193 The United States does not contest that the US law requires that determinations of likelihood of continuation or recurrence of dumping in sunset reviews be made on an order-wide basis, and that the Sunset Policy Bulletin states the determinations of likelihood will be made on an order-wide basis.[161] However, the United States submits that there is nothing in Article 11.3, the provision of the *Anti-dumping Agreement* that contains a substantive requirement, relating to sunset reviews, that requires that the investigating authorities carry out their likelihood of continuation or recurrence of dumping determinations in sunset reviews on a company-specific basis. The United States also argues that the inclusion of the phrase "regarding evidence and procedure" in the cross-reference to Article 6 in Article 11.4 limits the provisions of Article 6 that apply to sunset reviews to procedural provisions only. The provisions in Article 6 that set forth substantive rules, such as paragraph 10, do not therefore apply to sunset reviews. Therefore, the US law does not violate the *Anti-dumping Agreement* in requiring that the determination of the likelihood of continuation of dumping be made on an order-wide basis in a sunset review.

(ii) Arguments of third parties

Chile

7.194 Chile submits that dumping determinations in sunset reviews under Article 11.3 should be made on an company-specific basis.

(iii) Evaluation by the Panel[162]

7.195 Japan bases its "as such" claim solely on the Sunset Policy Bulletin. Japan has not directly invoked any provision of US law. Accordingly, we also limit our analysis to the provisions of the Sunset Policy Bulletin. We have found above (*supra*, para. 7.145) that the Sunset Policy Bulletin is not a measure that is challengeable, as such, under the *WTO Agreement*. Therefore, we examine this claim by Japan no further.

---

[160] Exhibit JPN-6, Section II:A.2 at 18872.

[161] The United States points out that the US Statute requires the DOC to carry out its likelihood of continuation or recurrence of dumping determinations on an order-wide basis in sunset reviews. Section 751(c)(1) of the Statute states: "[T]he administering authority and the Commission shall conduct a review to determine ... whether revocation of the ... anti-dumping order ... would be likely to lead to continuation or recurrence of dumping." *See* First Written Submission of the United States, para. 162.

[162] In this section, we examine Japan's allegation that the DOC's making of its likelihood determination on an order-wide basis as envisaged in the Sunset Policy Bulletin, as such, is inconsistent with Article 6.10 and Article 11.3 of the *Anti-dumping Agreement*.

(b) US Sunset Policy Bulletin as applied in the instant sunset review

(i) Arguments of parties

Japan

7.196 Japan submits that the United States acted inconsistently with Articles 6.10 and 11.3 of the *Anti-dumping Agreement*, by virtue of the cross-reference in Article 11.4 to the "[t]he provisions of Article 6 regarding evidence and procedure", as the likelihood of continuation or recurrence of dumping determination in this case was made on an order-wide basis.

United States

7.197 The United States submits that it made its likelihood determination on an order-wide basis in the instant sunset review and argues that the *Anti-dumping Agreement* does not require the investigating authorities to carry out their likelihood of continuation or recurrence of dumping determinations in sunset reviews on a company-specific basis. The United States nevertheless contends that, in the instant sunset review, the DOC also identified company-specific dumping margins likely to prevail in the event of revocation of the order.[163]

(ii) Evaluation by the Panel[164]

7.198 We understand Japan's claim to be based on an alleged violation of Article 11.3 of the *Anti-dumping Agreement*, as well as of Article 6.10, by virtue of the cross-reference in Article 11.4 to "[t]he provisions of Article 6 regarding evidence and procedure".

7.199 The United States does not contest that it made its determination of likelihood of continuation or recurrence of dumping on an order-wide basis in the instant sunset review. The United States also submits that it reported company-specific margins of dumping likely to prevail in the event of revocation of the order to the ITC.[165]

7.200 The issue before us is, therefore, whether Article 6.10, to the extent applicable by virtue of the cross-reference in Article 11.4, requires likelihood of continuation or recurrence of dumping determinations in sunset reviews under Article 11.3 to be made on a company-specific basis. We understand Japan to base this claim on the interrelationship between Articles 6.10, 11.4 and 11.3, rather than on the text of Article 11.3 itself. We therefore examine the nature of this interrelationship. This examination naturally focuses upon the text of the relevant treaty provisions. It turns upon the role of the qualifying phrase in the Article 11.4 cross-reference, as well as the nature of the obligations in Article 6.10.

7.201 Article 11.4 states, in part:

> "The provisions of Article 6 *regarding evidence and procedure* shall apply to any review carried out under this Article..." (emphasis added)

---

[163] First Written Submission of the United States, para. 167.

[164] In this section, we examine Japan's allegation that the DOC's making of its likelihood determination on an order-wide basis, in this case, is inconsistent with Article 6.10 and Article 11.3 of the *Anti-dumping Agreement*.

[165] Response of the United States to Question 26 (a) from the Panel. The United States stated: "Likelihood of dumping in the event of revocation was determined by Commerce in the instant sunset review on an order-wide basis. Margins likely to prevail in the event of revocation, however, were reported to the USITC on a company-specific basis for its consideration in making the likelihood of injury determination."

7.202 Article 11.4 contains a cross-reference to "the provisions of Article 6 regarding evidence and procedure". The cross-reference to Article 6 is therefore qualified by the phrase "regarding evidence and procedure".

7.203 Considering that the drafters often chose not to qualify the scope of application of many of the other cross-references elsewhere in the *Anti-dumping Agreement*[166], the threshold question that we address is the effect of this qualifying phrase. As a treaty interpreter, we are bound to heed the text of the treaty and to give effect to all of the terms. We are not entitled to reduce words in a treaty to redundancy or inutility. Given this, we must consider whether or not this cross-reference operates so as to render all the obligations contained in Article 6.10 applicable to sunset reviews, and if so, what effect this would have on the nature of the sunset review determination that must be made. We therefore examine the nature and scope of the cross-reference in Article 11.4 in order to determine whether it encompasses all provisions of Article 6 or only a subgroup of, or aspects of, those provisions that relate to evidence and procedure.

7.204 The chapeau of Article 6.10 states:

> "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated."

7.205 This provision requires the investigating authorities in an investigation to calculate margins of dumping, as a rule, on a company-specific basis. According to the United States, Article 6.10 contains substantive provisions; it thus does not apply to sunset reviews because the cross-reference in Article 11.4 renders only the *procedural and evidentiary* provisions of Article 6 applicable to reviews.

7.206 Even assuming *arguendo* that the cross-reference in Article 11.4 has the effect of rendering any evidentiary and procedural obligations of Article 6.10 generally applicable in sunset reviews, we would not be permitted to find, because of this, that an investigating authority in a sunset review is required to re-calculate a likely future dumping margin. In other words, by finding that the provisions of Article 6.10 may contain evidentiary and procedural obligations that are, in general, applicable in sunset reviews, we do not (and cannot) find that Article 6.10, by virtue of the cross-reference in Article 11.4, operates so as to super-impose an *additional* substantive requirement of re-calculation of the likely dumping margin in sunset reviews, a requirement that not even Japan argues is found in the text of Article 11.3, or elsewhere in the text of the *Anti-dumping Agreement*. We, as a treaty interpreter, are not allowed to derive substantive obligations out of the application of the evidentiary and procedural provisions of Article 6.[167] Equally, however, an interpreter is not allowed to disregard the plain text of Article 6.10, which requires the investigating authorities to determine an individual margin of dumping for each known exporter, where an operational provision elsewhere in the *Anti-dumping Agreement* requires the calculation of a dumping margin.

7.207 The issue therefore is how Article 6.10 is to be understood in the context of sunset reviews. Article 11.3 requires the authorities to determine, *inter alia*, "that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury". It therefore refers to a determination of likelihood of continuation or recurrence of dumping, rather than a "determination of

---

[166] For example, the cross-references in Article 4.4 and the one in the chapeau of Article 9.3 seemingly fall under this category, where the cross-reference is not qualified.

[167] We note in this respect that both parties in this dispute agree that the likelihood determination under Article 11.3 does not require the calculation of the likely margin of dumping.

dumping". It also refers to "dumping" but not "the margin of dumping". By contrast, Article 6.10 applies to the calculation of "margins of dumping" for each known exporter or producer concerned of the product under investigation. Considering that we have found no substantive requirement imposed by Article 11.3 or any other provision in the *Anti-dumping Agreement*, that an investigating authority must actually calculate the (likely) margin of dumping in a sunset review, we also find that the determination of likelihood of continuation or recurrence of dumping does not fall within the ambit of this aspect of Article 6.10, regulating the process of calculating margins of dumping. The provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.

7.208 Having found that the obligation in Article 6.10 to determine company-specific margins of dumping does not operate so as to require that the *likelihood* determination that must be made under Article 11.3 must be made on a company-specific basis, we find that the United States did not act inconsistently with its obligations in this case by determining likelihood of continuation or recurrence of dumping on an order-wide basis.

7. Obligation to determine likelihood of continuation or recurrence of dumping

(a) US law and Sunset Policy Bulletin as such

(i) Arguments of parties

Japan

a. "likely" vs. "not likely" standard

7.209 Japan submits that Article 11.3 requires a determination that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury, and therefore requires the application by investigating authorities of a "likely" standard. According to Japan, the US Sunset Regulations require the application of a "not likely" standard in respect of the DOC's determinations in sunset reviews, which runs afoul of this "likely" standard of Article 11.3. Japan contends that the meaning of "likely" is not identical to that of "not unlikely" in that the former provides for a greater degree of certainty as to the continuation or recurrence of dumping than the latter.

b. obligation to determine likelihood

7.210 Japan also contends that the Sunset Policy Bulletin follows this "not likely" standard of the Regulations and "creates an irrebuttable presumption that dumping is “likely” to continue."[168] According to Japan, investigating authorities in sunset reviews should base their likelihood determinations on a prospective analysis of positive evidence. To do so, the investigating authorities are required to gather factual evidence on which they will base their determinations. The US Sunset Policy Bulletin, however, bars the DOC from fulfilling this obligation. It simply creates certain factual scenarios, draws certain presumptions from each one of these scenarios and directs the DOC to examine under which scenario the facts of a given sunset review fall.[169] Japan submits that, applied together, these factual scenarios create an irrefutable presumption that dumping is likely to continue or recur, thereby barring the DOC from conducting a meaningful examination of the facts of the particular sunset review it is dealing with.

[168] Response of Japan to Question 38 from the Panel.

[169] In this respect, Japan cites the Sunset Policy Bulletin (Exhibit JPN-6, p. 18872). *See*, First Written Submission of Japan, para. 118.

7.211 Japan submits that, in a sunset review, the investigating authority is required to carry out a prospective analysis regarding the likelihood of continuation or recurrence of dumping. That analysis should rest on sufficient evidence. It is up to the investigating authority to make sure that its findings in this respect are premised on sufficient evidence. The US Sunset Policy Bulletin, however, precludes the DOC from fulfilling that requirement imposed under Article 11.3 of the *Anti-dumping Agreement*, because under the "good cause" requirement, the DOC does not consider evidence about factors other than those listed in the US legislation unless "good cause" has been shown as to why the DOC should consider those other factors.[170]

United States

a. "likely" vs. "not likely" standard

7.212 The United States submits that under US law what determines the standard for determining likelihood of continuation or recurrence of dumping in a sunset review is the Statute and not the Sunset Regulations. The Statute itself contains the "likely" standard as provided for in Article 11.3. The relevant provision in the Sunset Regulation cited by Japan, which refers to "not likely", is not operative: it is a timing provision and "ministerial" in nature. This provision refers to a negative likelihood determination in terms of procedure and does not define the substance of the determination to be made in a sunset review. The United States also argues that even assuming that the Regulations in fact contained a substantive standard inconsistent with that of the Statute, the US administering authorities would have to follow the provisions of the Statute, not those of the Regulation.[171]

b. obligation to determine likelihood

7.213 The United States also disputes Japan's argument that the factual scenarios set out in the SAA and the Sunset Policy Bulletin bar the DOC from carrying out a prospective likelihood analysis in sunset reviews. The United States submits that neither the SAA nor the Bulletin are binding legal instruments under US law, hence they can not be challenged independently as a violation of WTO obligations.

(ii) Arguments of third parties

Chile

7.214 Chile argues that the structure of the US law based on presumptions is contrary to Article 11.3 and inconsistent with the pro-active approach envisaged in the *Anti-dumping Agreement*.

European Communities

7.215 The European Communities is of the view that the US law with respect to likelihood determinations in sunset reviews of anti-dumping orders, as well as the DOC's general practice based on it, as described in its Sunset Policy Bulletin, falls short of the requirements of Article 11.3. Whereas Article 11.3 requires that anti-dumping duties be terminated no later than five years from their imposition unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury, the Sunset Regulations require the DOC to effectively apply a "not likely" standard. The European Communities also agrees with Japan's argument that Article 11.3 requires that the "likelihood" of the continuation or recurrence of dumping must be established on a prospective, rather than a retrospective, basis and that the "determination" must be based on positive evidence (while not requiring absolute certainty).

[170] First Written Submission of Japan, paras. 127-129.
[171] Second Written Submission of the United States, para. 23.

7.216 The European Communities does not disagree with the use of past dumping margins in sunset reviews, *per se*. However, it asserts that the US law violates the *Anti-dumping Agreement* in requiring the DOC to rely solely on historical margins in sunset reviews.[172]

Korea

7.217 Korea submits that, on the basis of reasoning analogous to that of the *US-DRAMs* panel, the use of a "not likely" standard for sunset reviews rather than the "likely" standard of Article 11.3 indicates that the US law is biased in favour of the continuation of the dumping order and is therefore inconsistent with US obligations. Korea also asserts that the Sunset Policy Bulletin directs the DOC to examine whether the facts of the particular sunset review fall into certain factual scenarios and that that these scenarios create an irrefutable presumption of the likelihood of dumping.

Norway

7.218 Norway considers that the DOC does not take the proper prospective approach to determine whether dumping is likely to continue in a sunset review and therefore acts inconsistently with Article 11.3 as a general practice and in this case. Notwithstanding the previous panel decision (in *US-DRAMS*), the United States continues to maintain the "not likely" standard in its Regulations with respect to sunset reviews. Moreover, the Sunset Policy Bulletin impermissibly restricts any real factual investigation to determine prospectively whether dumping is "likely" to continue or recur, nonetheless the terms "likely" and "determine" in Article 11.3 require that the authorities undertake a prospective analysis of positive evidence to establish whether dumping is likely to continue or recur.

7.219 Norway does not disagree with the use of past dumping margins in sunset reviews, *per se*. However, argues Norway, the investigating authorities should also consider evidence regarding the present situation.[173]

(iii) Evaluation by the Panel[174]

a. "likely" vs. "not likely" standard

7.220 As always, we begin with the text of the relevant treaty provision. The relevant part of Article 11.3 states:

> "…[U]nless 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…" (footnote omitted)

7.221 The parties agree that the standard that applies to the likelihood determinations under Article 11.3 of the *Anti-dumping Agreement* is the "likely" standard. Therefore, the issue before us is whether the standard set forth under US law corresponds to the "likely" standard of Article 11.3.

---

[172] Response of the European Communities to Question 11 from the Panel.

[173] Response of Norway to Question 14 from the Panel.

[174] In this section, we first examine Japan's allegation that the DOC regulation's allegedly imposing a "not likely" standard rather than a "likely" standard is, as such, inconsistent with Article 11.3 of the *Anti-dumping Agreement*. We then examine Japan's allegation that the Sunset Policy Bulletin, as such, establishes an irrefutable presumption that dumping is likely to continue where import volumes decline or where dumping margins remain after imposition of the order which is inconsistent with the requirement in Article 11.3 of the *Anti-dumping Agreement* that authorities make a prospective determination that dumping is likely to recur or continue.

7.222 We shall carry out our analysis on the basis of the relevant provisions under US law in order to decide what standard that law provides for. We recall that the purpose of our examination of US municipal law is to determine the consistency of the law with the obligations of the United States under the *WTO Agreement*.[175]

7.223 We turn to the Statute first. We note that Section 751(c) of the Tariff Act of 1930 which, according to the United States[176], sets forth the likelihood standard under US law reads in relevant part:

> "(c) Five-year review
>
> (1) In general
>
> …5 years after the publication of --…an antidumping duty order…the administering authority and the Commission shall conduct a review to determine…whether revocation of the …antidumping duty order …would be <u>likely to</u> lead to continuation or recurrence of dumping…and of material injury."[177] (emphasis added)

7.224 Section 751(d)(2) of the Statute provides in relevant part:

> "Five-year reviews
>
> In the case of a review conducted under subsection (c) of this section, the administering authority shall revoke a countervailing duty order or an antidumping duty order or finding, or terminate a suspended investigation, unless --
>
> the administering authority makes a determination that dumping or a countervailable subsidy, as the case may be, would be <u>likely</u> to continue or recur[.]"[178] (emphasis added)

7.225 On the basis of the relevant provisions of the Statute, it appears to us that, on its face, the Statute provides for the same standard as Article 11.3 of the *Anti-dumping Agreement*, i.e. the "likely" standard. In fact the language of the Statute is very similar to the text of Article 11.3 in this respect.

7.226 Next we turn to the Regulations. The US Regulations provide in relevant part:

> "(i) *Revocation or termination based on sunset review*--(1) *Circumstances under which the Secretary will revoke an order or terminate a suspended investigation.* In the case of a sunset review under §351.218, the Secretary will revoke an order or terminate a suspended investigation:
>
> …
>
> (ii) Under section 751(d)(2) of the Act, where the Secretary determines that revocation or termination is <u>not likely</u> to lead to continuation or recurrence of a countervailable subsidy or dumping (see section 752(b) and section 752(c) of the Act) as applicable not later than 240 days…after the date of publication in FEDERAL REGISTER of the notice of initiation…"[179] (italic emphasis in original, underline emphasis added)

---

[175] See *supra*, note 104.
[176] Response of the United States to Question 37 from the Panel.
[177] Codified in 19 U.S.C. § 1675(c)(1) (Exhibit JPN-1d at 473-474).
[178] Codified in 19 U.S.C. § 1675(d)(2) (Exhibit JPN-1d at 477).
[179] Codified in 19. C.F.R. §351.222(i)(1)(ii) (Exhibit JPN-3 at 234).

7.227 The phrase "not likely" rather than "likely" thus appears in the text of the Regulations. The crux of the disagreement between the parties is whether the language "not likely" in the Regulations sets forth the standard under US law regarding the likelihood determinations in sunset reviews. We thus analyze the provisions of the Regulations in their legal context and in conjunction with the Statute.

7.228 Under US law (as is probably the case in most other jurisdictions as well), a regulation is subordinate to a statute.[180] In addition to that general observation, we note that the above text of the Regulations further confirms, by its own terms, that the Regulations are subservient to the Statute, by referring to the Statute's relevant provisions. Therefore, the Regulations set forth the procedural means of implementing the "likely" standard provided for in the Statute regarding sunset determinations. In the context of its sunset review determinations, the DOC may come up with two possible conclusions: it may find that the continuation or recurrence of dumping is either likely or not likely. In each case, there are procedural steps to be taken by the DOC in order to proceed with and implement the sunset review determination. The text of the quotation above from the Regulations indicates what happens when the US administering authorities make a negative determination with respect to whether there is a likelihood of continuation or recurrence of dumping in a sunset review.

7.229 The fact that the Regulations do not change the standard applicable to sunset reviews under the Statute is further confirmed on the basis of a comparison of the language used in these two legal instruments. For example, the Statute contains the word "shall" whereas the Regulations contain "will". Also, the phrase "where the Secretary determines" confirms the view that the Regulations describe what occurs when a negative determination is formally made, and not the standard by which that determination is made.

7.230 We also note that the text of the Regulations following the above quotation deals with further procedural issues, such as the effective date of revocation.[181] Therefore, we agree with the US argument that this does not operate so as to undermine the "likely" standard set by the Statute.

7.231 Furthermore, we consider the use of the "likely" standard in the notice of continuation in this case to be also indicative of the fact that under US law the standard for the likelihood determinations in sunset reviews is the "likely" standard.[182]

7.232 Finally in this respect, given that the parties expressed divergent views regarding the relevance of the panel's decision in *US – DRAMs*, we find it necessary to distinguish that case from the present proceedings.

7.233 As an initial matter, we note that the *US – DRAMs* case involved the standard used by the United States in Article 11.2 changed-circumstances reviews. The panel in *US – DRAMs* found that a "likely" standard was not equal to a "not likely" standard in the sense that the former provided for a greater degree of certainty than the latter.[183] Therefore, that panel's decision may be relevant to the case at hand. In other words, had we found in this case that the standard under US law was "not likely" rather than "likely", we could follow the same line of reasoning of the panel in *US – DRAMs* and conclude that US law was WTO-inconsistent. However, we did not. Therefore the panel's decision in *US – DRAMs* is not relevant to this aspect of our case.

---

[180] Second Written Submission of the United States, para. 23.

[181] Codified in 19. C.F.R. §351.222(i)(1)(ii) (Exhibit JPN-3 at 234).

[182] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e, pp. 6 and 8). The Final Determination states, *inter alia*: "Therefore, an analysis of the relationship between dumping margins and import volumes before and after the issuance of the order demonstrates that dumping will continue if the order were revoked"; and "[t]herefore, given that dumping continued after the issuance of the order and imports continued in 1998 at levels far below pre-order levels, we determine that dumping is *likely* to continue if the order were revoked." (emphasis added)

[183] Panel Report, *US – DRAMS* , *supra*, note 48, paras. 6.45-6.46.

7.234 We also note that there are a number of important factual differences between the two cases. In *US – DRAMs*, the language contained in the US Regulations gave the impression that the use of the phrase "not likely" in the Regulations aimed at setting the relevant standard under US law for purposes of Article 11.2 reviews. The Regulations in that case read in relevant part:

> "The Secretary may revoke an order in part if the Secretary concludes that:
>
> (…)
>
> (ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value;
>
> (…)"[184]

7.235 This text seems to indicate that the Secretary would apply a "not likely" standard in order to determine whether there is a likelihood of continuation or recurrence.

7.236 Secondly, in *US – DRAMs* the DOC's Final Determination clearly stated that it applied the "not likely" standard in its determination. That also distinguishes *US - DRAMs* from the present case where the DOC's Final Determination clearly uses the "likely" standard.

7.237 Finally, in *US – DRAMs*, unlike the present case, there was no discussion of a statute providing for the "likely" standard. The panel in *US – DRAMs* made its decision on the basis of the text of the Regulations and the DOC's Final Determination. In this case, however, the Statute, which is before us, provides for the "likely" standard. By the same token, the DOC's Final Determination regarding the likelihood of continuation or recurrence of dumping contains the "likely" standard.

7.238 Therefore, in light of these factual differences between the two cases, we find that the findings of the panel in *US – DRAMs* regarding the type of the likelihood standard used under US law are not determinative for the present case.

7.239 On the basis of the above considerations, we conclude that the US law is not inconsistent with Article 11.3 of the *Anti-dumping Agreement* regarding the standard that applies to sunset determinations.

b. Obligation to "determine" likelihood

7.240 The US legal framework relevant to this allegation of Japan is as follows.

7.241 The US Statute reads in relevant part:

> "(c) Determination of likelihood of continuation or recurrence of dumping
>
> (1) In general
>
> In a review conducted under section 1675(c) of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under section 1673c of this title would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider—
>
> (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

[184] Panel Report, *US – DRAMS* , *supra*, note 48, para. 6.37.

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

(2) Consideration of other factors

If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant."[185] (emphasis added)

7.242 The Statute stipulates that under US law the DOC in a sunset review will base its likelihood determinations normally on two sets of information provided for in the Statute: dumping margins determined in the investigation and subsequent reviews, and the volume of imports before and after the imposition of the measure. Interested parties wishing to submit certain pieces of information (other than the two sets of information set out in the Statute) to the DOC for consideration in a sunset review must show that there is good cause that justifies the consideration of that evidence in that sunset review.

7.243 In addition to these statutory provisions, the Regulations stipulate that evidence showing that there is good cause for the DOC to consider certain information has to be submitted in the substantive response of the interested party submitting the information, i.e. 30 days after the notice of initiation has been published. The Regulations read, in relevant part:

"(3) *Substantive response to a notice of initiation – (i) Time limit for substantive response to a notice of initiation*. A complete substantive response to a notice of initiation, filed under this section, must be submitted to the Department not later than 30 days after the date of publication in the FEDERAL REGISTER of the notice of initiation.

…

(iv) *Optional information to be filed by interested parties in substantive response to a notice of initiation* –(A) *Showing good cause*. An interested party may submit information or evidence to show good cause for the Secretary to consider other factors…Such information or evidence must be submitted in the party's substantive response to the notice of initiation under paragraph d(3) of this section."[186] (italic emphasis in original, underline emphasis added)

7.244 The Sunset Policy Bulletin states that the DOC will examine whether the facts of a particular sunset review fall into one of four factual scenarios (all relating to historical dumping margins and/or import volumes). In respect of three of the four factual scenarios, the Department will normally determine that revocation of an antidumping order is "likely" to lead to continuation or recurrence of dumping:

"(a) dumping continued at any level above *de minimis* after the issuance of the order or suspension agreement, as applicable;

(b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or

[185] Codified in 19 U.S.C. §1675(a)(c)(1) and (2) (Exhibit JPN-1e at 496-497).
[186] Codified in 19 C.F.R. §351.218(d)(3)(i) and (iv) (Exhibit JPN-3 at 223-225).

> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly."[187]

In respect of the fourth scenario, the Sunset Policy Bulletin also states:

> "…the Department normally will determine that revocation of an antidumping order … is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order … and import volumes remained steady or increased."[188]

7.245 Japan presents two arguments to demonstrate that the US law as such is inconsistent with the *Anti-dumping Agreement* in respect of the investigating authorities' obligation to determine likelihood under Article 11.3. First, Japan argues that by creating in the Bulletin certain factual scenarios under which the DOC is to find likelihood and other scenarios under which it will find no likelihood, the US law limits the DOC's ability to consider fully the circumstances of a particular sunset review on which to base its determinations.[189] Secondly, Japan argues (again on the basis of the Bulletin) that the fact that under US law an interested party has to show good cause in order for the DOC to consider certain evidence submitted by that party is also inconsistent with Article 11.3.[190]

7.246 Regarding both arguments, Japan exclusively invokes the provisions of the Bulletin (as opposed to the Statute or the Regulations). Japan has referred to no provision under US law to support its arguments.[191] We have found above (*supra*, para. 7.145) that the Sunset Policy Bulletin is not challengeable as such under the *WTO Agreement*. We therefore examine no further Japan's "as such" allegations relying solely on the Sunset Policy Bulletin.

(b) US law and Sunset Policy Bulletin as applied in the instant sunset review

(i) Claims under Articles 6.1, 6.2 and 6.6 of the Anti-dumping Agreement

Arguments of parties

Japan

7.247 Japan submits that in this sunset review the DOC violated Articles 6.1, 6.2 and 6.6 of the *Anti-dumping Agreement* by refusing to consider information submitted by NSC on 11 May 2000 on the grounds that it was submitted after the expiry of the 30-day deadline provided under US law for the submission of substantive information in a sunset review.[192] That, in Japan's view, amounted to a denial of NSC's right to defend its interests in this sunset review. According to Japan, the DOC impermissibly narrowed NSC's ability to submit evidence for its defense and therefore acted inconsistently with Article 6.[193]

United States

7.248 The United States submits that the Japanese exporters were given 15 months advance notice of the forthcoming initiation of the instant sunset review. Following the initiation, exporters were

---

[187] *Sunset Policy Bulletin*, 63 FR at 18872 (Exhibit JPN-6)
[188] *Sunset Policy Bulletin*, 63 FR at 18872 (Exhibit JPN-6)
[189] First Written Submission of Japan, paras. 118-119.
[190] First Written Submission of Japan, paras. 127-129.
[191] In this respect we note in particular Japan's statement that it did not challenge the US Regulations as part of its argument about the good cause requirement under US law. *See*, Response of Japan to Question 93 from the Panel.
[192] First Written Submission of Japan, para. 146.
[193] First Written Submission of Japan, para. 149.

given 30 days - the same amount of time provided for under Article 6.1.1 - to submit their substantive response. It is therefore evident that NSC was given full opportunity to present evidence in this sunset review. According to the United States, therefore, Japan fails to demonstrate how requiring the exporters to submit all their evidence within 30 days following the initiation of the sunset review violates Article 6.

Findings of the Panel[194]

7.249 Before proceeding to our analysis of this claim, we find it useful to refer to the facts relevant to the resolution of this dispute. As stated above, under US law, an interested party in a sunset review wishing the DOC to consider information other than the information set out in the Statute has to provide the DOC with good cause for the consideration of that evidence.[195] Good cause evidence needs to be submitted to the DOC within 30 days after the initiation of the sunset review, i.e. together with the party's substantive response.[196] Interested parties can request an extension of that deadline.[197]

7.250 The sunset review at issue was initiated on 1 September 1999. After the initiation, NSC submitted its substantive response in a timely manner. Also submitted in a timely manner was NSC's case brief and rebuttal case brief.[198] In its rebuttal case brief submitted on 11 May 2000, NSC also submitted information about an "other factor" that it thought should be considered by the DOC in its determinations, as Japan was of the view that this information tended to demonstrate why its volume of shipments to the US had not been dependent on the existence of dumping margins over the period. In this context, NSC asserted that the termination of the duty would not result in an increase in NSC's exports of the subject product into the United States because NSC had a controlling interest in a US company that produced the same product in the United States.[199] Under US law, NSC had to show good cause to the DOC within 30 days from the initiation of the sunset review, i.e. by 1 October 1999, for the DOC to consider this information. NSC submitted the additional information in May 2000, approximately seven months after the deadline. The US law provides for the possibility of extension of this deadline. However, while NSC requested and received an extension for another of its submissions, it did not make such a request in this context. The DOC informed NSC of its decision to refuse to consider the information in question in its Final Determination, issued two months after the 11 May 2000 submission was made. The DOC's Final Determination in this sunset review states the following regarding its decision to refuse to consider the additional information in the 11 May 2000 submission of NSC:

> "We agree with domestic interested parties that NSC has not shown good cause for the Department to consider other factors, including whether NSC's 50 percent-owned galvanizing plant achieved full production or NSC has maintained a steady base of customers. As specified in 19 CFR 351.218(d)(3)(iv), if an interested party wants the Department to consider other factors during the course of a sunset review, the party must submit the evidence of good cause in its substantive response. Because the NSC did not submit the additional information in their substantive response, we do not find good cause to examine other factors in this review. Further, as domestic interested

[194] In this section, we examine Japan's allegation that the DOC's refusal to accept and consider additional information submitted by a Japanese respondent in this case is inconsistent with Articles 6.1, 6.2, and 6.6 of the *Anti-dumping Agreement*. Subsequently, we examine Japan's allegation that the Sunset Policy Bulletin, as applied in this case, establishes an irrefutable presumption that dumping is likely to continue where import volumes decline or where dumping margins remain after imposition of the order, which is inconsistent with the requirement in Article 11.3 of the *Anti-dumping Agreement* that authorities make a prospective determination that dumping is likely to recur or continue.

[195] Codified in 19 U.S.C. §1675(a)(c)(1) and (2) (Exhibit JPN-1e at 496-497).

[196] *Ibid*.

[197] Response of the United States to Question 62 (f) from the Panel.

[198] As stated, *infra*, in para. 7.259 , NSC had requested an extension to the deadline for the submission of its case brief, which was granted by the DOC.

[199] Response of the United States to Question 59 from the Panel.

> parties point out, even if the Department were to consider these factors, they would be outweighed by the margin and import volume evidence on record. The factors do not provide sufficient evidence that NSC is not likely to dump in the future.[200]

7.251 It is apparent from the text of the Final Determination that the DOC's ground for refusing to consider the additional information in question was because the information was not submitted, and no good cause was shown, within the time-period provided for under US law, for the consideration of the additional information.

7.252 Japan claims that DOC's refusal to consider certain additional information contained in NSC's 11 May 2000 submission violated Articles 6.1,6.2 and 6.6 of the *Anti-dumping Agreement*. In response to Panel questioning, Japan clarified that its claim concerns more the *timing* aspect of the DOC's refusal as opposed to the requirement of good cause.[201] Therefore, we shall limit our analysis to the timing aspect of DOC's refusal to consider this information.

7.253 The issue before us is, therefore, whether the DOC's refusal to consider the information in NSC's 11 May 2000 submission on the basis of untimeliness was inconsistent with the provisions of Article 6 of the *Anti-dumping Agreement* which Japan has invoked (Articles 6.1, 6.2 and 6.6).

7.254 Turning to the relevant provision of the *Anti-dumping Agreement*, i.e. Article 6, we first note the provisions of Article 6.1 of the *Anti-dumping Agreement*, which deal with interested parties' right to submit evidence to the investigating authorities in an investigation and which is applicable to sunset reviews by virtue of the cross-reference to the provisions of Article 6 concerning evidence and procedure in Article 11.4. The chapeau of Article 6.1 reads:

"Article 6

Evidence

> 6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

Article 6.2 reads, in part:

> "Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."

Article 6.6 provides:

> "... the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."

7.255 Articles 6.1 and 6.2 make it clear that interested parties have a broadly-defined right to submit evidence to the investigating authority during a sunset review and are entitled to a full opportunity for

---

[200] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e at p.6).

[201] In this respect we note the following statement by Japan:

> The "good cause" requirement itself may also be inconsistent with Article 6, as it unreasonably restricts a respondent's ability to defend itself by improperly restricting the presentation of prospective information, and unreasonably restricted USDOC's ability to examine NSC's submitted information. But, Japan did not include this claim in its panel request. *See*, Response of Japan to Question 105 from the Panel.

the defense of their interests. Article 6.6 requires that the authorities satisfy themselves as to the accuracy of information submitted upon which they base their findings. In this respect, while recalling the distinction between rules of procedure and substance in the *Anti-dumping Agreement*[202], we also note the Appellate Body's statement, in *US – Carbon Steel*[203], that a determination of likelihood under Article 11.3 of the *Anti-dumping Agreement* requires the investigating authority to find, on the basis of adequate evidence, that there is likelihood. We consider that, in contrast to Article 6.6, the provisions of Articles 6.1 and 6.2 deal with the right of a party to *submit* information, including the temporal aspects of the submission of evidence. For its part, Article 6.6 addresses the obligations of the investigating authority in respect of the information supplied on which its findings are based. If we find that the United States did not act inconsistently with the temporal component of Articles 6.1 and 6.2 , we consider that there will be no need for us to address Japan's allegation under Article 6.6.

7.256 We therefore examine whether the DOC acted inconsistently with Articles 6.1 or 6.2 in this case by refusing to consider evidence for which no good cause had been shown by the 30-day deadline for filing the substantive response in US sunset reviews.

7.257 The focus of our inquiry under Article 6.1 of the *Anti-dumping Agreement* is whether NSC was given "ample opportunity" to submit all evidence which it considered relevant in respect of this sunset review and, under Article 6.2, whether NSC had a full opportunity for the defence of its interests throughout this sunset review.

7.258 The right of interested parties to submit information in a sunset review cannot be unlimited. One of the important limitations that can legitimately be imposed on that right is deadlines for the submission of information. We endorse the view of the panel – with which the Appellate Body also agreed -- in *US-Hot-Rolled Steel* that "in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines."[204] Investigating authorities must be able to control the conduct of their review and to carry out the multiple steps in a review required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their review within the time-limits mandated under the *Anti-Dumping Agreement*.[205] We note, in that respect, that Article 11.4 of the *Anti-Dumping Agreement* stipulates that reviews under Article 11 "shall be carried out *expeditiously* and shall normally be concluded within 12 months of the date of initiation of the review". (emphasis added) Furthermore, Article 6.14 provides generally that the procedures set out in Article 6 "are not intended to prevent the authorities of a Member from proceeding *expeditiously*". (emphasis added) Deadlines are, therefore, necessary and legitimate tools that allow investigating authorities to carry out and complete sunset reviews in a timely manner. Obviously, in cases where the *Anti-dumping Agreement* sets a certain deadline for the submission of certain information, the investigating authorities are bound by the deadline imposed by the *Anti-dumping Agreement*. An example of such a provision is Article 6.1.1 of the *Anti-dumping Agreement*, which requires that exporters be given at least 30 days to respond to the questionnaires sent by the investigating authority. In other cases, the national law of a WTO Member may set a deadline for the exercise of a certain procedural right during an investigation, even where the *Anti-dumping Agreement* may not expressly require such a deadline, provided that the deadline is consistent with a Member's WTO obligations. There must be a balance struck between the rights of the investigating

---

[202] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001, paras. 106-110.

[203] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 117.

[204] Panel Report, United States – Anti-dumping measures on certain Hot-Rolled Steel Products from Japan ("US-Hot-Rolled Steel"), WT/DS184/R, adopted 23 August 2001 as modified by Appellate Body Report *supra*, note 19, para. 7.54.

[205] Appellate Body Report, *US – Hot-Rolled Steel*, *supra*, note 19, para. 73.

authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.[206]

7.259 In our view, the DOC's application in this case of the 30-day deadline in the US Regulation for the submission of information or evidence to show good cause for the DOC to consider NSC's additional information relating to possible "other factors" did not undermine NSC's "ample opportunity" to submit information that it considered relevant to the review. We do not find 30 days to be an unreasonable period of time for the submission of information in a sunset review. If this timeframe was not sufficient in this particular case, NSC could have requested an extension. However, NSC never requested an extension of the time-period provided for under US law for the submission of this information, although such extension is envisaged in the Regulation and could have been granted by the DOC. In fact, once during this sunset review NSC requested an extension for the submission of its case brief and that request was granted by the DOC.[207] Japan has pointed to no particular reason concerning the nature of the information contained in this submission that would justify such delay. Indeed, Japan has confirmed, in response to a Panel question, that the information in question was in NSC's possession at the time of its submission of the substantive response within the 30-day deadline.[208]

7.260 Japan argues that, since the decision of the Appellate Body in *US – Hot-Rolled Steel* concerned time-limits applicable to the submission of responses to questionnaires, it does not apply here because no questionnaire was sent to the parties in the sunset review at issue.[209] Indeed, the factual circumstances of the *US – Hot-Rolled Steel* case were different, in that it concerned the submission of responses to the questionnaires sent by the investigating authority in an investigation. Moreover, the legal claim was made and examined under Article 6.8 and Annex II of the *Anti-dumping Agreement*. These treaty provisions contain different obligations and terms, including the terms "reasonable period [of time]". However, to the extent that the Appellate Body's reasoning in *US-Hot Rolled Steel* may be relevant here, we consider that the submission of information seven months after the established deadline and approximately two months before the date established for the investigating authority's determination would, in any event, not be seen as timely even under the approach set by the Appellate Body in that case. We emphasize, however, that Japan has made no claim under Article 6.8 in this dispute.

7.261 We do not find relevant the US argument that the Japanese exporters had 15 months advance notice of the initiation of this particular sunset review, and thus had ample time to prepare their substantive responses in this sunset review. The procedural rules in the *Anti-dumping Agreement* are concerned with the conduct of investigations and reviews. The fact that a Member identifies, in advance, in its national legislation and regulations the date of initiation of a sunset review cannot mean that the rights of interested parties in a particular sunset review are limited. We by no means wish to discourage the exercise of transparency by Members. However, the fact that the parties may have received advanced notice of initiation does not limit their right to an ample opportunity to submit evidence in the particular review in which they are involved.[210]

---

[206] *Ibid.*, para. 86.

[207] Response of the United States to Question 62 (c) from the Panel.

[208] In this respect we note the following statement of Japan: "This information was in USDOC's files from its administrative reviews involving corrosion-resistant steel from Japan. As a result, NSC's case brief was the first opportunity to present information and argumentation after NSC learned what facts USDOC intended to consider in its final determination." Response of Japan to Question 107 from the Panel.

[209] Response of Japan to Question 106 from the Panel.

[210] Moreover, to the extent that the United States argues that the information required in a sunset review was published and widely available in advance of the initiation of this review, we note that while the Regulation refers to "optional information to be submitted by interested parties in substantive response…", and states, in accordance with the US Statute, that "good cause" evidence must be shown in order for the DOC to consider other factors, it does not explicitly identify what would constitute such evidence. Thus, although parties were put on notice that "good cause" evidence had to be submitted in the substantive response, the 15-month advance

7.262 We note Japan's argument that in this sunset review the Japanese exporters did not know until 15 days after the initiation of the sunset review whether the domestic industry would participate in the review. In Japan's view this meant that the exporters in fact had only 15 days to respond to the questionnaires, not even 30 days. According to Japan this violated Article 6.1.[211] In our view, the fact that the domestic producers informed the DOC of their intent to participate in the sunset review on day 15 after the initiation of the sunset review does not change the fact that the Japanese exporters had 30 days to respond to the notice of initiation. In our view, the fact that the domestic producers were given 15 days to inform the DOC as to whether they would participate in the sunset review did not affect Japanese exporters' right to be given ample opportunity to present evidence under Article 6.1.

7.263 We therefore find that the DOC did not act inconsistently with Articles 6.1 or 6.2 of the *Anti-dumping Agreement* by declining to consider the information contained in NSC's submission dated 11 May 2000 on the grounds of untimeliness.[212]

7.264 Having made this finding, we do not consider that it is necessary for us to proceed to an examination of the merits of Japan's claim under Article 6.6.

(ii) Claim under Article 11.3 of the Anti-dumping Agreement

Arguments of parties

Japan

7.265 Japan contends that the application by the DOC of the "not likely" standard in this sunset review is inconsistent with Article 11.3. Japan submits that in this sunset review the DOC did not carry out a prospective likelihood analysis; instead it applied the above-mentioned strict factual presumptions set forth in the Sunset Policy Bulletin and concluded that dumping was likely to continue. In Japan's view, the fact that the DOC refused to consider NSC's 11 May 2000 submission also points to its unwillingness to carry out a forward-looking likelihood analysis. Japan argues that the DOC's conclusion could have changed had it not refused to consider NSC's submission.

United States

7.266 The United States argues that the DOC applied the "likely" standard of Article 11.3 in this sunset review. In its likelihood analysis the DOC considered -- in addition to the information submitted by interested parties -- its findings in the administrative reviews and found that the Japanese exporters had continued to dump the subject product into the US market after the imposition of the anti-dumping order. It also found that imports from Japan decreased significantly after the imposition of the anti-dumping order and remained at low levels thereafter. Therefore, the DOC concluded that there was a likelihood of continuation or recurrence of dumping should the order be terminated. The United States also submits that NSC had the right to submit evidence on factors other than DOC's findings in the original investigation and the intervening administrative reviews for DOC's consideration, but it failed to do so in a timely manner. Therefore, the United States acted consistently with Article 11.3 in this sunset review.

---

notice that the United States asserts existed in this case did not in fact exist in respect of the nature and content of "good cause" evidence.

[211] Second Written Submission of Japan, para. 76.

[212] In any event, that the DOC also indicated in its Final Determination that "...even if the Department were to consider these factors, they would be outweighed by the margin and import volume evidence on record." We consider the nature and import of this statement *infra* 7.276 ff.

Evaluation by the Panel

7.267 Regarding the standard applied by the DOC in its determinations in this sunset review, we recall our finding, *supra*, that the United States' Regulation does not require the application by the DOC of a "not likely" standard.[213] On this basis, we therefore do not consider that the Sunset Policy Bulletin, in its application pursuant to the Statute and the Regulation, contemplates the imposition of a "not likely" standard. Furthermore, the Final Determination[214] of the DOC and the Notice of Continuation[215] of the Anti-dumping Order in the instant sunset review state, on their face, that the standard applied is the "likely" standard. Japan fails to refer to any document in the record that would suggest that the DOC in fact used the "not likely" standard in this sunset review. Japan refers to DOC's statement in its Final Determination, which reads:

> "Therefore the fact that NSC reduced its dumping margins during the same time that its import levels have remained stable does not lead us to conclude that dumping is unlikely to occur in the future."[216] (emphasis added)

7.268 However, this statement reflects DOC's explanation regarding a comment made by NSC and thus does not reflect the standard by which the DOC reached its ultimate conclusion. As stated above, this document clearly states on its face that the standard used by the DOC in its sunset determinations is the "likely" standard. Therefore we find that the United States did not act inconsistently with the *Anti-dumping Agreement* in this respect.

7.269 Next, we turn to the other elements of Japan's claim that the DOC's determination of likelihood of continuation or recurrence of dumping was inconsistent with Article 11.3. We understand Japan's arguments here to be two-pronged: first, that the DOC's non-consideration of the information submitted by NSC near the end of the investigation period indicates that the DOC failed to properly determine likelihood in this sunset review; and second, that the DOC failed to make a proper, prospective likelihood determination within the meaning of Article 11.3 in that the DOC followed the factual presumptions of the Sunset Policy Bulletin and based its determination exclusively on historical data relating to dumping and the volume of dumped imports.

7.270 We must, therefore, examine the consistency with Article 11.3 of the determination of likelihood of continuation or recurrence of dumping made by the DOC in this sunset review.

7.271 We recall, once again, the text of the relevant treaty provision, which requires the termination of an anti-dumping duty not later than five years from its imposition,

> "…unless the authorities determine, in a review initiated before that date … that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

Here, we recall that Article 11.3 does not impose a particular methodology that must be followed for the "likelihood" determination to be made in a sunset review. This does not mean that the *Anti-*

---

[213] *Supra*, para. 7.239.

[214] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e at p. 6 and 8). The Final Determination states, *inter alia*: "Therefore, an analysis of the relationship between dumping margins and import volumes before and after the issuance of the order demonstrates that dumping will continue if the order were revoked"; and, "[t]herefore, given that dumping continued after the issuance of the order and imports continued in 1998 at levels far below pre-order levels, we determine that dumping is *likely* to continue if the order were revoked." (emphasis added)

[215] *Notice of Continuation of Antidumping and Countervailing Duty Orders on Certain Steel Products from Japan*, 65 FR 78469 (Exhibit US-5)

[216] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e, p. 6).

dumping Agreement is devoid of any obligation governing the requisite nature of a sunset review determination. The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury. The text of Article 11.3 does not, however, provide explicit guidance regarding the meaning of the term "determine". The ordinary meaning of the word "determine" is to "find out or establish precisely" or to "decide or settle".[217] The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence[218], that termination of the duty is likely to lead to continuation or recurrence of dumping and injury.[219] 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.

7.272 In this case, the DOC's Final Determination indicates that the basis of the DOC's likelihood determination in this sunset review was an analysis of the trends of changes in dumping margins and import volumes before and after the imposition of the measure. In particular, the DOC based its likelihood determination on the following two factual elements: first, that dumping continued after the imposition of the duty and, second, that import volumes dropped following the imposition of the measure and remained at relatively low levels. The DOC concluded that termination of the measure would be likely to lead to the continuation or recurrence of dumping.[220]

7.273 We first examine Japan's allegation that the DOC's non-consideration of the information submitted by NSC near the end of the investigation period indicates that the DOC failed to properly determine likelihood in this sunset review. Japan argues that since the DOC applied its 30-day "good cause" requirement in this sunset review and thereby restricted the type of information that could be submitted by interested parties, it acted inconsistently with Article 11.3.[221] This is the only specific information that Japan submits the DOC should have considered, but did not, in this sunset review.

7.274 At first blush, the DOC's refusal might seem to run counter to the legal framework we have outlined, in that it shows that the DOC declined to consider certain information that could have been relevant in its determinations in this sunset review. However, we find the ground for such rejection to be highly relevant. We found above (*supra*, para. 7.263) that the DOC was justified in rejecting this submission on procedural grounds of untimeliness. On the basis that the DOC did not act inconsistently with the *Anti-dumping Agreement* in declining to consider a certain piece of information on procedural grounds, we do not believe that the United States could still be found to have nevertheless violated its substantive obligation under Article 11.3, i.e. obligation to determine likelihood of continuation or recurrence of dumping, by not considering that information in its substantive analysis. Finding otherwise would render the procedural rules of the *Anti-dumping Agreement* meaningless. If procedural rules allow an investigating authority to disregard certain information under certain circumstances, it follows logically that that investigating authority cannot be required to nevertheless consider that information in its substantive analysis. Otherwise, procedural rules would have been rendered meaningless and would serve no purpose.

---

[217] *Oxford English Encyclopaedic Dictionary* (1991).

[218] See, *supra*, note 48.

[219] We recall our statement *supra*, para. 7.45, that: "Once the review is initiated, in order to properly decide to keep the measure in place the authorities are required to establish, on the basis of positive evidence, that there is a likelihood of continuation or recurrence of dumping and injury."

[220] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e, p. 5). As far as Japan's claim challenging the application of US law in the instant sunset review is concerned, whether or not this analysis reflects the provisions of the Sunset Policy Bulletin is immaterial. Here, we are reviewing the application of US law and the Sunset Policy Bulletin in the instant review, as opposed to the law and Sunset Policy Bulletin "as such".

[221] Response of Japan to Question 42 from the Panel.

7.275 We therefore find that the United States did not fail to determine likelihood of continuation or recurrence of dumping by declining to consider the additional information as to possible "other factors" contained in the 11 May 2000 submission of NSC.

7.276 In any event, we recall the following statement in the Final Determination in respect of the additional information in question:

> "…even if the Department were to consider these factors, they would be outweighed by the margin and import volume evidence on record. The factors do not provide sufficient evidence that NSC is not likely to dump in the future."[222]

7.277 Even assuming *arguendo* that the DOC were required to consider the information contained in NSC's 11 May 2000 submission, in our view, the above statement demonstrates that it did, in fact, consider it. It is clear that the DOC nevertheless considered the substance of the evidence and determined that it would not have changed its affirmative determination of likelihood.

7.278 We next examine whether the DOC met its obligation under Article 11.3 to make a reasoned finding on the basis of positive evidence[223] that dumping was likely to continue or recur upon revocation of the order. We recall the text on the face of the DOC's Final Determination, as follows:

> "As discussed in section II:A.3 of the Sunset Policy Bulletin, the SAA at 890 and the House Report at 63-64, if companies continue dumping with the discipline of an order in place, the Department may reasonably infer that dumping would continue if the discipline were removed. We agree with domestic interested parties that the Department's preliminary determination that dumping is likely to continue if the order is revoked is supported by substantial evidence on the record. As stated in our preliminary results, and, as domestic interested parties observe, margins have remained above de minimis in every administrative review since the issuance of the order.
>
> Consistent with section 752(c) of the Act, the Department also considered the volume of imports before and after the issuance of the order. We noted in our preliminary results that import statistics provided by domestic interested parties and NSC on imports of subject merchandise declined from 1992 to 1993, the year of the order, and have remained at much lower levels. Therefore, an analysis of the relationship between dumping margins and import volumes before and after the issuance of the order demonstrates that dumping will continue if the order were revoked.
>
> In addition, we disagree with NSC that the Department has disregarded the plain language of the statute and selectively used language from the SAA to establish a policy of continuing an order unless respondents show that future dumping is not likely. In accordance with section 752(c) of the statute, we have analyzed the relationship between dumping margins and import volumes before and after the issuance of the order. We find that dumping has continued to occur throughout the life of the order and import volumes have been significantly lower than pre-order volumes. Therefore, the fact that NSC reduced its dumping margins during the same time that its import levels have remained stable does not lead us to conclude that dumping is unlikely to occur in the future.

---

[222] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e, p.6).

[223] See, *supra*, note 48.

> NSC also argues that the Department has reversed the presumption with respect to revocation. We disagree. Rather, the Sunset Policy Bulletin sets for[th] the conditions that must be satisfied for the revocation standard to be established…..
>
> Based on this analysis, the Department finds that the existence of dumping margins after the issuance of the order is highly probative of the likelihood of continuation or recurrence of dumping. Deposit rates above a de minimis level continue in effect for exports of the subject merchandise by all known Japanese producers and exporters. Therefore, given that dumping continued after the issuance of the order and imports continued in 1998 at levels far below pre-order levels, we determine that dumping is likely to continue if the order were revoked."[224]

7.279 It is clear from this Final Determination that the DOC considered data relating to dumping margins, as established in administrative reviews following the imposition of the measure, and import volumes preceding and following the imposition of the measure.[225] This data relates to facts preceding the determination, and thus could be referred to as "historical" in nature. We do not disagree with Japan's argument, which the United States does not contest[226], that the likelihood determination is inherently "prospective" in nature, as it must necessarily relate to a hypothetical future point in time, following the determination. It is, however, impossible to predict future developments with certainty or absolute precision. Future "facts" do not exist. The only type of facts that exist and that may be established with certainty and precision relate to the past and, to the extent they may be accurately recorded and evaluated , to the present. We recall that one of the fundamental goals of the *Anti-dumping Agreement* as a whole is to ensure that objective determinations are made, based, to the extent possible, on facts.[227] Thus, to the extent that it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest on a factual foundation relating to the past and present. The investigating authority must evaluate this factual foundation and come to a reasoned conclusion about likely future developments.

7.280 Japan does not contest that past dumping margins and import volumes may be relevant, and may be taken into account, in a likelihood determination. However, for Japan, they are not a sufficient basis for a likelihood determination. Japan argues that the investigating authorities should consider all relevant facts, which may include past margins and import volumes, in order to come up with the likely rate of dumping which is likely to continue or recur should the duty be terminated.[228]

7.281 The underlying data on the record before the DOC indicated that:

---

[224] *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 FR 47380 (2 August 2000) (Exhibit JPN-8e at p. 5).

[225] We recall the following statement by the Appellate Body in *US – Carbon Steel*:

> "The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidization and injury." Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry." (footnote omitted)

Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 88.

[226] First Written Submission of the United States, para. 3.

[227] See Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/R and Corr.1, adopted 19 December 2002 as modified by Appellate Body Report, *supra*, note 22, para. 8.94 and Panel Report, *US – Hot-Rolled Steel*, supra, note 204, para. 7.55.

[228] Response of Japan to Questions 41 and 42 from the Panel.

> "In the first [administrative] review covering the period from August 1, 1996, through July 31, 1997, the Department assigned the NSC a margin of 12.51 percent. In the final results of the second review, covering the period from August 1, 1997, through July 31, 1998, the Department determined margins of 2.47 percent and 1.61 percent for NSC and Kawasaki…"[229]
>
> …
>
> The import statistics provided by domestic interested parties and NSC on imports of subject merchandise from 1991 to 1997, and those examined by the Department…demonstrate that imports of the subject merchandise declined from 1992 to 1993, the year of the order, and have remained at much lower levels.[230]

7.282 The DOC examined this evidence and reasoned that the evidence supported the view that dumping was likely to continue or recur upon revocation of the duty.

7.283 With our standard of review firmly in mind, given the factual foundation and reasoning apparent in the Final Determination, and in light of the particular circumstances of this sunset review, we see no reason to conclude that the DOC did not have before it relevant facts constituting a sufficient factual basis to allow it to reasonably draw the conclusions concerning the likelihood of such continuation or recurrence that it did.[231] We therefore find that the United States did not act inconsistently with Article 11.3 in this respect in this case.

8. Article X:3(a) of GATT 1994

(a) US law as such

(i) Arguments of parties

Japan

7.284 Japan submits that the US sunset review laws are administrative in nature and therefore challengeable under Article X:3(a) in accordance with established WTO jurisprudence. According to Japan the United States administers its sunset review laws in a manner inconsistent with the requirements of Article X:3(a) of GATT 1994. Japan contends that automatic self-initiation of sunset reviews gives rise to unreasonable administration of sunset review laws because it allows the DOC to disregard the substantive requirements for the initiation. The fact that automatic initiation favours the domestic industry makes it also partial. Different approaches taken by the DOC with respect to Article 11.2 reviews and sunset reviews under Article 11.3 also allegedly demonstrate that the administration of US sunset review laws is not uniform. According to Japan, given the similarities between the fundamental elements of the two reviews, and in particular the obligation to carry out a prospective determination, these two reviews should be administered in a uniform manner.

---

[229] *See Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Full Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 16169 (27 March 2000) (Exhibit JPN-8c at p. 1).

[230] *See Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Full Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 16169 (27 March 2000) (Exhibit JPN-8c at p. 6).

[231] We recall our findings *supra*, paras. 7.157and 7.184, concerning the use by the United States of the dumping margins calculated in administrative reviews, and our view that the United States did not act inconsistently with Articles 2.4 or 11.3 in that respect.

United States

7.285 The United States submits that Article 11.3 allows for the self-initiation of sunset reviews and the United States self-initiates sunset reviews for each anti-dumping order. Therefore, the US practice is consistent with Article X:3(a) in this respect. Regarding Japan's argument concerning non-uniform administration of Article 11.2 reviews and sunset reviews, the United States argues that Article X:3(a) is designed to ensure that a given provision is applied in the same manner in different situations; not that two different provisions are applied in the same manner. Given that Article 11.2 reviews cover different situations than sunset reviews it follows that the standards applied by investigating authorities to each one of these two reviews will also be different.

(ii) Evaluation by the Panel[232]

7.286 Japan makes two allegations in connection with its "as such" claim under Article X:3(a) of the GATT 1994. These relate to: self-initiation of sunset reviews without any evidence and alleged differences in the handling of likelihood analysis in Article 11.2 reviews and sunset reviews under US law.

7.287 We begin our examination, as always, with the text of the relevant treaty provision. Article X:3(a) of the GATT 1994 provides:

> "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.288 Before addressing the merits of Japan's allegations under this provision, we shall consider the threshold issue of whether Japan's claims fall within the scope of application of Article X:3(a).

7.289 It is well-established that only the *administration* of laws and regulations can be challenged under Article X:3(a), not the laws and regulations themselves. Substantive contents of laws and regulations can be challenged under relevant provisions of the covered agreements.

7.290 For example, with respect to the scope of application of Article X:3(a), the Appellate Body has stated:

> "The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings... Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994."[233] (emphasis in original)

7.291 Similarly, the Appellate Body stated in *EC – Poultry*:

---

[232] In this section, we examine the following allegations by Japan: that the statute and regulations, "which mandate the DOC to administer sunset reviews in such a manner as to initiate the review automatically without any evidence, is an "unreasonable" and "partial" administration of US sunset laws, and are therefore", on their face, inconsistent with the USG's obligations under Article X:3(a) of the GATT 1994; and that the DOC's "non-uniform approach to reviews conducted under Article 11.3 as compared with its approach to reviews conducted under Article 11.2 is" as a general practice, inconsistent with Article X:3(a) of the GATT 1994.

[233] Appellate Body Report, *EC – Bananas III*, *supra*, note 49, para.200.

> "Thus, to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994."[234] (emphasis in original)

7.292 We are of the view that Japan's "as such" allegations under Article X:3(a) relate to US laws and regulations rather than their administration. Therefore, they do not fall within the scope of application of Article X:3(a) for the following reasons.

7.293 On the first point, i.e. self-initiation of sunset reviews without any, or sufficient, evidence, Japan argues that the US statute and regulations, which mandate such self-initiation, are "unreasonable" because they allow the DOC to disregard the substantive requirements for the initiation. Japan further submits that such self-initiation renders the administration of US law "partial" because it favours the US domestic industry. We note that Japan made a substantive claim challenging both the US law as such and its application in this particular sunset review regarding self-initiation of sunset reviews without sufficient evidence. We recall our finding above (*supra*, para. 7.54) that self-initiation of sunset reviews under Article 11.3 is not subject to the evidentiary requirements of Article 5.6. This indicates that the substantive content of this aspect of US law, i.e. evidentiary standards applicable to the self-initiation of sunset reviews, can be, and in fact has in this case been, challenged by Japan. Therefore, deriving guidance from the ruling of the Appellate Body, in *EC – Poultry*, we find that this aspect of US law cannot be challenged under Article X:3(a) of GATT 1994 because it relates to the *substance* rather than the administration of US law.

7.294 With regard to the second "as such" allegation of Japan, i.e., different approaches taken by the United States regarding Article 11.2 and 11.3 reviews, even assuming that this argument legitimately falls within the scope of application of Article X:3(a), we understand that Japan has based its "as such" allegations here exclusively upon the Sunset Policy Bulletin. We have found above (*supra*, para 7.145) that the Sunset Policy Bulletin is not challengeable as such under the *WTO Agreement*. We therefore examine no further Japan's "as such" allegations relying solely on the Sunset Policy Bulletin.

7.295 We therefore conclude that the administration of the US sunset review law as such was not inconsistent with Article X:3(a) of GATT 1994.

(b) US law as applied in the instant sunset review

(i) Arguments of parties

Japan

7.296 Japan argues that the application of the two aspects of the US law identified in its "as such" claim in this sunset review was inconsistent with Article X:3(a) of GATT 1994. Japan also argues that requiring the respondents in a sunset review to provide a considerable amount of detailed information in a short period of time – i.e. refusal to consider any information which is submitted after the first 30-day period from initiation of a sunset review, as provided in its regulations -- is unreasonable. The fact that not as much information is requested from domestic producers indicates that US laws are also being administered in a partial manner inconsistently with Article X:3(a).

---

[234] Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products* ("*EC – Poultry*"), WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, para. 115.

United States

7.297 The United States presents no additional argument about the application of the two aspects of US law addressed in its "as such" arguments in the instant sunset review in respect of this "as applied claim. Regarding the amount of time given to the respondents, the United States argues that Article 6.1.1 of the *Anti-dumping Agreement* also provides for 30 days for responses to questionnaires. That the DOC requires the foreign exporters to submit more information than domestic producers stems from the nature of the dumping side of an anti-dumping investigation, which depends principally on the information provided by foreign exporters. The ITC, on the other hand, requires more information from domestic producers because it makes injury determinations under US law, which depend principally on information provided by the domestic industry. Therefore information requirements from foreign exporters concerning dumping are consistent with Article X:3(a).

Evaluation by the Panel[235]

7.298 For the reasons set out above, we consider that the elements identified above in connection with Japan's "as such" claims fall outside the scope of application of Article X:3(a).

7.299 With respect to Japan's allegations concerning different approaches taken by the United States regarding Article 11.2 and 11.3 reviews, even assuming that this argument legitimately falls within the scope of application of Article X:3(a), we find that it does not prevail. Japan argues that the administration of US law is not uniform because the DOC takes different approaches regarding reviews under Article 11.2 and Article 11.3. According to Japan, given that these two types of reviews involve the same likelihood analysis which is prospective in nature, the DOC should treat them in the same manner.

7.300 As we have already noted, Article 11.1 sets out the general rule that an anti-dumping duty can remain in force only as long as and to the extent necessary to counteract injurious dumping. Articles 11.2 and 11.3 are similar. They reflect the application of this general rule to reviews under different circumstances.

7.301 We have already cited the text of Article 11.3 on numerous occasions. The text of Article 11.2 provides:

> "The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has

---

[235] In this section, we examine Japan's allegations that:

- the US sunset Statute and Regulations, "which mandate the DOC to administer sunset reviews in such a manner as to initiate the review automatically without any evidence, is an "unreasonable" and "partial" administration of US sunset laws, and are therefore .... as applied in this case, inconsistent with the USG's obligations under Article X:3(a) of the GATT 1994";

- "The application of DOC's administrative regulations requiring DOC to refuse to consider other evidence outside of the parties' substantive response is "unreasonable," and therefore, as applied in this case, inconsistent with the USG's obligations under Article X:3(a) of the GATT 1994"; and

- DOC's non-uniform approach to reviews conducted under Article 11.3 as compared with its approach to reviews conducted under Article 11.2 is, as applied in this case, inconsistent with Article X:3(a) of the GATT 1994.

> elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately." (footnote omitted)

7.302 The text of Article 11.2 makes it clear that the circumstances under which the reviews envisaged in Article 11.2 are to be carried out are different from the circumstances surrounding sunset reviews under Article 11.3. More importantly, neither paragraph 2 nor paragraph 3 of Article 11 explicitly provides for a particular methodology that applies to the substantive determinations to be made in these reviews. This would support the proposition that WTO Members are allowed to use different methodologies in discharging their substantive obligations in these reviews, provided that their conduct and determinations rest on a sufficient factual basis and that the methodologies used are not otherwise inconsistent with the obligations imposed by the *Anti-dumping Agreement* and the Article VI of the *GATT 1994*. Therefore, given the differences between these two reviews and the fact that the *Anti-dumping Agreement* does not contain a particular methodology to be followed in these reviews, in our view, these two types of reviews cannot possibly be required to be carried out in the same manner.

7.303 We consider that the third aspect of Japan's claim identified in connection with the application of US law in this case -- that is, that the application of the requirement that any evidence pertaining to possible additional relevant factors in the likelihood determination must be submitted in the substantive response on day 30 of the sunset review -- also falls outside the scope of application of Article X:3(a). Japan alleges that the DOC refusal to consider other evidence outside of the parties' substantive response is "unreasonable," and therefore, as applied in this case, inconsistent with the US obligations under Article X:3(a) of the GATT 1994.

7.304 Regarding the 30-day requirement for the submission of certain evidence under US law, Japan challenged the application of this requirement in this sunset review and we found (*supra*, para. 7.263) that the Japanese exporter (NSC) did not make its 11 May 2000 submission in a timely manner. Thus, this element also concerns the substance of US law rather than its *administration*.

7.305 In this context, Japan also argues that requiring the exporters in a sunset review to provide a considerable amount of information is unreasonable. Japan further argues that the fact that not as much information is requested from domestic producers renders the administration of US law partial.

7.306 The nature and quantity of the information that will be in the possession of foreign exporters and producers will necessarily differ from the information possessed by the domestic industry, and this information will be used for different purposes by the investigating authority. This is because generally, in investigations (and reviews), foreign exporters will be the main source of information regarding the dumping, or likelihood of continuation or recurrence of dumping, component of the determination that must be made, while domestic producers will possess more information relevant to the injury component of the determination that must be made. Consequently, we find that this aspect of Japan's claim also falls outside the scope of Article X:3(a).

7.307 Even assuming *arguendo* that these aspects of US law challenged by Japan fell within the scope of Article X:3(a), we consider that a primary threshold issue would be whether the determinations of the US investigating authorities in the instant sunset review have had a significant impact on the administration of US sunset review legislation.

7.308 That does not seem to be the case here because the sunset review at issue is one of the many other reviews conducted by the United States and the United States seemingly applies the same provisions of its domestic legislation in all these sunset reviews. The thrust of the claims in these panel proceedings is the alleged inconsistency of US law with relevant WTO provisions. The claims challenging the application of US law in the instant review appear to have been derived from the main claims dealing with the US law as such.

7.309 Regarding Japan's claims under Article X:3(a) challenging the application of US sunset review legislation in the instant sunset review, we consider useful the following statement by the Appellate Body:

> "Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules "of general application".[236]

7.310 Similarly, the panel, in *US – Hot-Rolled Steel*, pointed out that, for a Member's action to violate Article X:3(a) that action should have a significant impact on the overall administration of that Member's law and not simply on the outcome of the single case in question.[237] Japan has not shown that the application of US law in the instant sunset review had such an impact on the overall administration of US sunset review law. We therefore also find that the application of the US sunset review law in the instant sunset review was not inconsistent with Article X:3(a) of GATT 1994.

9. Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement*

(a) US law as such

(i) Arguments of parties

Japan

7.311 Japan submits that the United States also acted inconsistently with Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement* by maintaining the above-mentioned WTO-inconsistent laws and procedures.

United States

7.312 The United States submits that since the US Congress made necessary changes to US law in order to conform to the provisions of the *Anti-dumping Agreement*, the present US law is consistent with Article XVI:4 of the *WTO Agreement*.

(ii) Arguments of third parties

Norway

7.313 Norway argues that, by being inconsistent with Article 11 and related articles of the *Anti-dumping Agreement* as they apply to a sunset review, the US law, regulations and practices as such, and as applied to the products in question in this case, are also inconsistent with Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

(iii) Evaluation by the Panel

7.314 Japan's claims under Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement* are dependent upon a finding that certain aspects of US law are inconsistent with the covered agreements.

---

[236] Appellate Body Report, *EC - Poultry*, *supra*, note 234, para. 111.
[237] Panel Report, *US – Hot-Rolled Steel*, *supra*, note 204, para. 7.268.

7.315 Since we did not find any aspect of US law to be inconsistent with the covered agreements, we do not find any violation of Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement* either.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In conclusion, we find that:

(a) In respect of the evidentiary standards applicable to the self-initiation of sunset reviews:

(i) Section 751(c)(1) and (2) of the US Statute and section 351.218(a) and (c)(1) of the US Sunset Regulations, which contain no evidentiary standard for the DOC to self-initiate a sunset review, are not inconsistent with Articles 11.1, 11.3, 12.1, 12.3, and 5.6 of the *Anti-dumping Agreement*,

(ii) the DOC did not act inconsistently with Articles 5.6, 11.1, 11.3, 12.1, and 12.3 of the *Anti-dumping Agreement* by self-initiating the sunset review at issue in application of Section 751(c)(1) and (2) of the US Statute and section 351.218(a) and (c)(1) of the US Sunset Regulations.

(b) In respect of the *de minimis* standard applicable in sunset reviews:

(i) Section 351.106(c) of the US Sunset Regulations, which requires that a 0.5 per cent *de minimis* standard apply in sunset reviews, is not inconsistent with Articles 5.8 and 11.3 of the *Anti-dumping Agreement*,

(ii) the DOC did not act inconsistently with Articles 5.8 and 11.3 of the *Anti-dumping Agreement* by not applying in this sunset review the *de minimis* standard set out in Article 5.8,

(c) In respect of cumulation in sunset reviews:

(i) the ITC did not act inconsistently with Articles 3.3, 5.8 and 11.3 of the *Anti-dumping Agreement* in this sunset review by cumulating imports from Japan with those from other subject countries without applying the negligibility standard of Article 5.8,

(d) In respect of the dumping margins used in sunset reviews:

(i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Articles 2.2.1, 2.2.2, 2.4, 11.3 and 18.3 of the *Anti-dumping Agreement*,

(ii) the DOC did not rely upon the original dumping margins as a basis for its determination of likelihood of continuation or recurrence of dumping in the instant sunset review, and it was therefore not necessary for us to address the alleged inconsistences of such margins with Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement*,

(iii) the DOC did not act inconsistently with Article 2.4, or, in the alternative, Article 11.3, of the *Anti-dumping Agreement* regarding the administrative review dumping margins which it relied upon as a basis for its likelihood of continuation or recurrence of dumping determinations in this sunset review,

(iv) the allegation of Japan concerning DOC's reporting of the original dumping margins to the ITC for use by the latter in its likelihood of continuation or recurrence of injury determinations is not properly before us and we therefore declined to examine it.

(e) In respect of determination of likelihood of continuation or recurrence of dumping on an order-wide basis in sunset reviews:

(i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Articles 6.10 and 11.3 of the *Anti-dumping Agreement* regarding the basis of the likelihood of continuation or recurrence of dumping determinations in sunset reviews,

(ii) the DOC did not act inconsistently with Articles 6.10 and 11.3 of the *Anti-dumping Agreement* by making its likelihood determination in this sunset review on an order-wide basis,

(f) In respect of the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping in sunset reviews:

(i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Article 11.3 regarding the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping in sunset reviews,

(ii) the DOC did not act inconsistently with Article 11.3 of the *Anti-dumping Agreement* in this sunset review in making its determination regarding the likelihood of continuation or recurrence of dumping,

(iii) the DOC did not act inconsistently with Article 6.1, 6.2 or 6.6 of the *Anti-dumping Agreement* in this sunset review in declining to consider certain additional information submitted by NSC in its submission dated 11 May 2000,

(g) In respect of the administration of the US sunset review laws and regulations:

(i) the US sunset review law is not inconsistent with Article X:3(a) of GATT 1994,

(ii) the application of US law in this sunset review was not inconsistent with Article X:3(a) of GATT 1994,

(h) The US did not act inconsistently with Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

8.2 In the light of our conclusions, we make no recommendations under Article 19.1 of the *DSU*.

IX. JAPAN'S REQUEST FOR ESTABLISHMENT OF THE PANEL (WT/DS244/4)

WORLD TRADE ORGANIZATION

WT/DS244/4
5 April 2002

(02-1902)

Original: English

UNITED STATES – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM JAPAN

Request for the Establishment of a Panel by Japan

The following communication, dated 4 April 2002, from the Permanent Mission of Japan to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 9 July 1993, the United States Department of Commerce ("DOC") concluded its antidumping investigation on imports of Certain Corrosion-Resistant Carbon Steel Flat Products ("Corrosion-Resistant Steel") from Japan and found that Japanese products were being sold in the United States at less than their fair value (i.e., dumped).[238] The United States International Trade Commission ("ITC") on 9 August 1993, then, determined that imports of Corrosion-Resistant Steel from Japan were causing material injury to the United States domestic industry.[239] Following the ITC injury determination, on 19 August 1993, DOC published its final antidumping duty order on Corrosion-Resistant Steel from Japan establishing an initial dumping margin of 36.41 per cent *ad valorem*[240] for all exporters of the subject product.

On 1 September 1999, the DOC automatically initiated a "sunset" review of the definitive antidumping duties on the Corrosion-Resistant Steel from Japan.[241] The DOC preliminary results, issued on 27 March 2000, found that revocation of the order would result in continued dumping at the original rate of 36.41 per cent.[242] The DOC's final determination, published on 2 August 2000, affirmed its preliminary determination.[243] Finally, on 2 November 2000, the ITC determined that

---

[238] See Final Determinations of Sales at Less Than Fair Valve: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 58 Fed. Reg. 37154 (9 July 1993).

[239] *See Certain Flat-Rolled Carbon Steel Products from Japan*, USITC Pub. No. 2664, Inv. No. 731-TA-617, at 4 (Final) (August 1993).

[240] See Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 58 Fed. Reg. 44163 (19 Aug. 1993).

[241] See Initiation of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products, 64 Fed. Reg. 47767 (1 Sep. 1999).

[242] See Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Sunset Review of Antidumping Duty Order, 65 Fed. Reg. 16169 (27 March 2000).

[243] See Corrosion-Resistant Carbon Steel Flat Products From Japan; Final Results of Full Sunset Review of Antidumping Duty Order, 65 Fed. Reg. 47380 (2 August 2000).

revocation of the antidumping order would result in continued injury to the United States' domestic industry.[244]

Following these events, on 30 January 2002, Japan requested consultations with the United States pursuant to Article 4 of the DSU, Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.2 of the Agreement on Implementation of Article VI of GATT 1994 (the "AD Agreement"), regarding the final determinations of both the DOC and the ITC and the relevant provisions and procedures of the United States.[245] The consultations, which were held in Geneva on 14 March 2002, enabled the parties to gain a better understanding of each other's position, but unfortunately did not give rise to a mutually satisfactory solution.

The Government of Japan considers both (i) the United States' decision not to terminate the imposition of the antidumping duties on the imports of Corrosion-Resistant Steel from Japan, and (ii) the provisions, procedures and practices pertaining to the United States Tariff Act of 1930 ("the Act") on which the decision was based, to be inconsistent with the United States' obligations under Articles VI and X of the GATT 1994, Articles 2, 3, 5, 6, 11, 12 and 18 of the AD Agreement, and Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization (the "WTO Agreement"). The Government of Japan would like a panel, which will be established in accordance with Article 4.7 and Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), to address the following specific claims:

1. Article 11.1 of the AD Agreement sets forth the overriding principle that antidumping duties shall remain in force "only as long as and to the extent necessary" to counteract injurious dumping. Article 11.3 provides that antidumping duties must be terminated after five years, unless the authorities determine that their expiry would be likely to lead to the continuation or recurrence of dumping and injury. In this context, Article 12 calls on the authorities to satisfy themselves that sufficient evidence (as defined by Article 5) exists to justify an initiation of the review before notifying the public of such initiation. Notwithstanding these provisions of the AD Agreement, Section 751(c)(1) and (2) of the Act and the DOC regulation 19 C.F.R. § 351.218(a) and (c)(1) mandate the DOC to automatically self-initiate sunset reviews without sufficient evidence. This initiation standard does not require sufficient positive evidence that the above-mentioned provisions of the AD Agreement require to be shown. In this particular case, as in all others, the DOC automatically initiated the sunset review without presenting a scintilla of evidence of the likelihood of continued or recurrent dumping or injury. Therefore, Section 751(c)(1) and (2) of the Act and the DOC regulation 19 C.F.R. § 351.218(a) and (c)(1), on the face and as applied in this case, are inconsistent with Articles 5.6, 11.1, 11.3, 12.1, and 12.3 of the AD Agreement and Article X:3(a) of the GATT 1994.

2. The US laws, regulations, procedures, practices and determinations regarding the "likelihood of continuation or recurrence of dumping" are inconsistent, on the face, as a general practice and as applied in this case, with the WTO obligations as follows:

   (a) The DOC regulation 19 C.F.R. §351.222(i)(1)(ii) sets forth the "not likely" standard to revoke an antidumping duty order. In addition, Sections II.A.3 and II.A.4 of the DOC *Sunset Policy Bulletin*[246] provide irrefutable conditions where the DOC may find no likelihood of continued or recurrent dumping. In fact, to our knowledge, no single case has ever met the "not likely" conditions set by *Sunset Policy Bulletin* to date. The DOC regulation 19 C.F.R. § 351.222(i)(1)(ii) and Sections II.A.3 and

[244] *See Certain Carbon Steel Products From Japan*, USITC Pub. No. 3364, Inv. No. 731-TA-617 (Review) (2 Nov. 2000).

[245] That request was circulated in document WT/DS244/1, GL/508, G/ADP/D39/1.

[246] Policies Regarding the Conduct of Five-year ("Sunset") Review of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed. Reg. 18871 (16 April 1998) (hereinafter "Sunset Policy Bulletin").

II.A.4 of the DOC's *Sunset Policy Bulletin*, on the face, as a general practice and as applied in this case, are inconsistent with the requirements of Article 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(b) Both the *Statement of Administrative Action* at 890 and the *Sunset Policy Bulletin* at Section II.A.3 set an irrefutable presumption that dumping is likely to continue where the import volume has declined or where dumping margins remain after issuance of the order. The "good cause" requirement in the DOC regulation 19 C.F.R. § 351.218(d) does not mitigate this defect because it impermissibly narrows the administering authorities' ability to examine other evidences. As such, no attempt whatsoever is made to "determine" whether dumping is likely to continue or recur. The United States' procedures and practice in this regard, both as a general practice and as applied in this case, are inconsistent with the obligations of Article 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(c) The dumping margins that the DOC used in its sunset reviews, including its interpretation of the proper *de minimis* standard in conducting its likelihood analysis,[247] are inconsistent with the WTO obligations as follows:

(i) The DOC used the dumping margins calculated in the original investigation in 1993 to determine the likelihood of continuation or recurrence of dumping in this sunset review. These dumping margins were not calculated pursuant to Article 2 of the AD Agreement. The US policy and practice, both as a general practice and as applied in this case, are thus inconsistent with the United States' obligations under Articles 2, 11.3 and 18.3 of the AD Agreement and Article X:3 of the GATT 1994.

(ii) The DOC has a traditional practice of zeroing negative margins when calculating dumping margins. The DOC applied this practice in its calculation of dumping margins in the original investigations and the administrative reviews in this case. The Appellate Body found this practice of zeroing to be inconsistent with Article 2.4 of the AD Agreement in the *EC – Bed-Linen* case (WT/DS141). The United States' general practice and its application of the practice in this case are therefore inconsistent with Article 2.4 (particularly 2.4.2) of the AD Agreement and Article X:3 of the GATT 1994.

(iii) Notwithstanding the 2.0 per cent *de minimis* standard set forth in Article 5.8 of the AD Agreement, the DOC regulation 19 C.F.R. § 351.106(c)(1) and Section II.A.5 of the *Sunset Policy Bulletin* provide for a 0.5 per cent *de minimis* standard for sunset reviews. In this case, had the DOC properly applied the 2.0 per cent *de minimis* standard provided in Article 5.8 of the AD Agreement, the Japanese producers might have been exempt from the continuation of antidumping duties. Japan contends that the US *de minimis* standard, on the face and as applied in this case, is inconsistent with the United States' obligations under Articles 5.8 and 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(d) Both the *Statement of Administrative Action* and *Sunset Policy Bulletin* provide that the DOC "will make its determination of likelihood on an order-wide basis."[248] The US policy and practice, as a general practice and as applied in this case, are inconsistent with Articles 6.10 (which provides the obligation to determine dumping

[247] *Id.* at section II.A.5.
[248] *Id.* at section II.A.2.

margins on an individual company basis) and 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(e) The DOC requires Japanese respondents to file all relevant evidence in their "substantive response" within 30 days from the date of initiation. The DOC refused to accept and consider any other information submitted by a Japanese respondent in this case.[249] The DOC's refusal to accept and consider such information in this case was inconsistent with Articles 6.1, 6.2 and 6.6 of the AD Agreement and Article X:3 of the GATT 1994.

(f) The DOC's approach to Article 11.3 determinations contradicts its approach to Article 11.2 determinations pursuant to Sections 751(a) and (d) of the Act and the DOC regulation 19 C.F.R. § 351.222(b) and (d). Given that the language with regard to determining the "likelihood of continuation or recurrence of dumping" is the same in Article 11.2 as in Article 11.3, the US difference in approach, on the face, as a general practice and as applied in this case, is inconsistent with Article X:3 of the GATT 1994.

3. The US procedures and determinations regarding the "magnitude of the margin likely to prevail", *i.e.*, determinations of dumping margins to be reported to the ITC for the purpose of its injury analysis, are inconsistent with the WTO obligations as follows:

(a) Both Section 752(c)(3) of the Act and Section II.B.1 of the *Sunset Policy Bulletin* state that the DOC shall normally provide the ITC with dumping margins from the original investigation. The DOC applied this policy in this case without considering any other factors. The US policy and practice, as a general practice and as applied in this case, are therefore inconsistent with the United States' obligations under Article 11.3 of AD Agreement and Article X:3 of the GATT 1994.

(b) The DOC's reporting of the pre-WTO-Agreement dumping margins to the ITC is, as a general practice and as applied in this case, inconsistent with the United States' obligations under Articles 2, 11.3 and 18.3 of AD Agreement and Article X:3 of the GATT 1994 for the same reasons as discussed in Paragraph 2(c)(i) above.

(c) The DOC's application of its WTO-inconsistent practice of zeroing negative dumping margins for the magnitude of dumping margins in the sunset review, as a general practice and as applied in this case, is inconsistent with Article 2.4 (particularly 2.4.2) of the AD Agreement and Article X:3(a) of the GATT 1994 for the same reasons as discussed in Paragraph 2(c)(i) above.

4. The ITC does not consider whether imports were negligible as defined in Article 5.8 of the AD Agreement when determining whether to cumulate imports in a five-year "sunset" review. In addition, the ITC, in this case, never examined whether imports were negligible and therefore whether they should, or should not, be cumulated. In light of footnote 9 of the AD Agreement, the United States has acted inconsistently with Articles 3.3, 5.8, 11.3, 12.2 and 12.3 of the AD Agreement and Article X:3 of the GATT 1994.

5. As mentioned above, the US erroneously maintains the antidumping duty on the imports of Corrosion-Resistant Steel from Japan. In this regard, the US acts inconsistently with Articles 11.1 and 11.3 of the AD Agreement.

[249] Nippon Steel Corporation ("NSC") provided information on that its 50 per cent-owned galvanizing plant in Indiana achieved full production and that NSC has maintained a steady base of customers.

6. As mentioned above, the US has not conducted the sunset review in a uniform, impartial and reasonable manner. In this regard, the US acts inconsistently with Article X:3(a) of the GATT 1994.

7. Finally, by maintaining these inconsistent laws, regulations and administrative procedures with its obligations under the AD Agreement and Article VI of GATT 1994, the United States is in violation of Article XVI:4 of the WTO Agreement as well as Article 18.4 of the AD Agreement.

Accordingly, pursuant to Article XXIII of the GATT 1994, Articles 4.7 and 6 of the DSU, as well as Article 17 of the AD Agreement, the Government of Japan respectfully requests the establishment of a panel. To that end, I would be grateful if this request could be included in the agenda for the next meeting of the Dispute Settlement Body on 17 April 2002.

ANNEX A

First Written Submissions by the Parties

Contents		Page
Annex A-1	Executive Summary of the First Written Submission by Japan	A-2
Annex A-2	Executive Summary of the First Written Submission by the United States	A-12

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. The Government of Japan (hereinafter "Japan") challenges the WTO consistency of the United States Government's (hereinafter the "USG") implementation of its WTO obligations through various laws and practices, which allows imposition of an anti-dumping duty to continue in perpetuity, rather than "sunsetting" after five years. Japan focuses specifically on the USG's decision to maintain anti-dumping duties on imports of certain corrosion-resistant carbon steel flat products (hereinafter "the subject product") from Japan[1] after conducting a sunset review of the original anti-dumping duty order on these products. The US statutes and regulations implementing sunset reviews are, on their face, inconsistent with the USG's obligations under the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994") and the Agreement on Implementation of Article VI of GATT 1994 (hereinafter the "AD Agreement"), and Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "WTO Agreement"). Moreover, the application thereof, both as a general practice and in this case, is inconsistent with numerous substantive provisions of these agreements.

2. The USG divides the obligations of administering its sunset proceedings between two of its agencies, the US Department of Commerce (hereinafter "USDOC"), which determines whether dumping is likely to continue or recur, and the US International Trade Commission (hereinafter the "USITC"), which determines whether injury is likely to continue or recur.

3. The USG has an affirmative obligation to ensure that its statutes and regulations as well as its administrative practices comply with WTO obligations. Article 18.4 of the AD Agreement and Article XVI: 4 of the WTO Agreement explicitly require that each WTO Member makes its statutes, regulations, and "administrative procedures" conform to its WTO obligations. These provisions explicitly contemplate that Members will adjust their "administrative procedures" to conform with their WTO obligations. Review by this Panel of WTO inconsistent claims, therefore, is not restricted to specific instances of WTO inconsistency or the mandatory provisions of statutes and regulations, but also extends to consistent administrative procedures that are not in conformity with relevant WTO obligations.

4. Japan notes with amazement that of 305 sunset reviews before the USDOC, only 73 of those reviews have resulted in findings that dumping is not likely to continue or recur. Moreover, all of these 73 reviews were due to either a lack of interest or affirmative withdrawal by the domestic industries. Where the domestic industry actively participated in the sunset review proceedings, USDOC has never – not even once – determined that there was no likelihood respondents would dump in the future. It is hard to imagine a system of laws and practices that more effectively ensures a single outcome in every single case.

---

[1] *Corrosion-Resistant Carbon Steel Flat Products From Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 47380 (2 August 2000) and *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom*, USITC Pub. No. 3364, Inv. Nos. AA1921-197 (Review), 701-TA-231, 319, 322, 325-328, 340, 342, and 348-350 (Review), and 731-TA-573-576, 578, 582-587, 604, 607-608, 612 and 614-618 (Review), at 16 (November 2000).

II. FACTUAL BACKGROUND

5. On 19 August 1993, after completed investigations by both the USDOC and the USITC, USDOC issued a final dumping margin of 36.41 per cent.

6. As of 1 January 1995, the USG amended the Tariff Act of 1930 (the "Act") in their attempt to comply with the current AD Agreement. These amendments included changes of various dumping margin calculation methodologies and new sunset review provisions. The US Congress also adopted the Statement of Administrative Action (the "SAA") as the authoritative interpretation of these amendments.

7. On 19 May 1997, USDOC published its amended anti-dumping regulations to implement the 1995 amendment to the Act. On 20 May 1998, USDOC published "interim" regulations with respect to sunset reviews and Article 11.2 revocation proceedings. On 16 April 1998, USDOC issued the Sunset Policy Bulletin, stipulating USDOC's policy and practice with respect to sunset reviews. On 22 September 1999, USDOC again amended the "interim" regulations, but only with respect to revocation proceedings under Article 11.2 of the AD Agreement. The 1998 "interim" regulations continue to be applicable to all sunset reviews.

8. On 16 March 1999, USDOC issued its final results of the fourth administrative review covering the period from 1 August 1996 to 31 July 1997. In that review, USDOC found that the dumping margin rate of Nippon Steel Corporation ("NSC") was 12.51 per cent. On 29 September 1998, USDOC initiated the fifth administrative review. Its final results were issued on 23 February 2000, assigning a new dumping margin of 2.48 per cent to NSC, and 1.32 per cent to Kawasaki Steel Corporation ("KSC").

9. On 1 September 1999, USDOC automatically initiated a sunset review of the anti-dumping duty order against the subject product in accordance with the prescribed schedule. On 1 October 1999, NSC, which has exported the vast majority of the subject product from Japan to the United States, submitted its substantive response. On 11 May 2000, NSC submitted its case brief, stating that NSC's continuation or recurrence of dumping is unlikely due to its establishment and operation of its US joint venture to produce the subject product in the United States and NSC's steady US customer base. On 2 August 2000, more than two and a half months after NSC's submission, USDOC published its final determination in the sunset review of corrosion-resistant steel from Japan. USDOC made its affirmative determination on an order-wide basis and refused to consider the factors and information submitted by NSC.

III. THE ARGUMENT

A. AUTOMATIC INITIATION OF SUNSET REVIEWS

10. Sections 751(c)(1) and (2) of the Act and Sections 351.218(a) and (c)(1) of USDOC regulations mandates that USDOC automatically initiate all sunset reviews without any evidence. In accordance with the statute and its regulations, USDOC automatically initiated the sunset review in this case. These provision of the Act and regulations, and the applications by USDOC of these provisions to this sunset review, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 of the AD Agreement on their face and as applied in this case.

1. The Text of Article 11.3 Imposes Strict Disciplines on Continuing Anti-Dumping Orders

11. The language "{n}otwithstanding the provisions of paragraphs 1 and 2" in Article 11.3 of the AD Agreement means that an anti-dumping duty must be terminated within five years from its original imposition in spite of any prior decisions in reviews conducted under Article 11.2. Article 31

of the Vienna Convention requires that treaty interpretation must first begin with the text of the treaty, giving the words of the treaty their "ordinary meaning" within their proper "context." Article 11.1 states that "{a}n antidumping duty may remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Furthermore, Article 11.2 obliges the authorities to terminate an anti-dumping duty order immediately when the authorities determine that the order is no longer warranted as a result of a review. Consequently, Article 11.3, in conjunction with Articles 11.1 and 11.2, create a presumption that anti-dumping measures will terminate within five years from imposition. The terms "shall" and "unless" in Article 11.3 also represent the same obligation that the imposition of anti-dumping duties must be terminated in five years.

12. The absence of any specific language in Article 11.3 with respect to how an administering authority is to initiate sunset reviews is not conclusive; the absence simply confirms that one must look elsewhere in the Agreement for those specific rules.

2. The Absence of Any Specific Language in Article 11.3 with Respect to How an Administering Authority Is to Initiate Sunset Reviews Is Not Conclusive; the Absence Simply Confirms That One Must Look Elsewhere in the Agreement for Those Specific Rules

13. Article 11.1 provides the general objective applicable to all decisions to continue imposing an anti-dumping duty – that the duty may remain in force only as long as necessary to counteract injurious dumping. The purpose of "initiating" a sunset review is not only to begin analyzing whether continuation of the order is necessary, but also to determine if "initiation" itself is necessary. The above-mentioned presumption that the imposition of an anti-dumping duty will terminate in five years contemplates that some duties will terminate without any review or analysis. Therefore, Article 11.3 first requires that the administering authority make a threshold decision as to whether to begin a sunset review. Initiation is not an empty or automatic decision.

14. In other provisions within the AD Agreement, such as Article 5.6, the authorities do not have carte blanche to automatically initiate investigations without first having "sufficient evidence." It is illogical to imagine that the AD Agreement only limits administering authorities' ability to self-initiate in some instances but not in others.

15. Further, the automatic initiation of sunset reviews has a chilling effect similar to the initiation of investigations. Automatic initiation of sunset reviews negate any benefits that exporters may enjoy from knowing that imposition of an anti-dumping duty will terminate predictably after five years. By automatically initiating sunset reviews, the USG virtually assures that the imposition lasts at least six years rather than five years, and for those exporters who cannot afford to participate, the imposition of the anti-dumping duty will continue indefinitely. Automatic initiation thus results in inconsistent interpretation of Article 11.3.

3. The Context in Which Article 11.3 Operates Confirms There Must Be "Sufficient Evidence" to Justify Initiating a Sunset Review

16. Furthermore, the text and context of Article 12 explicitly requires that the authorities have "sufficient evidence" to initiate sunset reviews under Article 11.3. The *mutatis mutandis* application of Article 12.1 in accordance with Article 12.3 to Article 11.3 establishes that, once the authorities are satisfied that there is "sufficient evidence" to justify initiation, the authorities must provide public notice of the initiation of the sunset review. To give Article 12 its proper meaning, therefore, the authorities must satisfy the "sufficient evidence" standard to initiate sunset reviews. The USG's interpretation of Article 11.3 is thus incorrect because it reads the application of Article 12.1 and 12.3 out of the Agreement.

17. The text and context of Article 5.6 also requires that the administering authorities have "sufficient evidence" to initiate sunset reviews under Article 11.3. Because of the *mutatis mutandis* application of the Article 12 to Article 11.3, the language "pursuant to Article 5" in Article 12.1 requires that Article 5.6 must also apply to sunset reviews. Article 5.6 requires that the sufficient evidence standard defined in Article 5.2 must also apply to instances where the administering authorities self-initiate. Therefore, because both Articles 12.1 and 5.6 use the "sufficient evidence" rules, those same rules apply to all initiations, including self-initiations by the authorities in original investigations and sunset reviews.

4. The Prior Panel Decision on Article 21.3 of the SCM Agreement Is Not Persuasive

18. With all due respect, we submit that the panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/R (3 July 2002), erroneously interpreted the consistency of the automatic initiation of sunset reviews with Article 21.3 of the SCM Agreement, the corollary to Article 11.3 of the AD Agreement. This Panel should not follow the prior panel's decision. First, the CVD panel misread the text. The panel's finding of "two modalities" in sunset reviews is true, but incomplete. Even in the case of a "duly substantiated" petition, the authorities must still evaluate whether the evidence is sufficient to "duly substantiate" the petition. Under the CVD panel's interpretation, there is no standard of "sufficient evidence" in either modality. Second, the CVD panel did not consider Article 21.3 in its proper context. The CVD panel never discussed or even mentioned Article 22.1 of the SCM Agreement (the corollary to Article 12.1 of the AD Agreement), which provides for the "sufficient evidence" standard, standard and also establishes a textual link to Articles 21.3 through 22.7 of the SCM Agreement. Third, the CVD panel allowed "purpose" to override the text and context, resulting in an inadequate analysis of the purpose of Article 21.3 of the SCM Agreement. Finally, the CVD panel misinterpreted the meaning of "special circumstances" in Article 11.6 (the corollary to Article 5.6 of the AD Agreement) of the SCM Agreement. The "sufficient evidence" standard should still be applicable irrespective of the frequency of self-initiation as between an original investigation and a sunset review.

19. For the reasons stated above, the proper interpretation of Article 11.3 in accordance with its text, context, and object and purpose requires a self-initiated sunset review be based on "sufficient evidence." Although the standard of "sufficient evidence" may vary on a case-by-case basis, automatic self-initiation by the authorities without any evidence cannot be within the scope of the "sufficient evidence" standard. The Act and USDOC's regulations mandating automatic initiation of sunset reviews without any evidence, therefore, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 on its face. Further, USDOC's automatic initiation of this sunset review on 1 September 1999 pursuant to the Act and USDOC's regulations is also inconsistent with these provisions of the AD Agreement.

B. "LIKELIHOOD" OF CONTINUATION OR RECURRENCE OF DUMPING

20. USDOC's complete refusal in sunset reviews to undertake a serious prospective examination of the probability of future dumping based on positive evidence is inconsistent with Article 11.3, on its face, as a general practice, and as applied in this case. USDOC's regulations, the SAA, and the Sunset Policy Bulletin create a myriad of WTO-inconsistencies by preventing any sort of prospective analysis. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence that there is a probability, not some remote possibility, that dumping will continue or recur in the future.

1. Regulations Mandate Application of "Not Likely" Standard

21. Section 351.222(i)(1)(ii) of USDOC regulations mandate explicit application of a "not likely" standard, even though a prior panel in *United States – Anti-dumping Duty on Dynamic Random*

Access Memory Semiconductors (DRAMS) of one Megabit or Above from Korea, WT/DS99/R (29 January 1999), has made clear that a "not likely" standard does not comply with the "likely" standard of Article 11. Notwithstanding this previous panel decision and the USG's own acceptance of this panel decision, the USG continues to maintain the "not likely" standard in USDOC's regulations with respect to sunset reviews. Because USDOC's regulation mandates termination of an anti-dumping duty based on the "not likely" standard, USDOC's regulation is thus inconsistent with Article 11.3.

2. No Attempt to Determine "Likely" of Dumping Prospectively

22. The USG's WTO-inconsistency on this issue does not stop at the provisions of the regulations. The Sunset Policy Bulletin impermissibly restrict any real factual investigation to determine prospectively whether dumping is "likely" to continue or recur, nonetheless the terms "likely" and "determine" in Article 11.3 require that the authorities undertake a prospective analysis of positive evidence to establish whether dumping is likely to continue or recur. Instead of looking forward, as a general practice USDOC looks backwards.

23. Based on statements in the SAA, the Sunset Policy Bulletin establishes four factual scenarios to determine whether dumping is likely to continue or recur. All of these four factual scenarios, however, examine only historical dumping margins and import volumes. The Sunset Policy Bulletin thus impermissibly restricts USDOC's analysis to a retrospective rather than a prospective analysis. Furthermore, of these four factual scenarios, there is only one scenario in which respondents may be deemed "not likely" to dump in the future. Yet, this factual scenario is virtually impossible to satisfy. Respondents who satisfy one of other three factual scenarios that indicate respondents are "likely" to dump in the future can only overcome this presumption by placing other evidence on the record. To place other evidence on the record, however, a respondent must first establish "good cause." This restrictive, static, and retrospective approach creates an irrefutable presumption that dumping will continue or recur. USDOC nearly always finds one of the first three scenarios to be applicable to sunset reviews of anti-dumping duty and hardly ever finds other factors or other information sufficient to rebut this presumption.

24. For these reasons, USDOC does not take the proper prospective approach to determine whether dumping is likely to continue in a sunset review and therefore acts inconsistently with Article 11.3 as a general practice.

25. Further, USDOC applied this general practice to this sunset review to determine that dumping is likely to continue in this case. USDOC determined that dumping is likely because respondents met one of the three "likely" scenarios in the Sunset Policy Bulletin (the present import volume had been lower than the volume during the period of the original investigation, and dumping continued at level above 0.5 per cent). In reaching this determination, USDOC refused to consider other information submitted by NSC showing that NSC's export volume had been lowered due to the production of subject product at its joint-venture in the United States. NSC also presented facts that NSC would not export the subject product at dumped price. USDOC also refused to consider these facts, although USDOC has known of the existence of these facts since the original investigation and subsequent administrative reviews. The determination is thus also inconsistent with Article 11.3.

3. USDOC's Application of 30-Day Submission Rules to This Review

26. Instead of positively collecting and analyzing information relevant to potential future dumping, USDOC regulations shuts down any meaningful inquiry with rigid procedures and artificial deadlines. Applying the regulations, USDOC stated that it did not consider any information submitted after the 30-day period from the initiation of this sunset review, as provided in its regulations. USDOC then failed to give NSC a full opportunity to defend its interests when USDOC

refused to consider NSC's information in its 11 May 2000 submission. Such a determination is inconsistent with Articles 6.1, 6.2. and 6.6.

C. USE OF WTO-INCONSISTENT DUMPING MARGINS AND *DE MINIMIS* STANDARD

1. Use of WTO-Inconsistent Margins

27. In accordance with the Sunset Policy Bulletin, USDOC bases its likelihood determination of future dumping on historical dumping margins, including dumping margins found in the original investigation and those found in subsequent administrative reviews. USDOC applied this general practice to this sunset review. These dumping margins reflect WTO-inconsistent methodologies. As a result, the USG acts inconsistently with Articles 2.2.1, 2.2.2, 2.4.2, 11.3 and 18.3 both as a general practice and as applied in this case.

28. Article 2 sets forth the fundamental definition of "dumping," which governs throughout the rest of the AD Agreement. At the same time, Article 18.3 requires that each Member conduct its sunset reviews in accordance with the provisions of the AD Agreement. Consequently, the USG is under an obligation to apply Article 2-consistent dumping margins in its sunset reviews.

29. In accordance with the Sunset Policy Bulletin, however, USDOC continues to apply to sunset reviews, including this case, dumping margins calculated in the original investigations prior to the WTO Agreement. These margins were calculated pursuant to the Article 2 inconsistent methodologies, including the minimum 10 per cent G&A for COP and CV, the minimum 8 per cent profit for CV, the "10/90" below-cost test, and the individual-to-monthly-average comparison. USDOC uses these WTO-inconstant dumping margins to determine the likelihood of dumping in sunset reviews without any attempt to bring these margins into conformity with Article 2.

30. Further, the Appellate Body in *EC – Bed Linens*, WT/DS141/AB/R (1 March 2001), found that Articles 2.4 and 2.4.2 oblige the authorities to make a dumping determination without "zeroing" negative dumping margins. Yet, as a general practice USDOC has consistently calculated dumping margins in original investigations and subsequent reviews using the zeroing methodology for more than fifteen years. In accordance with the Sunset Policy Bulletin, USDOC uses these dumping margins upon which it bases its likelihood determination.

31. Therefore, by applying these WTO-inconsistent dumping margins, the USG acts inconsistently with its obligation under both Articles 2, and 11.3 and 18.3 as a general practice and as applied in this case.

2. USDOC Applies the Wrong *De Minimis* Standard

32. USDOC's regulations applying a 0.5 per cent *de minimis* standard to sunset reviews, rather than the proper 2.0 per cent *de minimis* standard as provided for in Article 5.8, are both on their face and as applied in this case inconsistent with the USG's obligations under Articles 5.8 and 11.3. If the proper *de minimis* standard were applied to WTO-consistent dumping margins in this sunset review respondents would be found to be *de minimis*, resulting in the termination of the anti-dumping duty.

33. As stated above, the term "dumping" must be given the same interpretation throughout the AD Agreement. Therefore, the rules in the original investigation to determine "dumping" also apply to the "dumping" determinations in sunset reviews as well. Also as discusses above, a sunset review and an original investigation share the same object and purpose. Thus, both also share the same *de minimis* standard under Article 5.8. Further, Article 11.1 mandates that anti-dumping duties should remain in place only as long as they continue to counteract dumping that is causing injury. Article 5.8 states that a dumping margin of less than 2.0 per cent is incapable of causing injury. Therefore, it

would be inappropriate to continue an anti-dumping duty order on respondents when their dumping margins are by definition incapable of causing injury.

34. The panel in *US – German Steel CVD Sunset* supports this interpretation. The panel found that the same *de minimis* standard under Article 11.9 of the SCM Agreement should apply to both original investigations and to sunset reviews of countervailing duty orders under Article 21.3 of the SCM Agreement. The same rationale applies in this case. Further, the panel in *US – DRAMs* also supports that a *de minimis* standard of two per cent applies to sunset reviews.

D. USDOC'S ORDER-WIDE BASIS DUMPING DETERMINATION

35. USDOC's dumping determination in sunset reviews on an order-wide basis is inconsistent with Articles 6.10 and 11.3 of the AD Agreement. The Sunset Policy Bulletin explicitly states that USDOC will base its likelihood determination on an order-wide basis. As a result, USDOC on every occasion has made its determination on an order-wide basis, including this sunset review. This approach is inconsistent with the company-specific evaluation of facts required by Article 6.10. Articles 9.2 and 11.1 also provide Article 11.3 with the contextual support that the authorities shall name suppliers who must be subject to an anti-dumping duty. Thus, USDOC's determinations in sunset reviews on an order-wide basis are inconsistent with Articles 6.10 and 11.3 both as a general practice and as applied in this case.

E. USDOC'S REPORTING OF WTO-INCONSISTENT MARGINS TO THE USITC FOR THE PURPOSE OF ITS INJURY ANALYSIS

36. As a general practice and as applied in this sunset review, USDOC reports to the USITC WTO-inconsistent dumping margins for use in the USITC's injury analysis. USDOC's reporting of flawed dumping margins creates another set of WTO inconsistencies.

37. As discussed above, the "likely" standard in Article 11.3 requires a prospective "determination" based on positive evidence that dumping is likely to continue or recur on a case-by-case basis. Thus, simply relying on and reporting previously calculated dumping margins to the USITC does not satisfy the requirements of Article 11.3. Nonetheless, the Sunset Policy Bulletin in accordance with the SAA establishes USDOC's general practice of reporting previously calculated dumping margins in original investigations in substantially all sunset reviews to the USITC. USDOC never reports probable future dumping margin rates to the USTIC. This policy completely ignores the current conditions of the market. In this case, for example, USDOC reported the original seven-year old dumping margins without considering information submitted by NSC showing significant changes in market conditions over the last seven years. USDOC's reporting of outdated dumping margins to the USITC, therefore, both as a general practice and as applied in this case, is inconsistent with the USG's obligations under Article 11.3.

38. Moreover, as discussed above, Article 18.3 requires that the USG conduct sunset reviews in accordance with the provisions of the AD Agreement including Article 2. USDOC thus has an obligation to provide the USITC with WTO-consistent dumping margins for the purpose of its injury determination. Yet, USDOC reports WTO-inconsistent dumping margins in original investigations irrespective of their calculation methodologies. Nor does USDOC attempt to adjust the previously calculated margins to be WTO-consistent.

39. In this case, USDOC continued its general practice of not adjusting the originally calculated dumping margins in the original investigation, in reporting these margins to the USITC. USDOC's reporting of these margins to the USITC, therefore, is inconsistent with Articles 2, 11.3 and 18.3.

F. THE USITC'S CUMULATIVE ASSESSMENT OF NEGLIGIBLE IMPORTS WITH OTHER IMPORTS

40. Article 3.3 requires that the USITC address whether imports from a particular country are negligible in a sunset review. Throughout the AD Agreement, the term "injury" is defined by Article 3, as specifically provided in footnote 9. Therefore, any provisions of the AD Agreement, which require the authorities to evaluate injury, must refer to the obligations under Article 3, including the negligibility standards for cumulation under Article 3.3. Article 3.3 incorporates the three per cent negligibility standard under Article 5.8.

41. Section 752(a)(7) of the Act grants the USITC discretion to determine whether to cumulate respondent countries' imports when determining injury in a sunset review. The USITC exercised this discretion and considered negligibility in a sunset review context. No where in the USITC's determination in this case, however, did the USITC even discuss the negligibility of imports in deciding whether to cumulate imports from Japan with other imports. The USITC ignored the facts in its own record, which demonstrates that the subject imports from Japan have consistently been less than three per cent of the total imports, and an aggregate of all individually negligible imports has been less than seven per cent. Thus, the USITC's decision to cumulate subject imports from Japan with imports from other countries in this sunset review is inconsistent with Articles 3.3, 5.8, and 11.3.

G. THE USG'S CONDUCTING SUNSET REVIEWS NOT IN A UNIFORM, IMPARTIAL AND REASONABLE MANNER

42. The WTO Agreement regulates both the substance of Members' anti-dumping regimes and their administration, demanding adherence to the fundamental international law principle of good faith. Article X:3(a) of GATT 1994 reflects this obligation, requiring Members to "administer {its measures} in a uniform, impartial and reasonable manner." The panel in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* (WT/DS155/R) clarified that even examination of administrative rules are permissible under Article X:3(a), provided the rules are administrative in nature. In this case, the USG's policies and procedures discussed below are all administrative in nature and are inconsistent with the fundamental fairness provision of Article X:3(a) of GATT 1994.

1. The Administration of the USG's Initiation of Sunset Reviews

43. Section 751(c) of the Act and Section 351.218(a) and (c)(1) of USDOC's regulations establish administrative rules mandating the automatic initiation of all anti-dumping duty orders. The SAA has confirmed that these rules are administrative in nature. By automatically initiating its sunset reviews, the USG neglects its substantive obligations to collect evidence justifying the initiation of a particular sunset review. The automatic initiation of sunset reviews without any grounds, ignoring these substantive issues, is therefore an "unreasonable" administration of its substantive sunset review statute and regulations under Article X:3(a) of GATT 1994.

44. In addition, the USG admitted in the SAA that it automatically initiates sunset reviews to administer the initiation stage to "avoid placing an unnecessary burden on the domestic industry." The USG has chosen to initiate all sunset reviews automatically in favor of the domestic industry at the expense of respondents who suffer from the pro-longed effects of anti-dumping measures due to automatic initiation. Thus, the USG's statute and regulations, which mandates that USDOC administer its sunset reviews by automatic self-initiation without any evidence, is also a "partial" administration of US sunset laws, and thus inconsistent with the USG's obligations under Article X:3(a) of GATT 1994 both on its face and as applied in this case.

2. The Administration of USDOC's 30-Day Submission Rules

45. USDOC stated that it would not consider any information submitted after the first 30-day period from initiation of this sunset review, as provided in its regulations. As a result of USDOC's strict adherence to the 30-day rule, NSC was denied a full opportunity to defend its interests. Such practice is an unreasonable administration of the USG's sunset law.

46. The administration of the 30-day rule also placed a greater burden on respondents. USDOC's regulations require that respondents report much more in-depth and detailed information within the initial 30-day period rather than the domestic industry. In addition to the extra reporting requirements placed on respondents, if respondents wish to present alternative information, they must also provide documentation showing "good cause" as well as the supporting information. Therefore, USDOC's regulations prejudice respondents' ability to effectively defend itself and is a "partial" application of its regulations.

47. By applying these administrative regulations in this case, USDOC administered this sunset review unreasonably and partially with respect to respondents, and, consequently, inconsistently with Article X:3(a) of GATT 1994.

3. USDOC's Non-Uniform Approach to Termination Decisions under Article 11.2 and 11.3

48. Both revocation proceedings under Article 11.2 of the AD Agreement and the sunset proceedings under Article 11.3 share nearly identical objects, purposes, and legal standards to determine the likelihood of continuation or recurrence of dumping. Yet, as a general practice, USDOC has treated revocation reviews under Article 11.2 and sunset reviews under Article 11.3 differently. Under an 11.2 review, USDOC actively collects prospective information regarding current and future market conditions. Further, once a respondent establishes it has shipped in commercial quantities with zero or *de minimis* dumping margins for three consecutive years, it is then up to the domestic industry to rebut the presumption that dumping is not likely to continue or recur upon revocation. With respect to sunset reviews, however, USDOC effectively creates an irrebuttable presumption against respondents that dumping is likely to continue or recur despite any changes in the market over the past five year period. By maintaining two different standards for revocation proceedings under Article 11.2 and sunset reviews under Article 11.3, USDOC fails to administer these two proceedings in a uniform manner as required in Article X:3(a) of GATT 1994.

H. MAINTAINING THE ABOVE-DISCUSSED WTO-INCONSISTENT LAWS, REGULATIONS, AND ADMINISTRATIVE PROCEDURES ABROGATES THE USG'S OBLIGATIONS UNDER THE AD AGREEMENT AND ARTICLE XVI:4 OF THE WTO AGREEMENT

49. Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement both provide that a Member must ensure the conformity of its laws, regulations and administrative procedures with its obligations and should take all necessary steps to ensure such compliance. Given all of the WTO-inconsistencies discussed above, the USG still has not brought its sunset laws into conformity with the AD Agreement and Article X:3(a) of GATT 1994 or applying the existing legislation and accompanying regulations and policy guidelines in an inconsistent fashion. Therefore, the USG acted inconsistently with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement.

IV. CONCLUSION

For the reasons discussed above, Japan respectfully requests that the Panel: (1) find that the specific statutory provisions, regulations, and determinations made by the USG are inconsistent with the various enumerated provisions of the AD Agreement, GATT 1994 and the WTO Agreement; (2) recommend that the Dispute Settlement Body request that the USG act to amend the above listed

elements of its sunset statute, regulations, and policies to conform with its obligations under the WTO Agreement; and (3) find that compliance with its WTO obligations requires that the USG terminate the anti-dumping duty order on the subject product from Japan.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

1. In this proceeding, Japan challenges the findings of the US Department of Commerce ("Commerce") and the US International Trade Commission ("USITC") in the sunset review of the antidumping duty order on corrosion-resistant carbon steel flat products from Japan, in which the United States determined that revocation was likely to lead to the continuation or recurrence of dumping and injury and, as a result, continued the order. Japan claims that those findings are inconsistent with various provisions of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"), the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"). Japan also purports to challenge certain "practices" of the United States with respect to sunset reviews, without explaining how those practices are *mandatory* and, therefore, subject to review by this Panel. Finally, Japan challenges certain US statutory and regulatory requirements regarding sunset reviews, claiming that these are inconsistent with various provisions of the WTO Agreement, GATT 1994, and the AD Agreement.

2. Article 11.3 is the only provision of the AD Agreement that sets forth the substantive requirements for determining whether an order should be revoked five years after its imposition. In other words, Article 11.3 establishes the standards and criteria required by the AD Agreement with respect to sunset reviews. The terms of Article 11.3 are, however, very limited. They require simply that the authorities determine whether revocation of the order is likely to lead to the continuation or recurrence of dumping and injury. The United States, in the determination challenged by Japan, as well as in its antidumping law, has complied with the requirements of Article 11.3.

3. Nowhere does Article 11.3 address the type of evidence to be used or indicate the types of calculations, if any, that are necessary to determine whether, absent the order, dumping and injury is likely to continue or recur. Nevertheless, the terms of Article 11.3 make it clear that the purpose of a sunset review is to determine, based on a *predictive* analysis, whether the conditions necessary for the continued imposition of an antidumping duty exist. Thus, the focus of a sunset review under Article 11.3 is likely *future* behaviour if the remedial measure were removed, not whether or to what extent dumping or injury currently exists or has existed in the past.

4. Almost every aspect of Japan's first submission – including its claims that the United States has reversed the "presumption of revocation," has engaged in WTO-prohibited "zeroing," and has failed to apply the *de minimis* "rule" – is permeated with a basic misapprehension about the object and purpose of sunset reviews. For Japan, the fundamental operating assumption is that a sunset review is a proxy for a new antidumping investigation. Japan is unable to cite any textual support in the AD Agreement or the WTO Agreement for this supposition, because no such support exists. Japan's view is, moreover, inconsistent with the object and purpose of sunset reviews as reflected in Article 11.3. Plainly stated, a sunset review is not a proxy for an investigation, nor is it a proxy for an annual administrative review; the sunset review procedure stands on its own.

5. Japan's concerns are nothing more than attempts to read obligations into the agreements that are not there, and to seek to obtain through the dispute settlement process results which may only be obtained at the negotiating table. That, however, is not the function of the dispute resolution process as established by the Understanding on Rules and Procedures Governing the Settlement of Disputes

("DSU"). As is made clear in Article 3.2 of the DSU, recommendations and rulings of a panel "cannot add to or diminish the rights and obligations provided in the covered agreements." This Panel should reject Japan's effort to add to its rights at the expense of the United States.

6. In sum, the United States has met its WTO obligations and is not in violation of Article X of GATT 1994, Articles 2, 3, 5, 6, 11, 12, 18.3, 18.4 of the AD Agreement, or Article XVI:4 of the WTO Agreement.

II. FACTUAL BACKGROUND

7. On 9 July 1993, Commerce published its final affirmative antidumping duty determination on certain steel products from Japan, including corrosion-resistant carbon steel flat products. On 9 August 1993, the USITC notified Commerce of its final affirmative determination that imports of certain corrosion-resistant carbon steel flat products from Japan were causing injury to the US domestic industry. On 17 August 1993, Commerce issued the antidumping duty order on these products.

8. On 1 September 1999, Commerce and the USITC published notices of initiation of the sunset review of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan. On 2 August 2000, Commerce published its final sunset determination, finding that continuation or recurrence of dumping was likely. On 13 November 2000, the USITC published its final sunset determination, finding that continuation or recurrence of injury was likely. On 15 December 2000, the United States published notice of the continuation of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan based on the decisions by Commerce and the USITC.

III. SUBSTANTIVE ARGUMENT

A. JAPAN BEARS THE BURDEN OF PROVING ITS CLAIMS

9. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation. If the balance of evidence and argument is inconclusive with respect to a particular claim, the Panel must find that the complaining party, Japan, failed to establish that claim. The United States believes that Japan has failed to meet its burden to establish a *prima facie* case in this dispute.

B. ARTICLE 11.3 OF THE AD AGREEMENT DOES NOT REQUIRE AN ANTIDUMPING DUTY ORDER TO BE TERMINATED AFTER FIVE YEARS

10. Japan argues that Article 11.3 of the AD Agreement requires antidumping duty orders to be terminated after five years. Article 11.3 creates no such requirement.

11. Article 11.3 permits the authorities to evaluate an antidumping duty order five years from its imposition, and does not require the termination of an antidumping duty order after five years if a sunset review results in a determination that terminating the order would be likely to lead to continuation or recurrence of dumping and injury. Japan's assertions to the contrary misstate the explicit terms of Article 11.3.

C. THE AD AGREEMENT DOES NOT IMPOSE EVIDENTIARY REQUIREMENTS ON THE SELF-INITIATION OF SUNSET REVIEWS UNDER ARTICLE 11.3

12. Article 11.3 contains no reference to evidentiary requirements for the self-initiation of sunset reviews. Nonetheless, Japan argues that an evidentiary requirement is a "procedural rule" and

because Article 11, including Article 11.3, has no "procedural rules," such rules can and must be found elsewhere throughout the AD Agreement and then applied to Article 11.3 sunset reviews.

13. Japan fails to explain why, in this case, the absence of any reference to evidentiary requirements where authorities initiate a sunset review means anything other than the plain meaning: that the Members did not agree to assume any such requirements. When Article 11 contemplates procedural requirements, it states such requirements explicitly.

14. Japan next attempts to rely on the object and purpose of Article 11 to establish that the "sufficient evidence" standard of Article 5.6 is the evidentiary standard for self-initiation of sunset reviews under Article 11.3. Rather than reading the terms of the provision and interpreting them *in light of* the object and purpose of the AD Agreement, however, Japan effectively calls for the ascertainment of the object and purpose of a particular provision of the AD Agreement and then applies that object and purpose *in spite of* the ordinary meaning of the words. The initiation of a review is the necessary beginning of a process leading to a determination of whether or not dumping and injury are likely to continue or recur. Japan's argument is based upon an incorrect equation of the standards for initiation with those for the substantive determination to be made in a review.

15. Japan also makes the argument that the context of Article 11.3 confirms that the evidentiary requirement for self-initiation of sunset reviews under Article 11.3 is the "sufficient evidence" standard found in Article 5.6. However, consideration of the ordinary meaning to be given to the terms of Article 11.3 in their context and in light of the object and purpose of the AD Agreement provides no support for Japan's contention. Japan simply seeks to read into Article 11.3 "words that are not there."

16. Consequently, US law is not WTO-inconsistent in providing for automatic self-initiation of sunset reviews, and Commerce's automatic self-initiation in the case of the Japan steel sunset review is therefore not WTO-inconsistent.

D. US REGULATIONS AND COMMERCE'S SUNSET POLICY BULLETIN ARE NOT INCONSISTENT WITH THE ARTICLE 11.3 OBLIGATION TO DETERMINE WHETHER DUMPING IS LIKELY TO CONTINUE OR RECUR

17. Japan asserts that Section 351.222(i)(1)(ii) of Commerce's Sunset Regulations is inconsistent with the Article 11.3 obligation to determine likelihood. Japan misconstrues the purpose, and, consequently, the meaning of that regulatory provision. 19 C.F.R 351.222(i)(1)(ii) is ministerial in nature and addresses the timing of a revocation after Commerce has made a negative final sunset determination under section 751(d)(2).

18. Section 751(d)(2) of the Tariff Act of 1930 is the provision of US law governing full sunset reviews. Section 751(d)(2) clearly and unambiguously states that Commerce must determine that dumping "would be likely" in the context of a sunset review before an order could be maintained. Contrary to Japan's assertions, in accordance with the US statute, Commerce must use a "likely" standard in determining whether dumping will continue or recur.

19. Japan identifies the "Statement of Administrative Action" ("SAA") and the Sunset Policy Bulletin as the "practice and procedures" establishing an alleged "irrefutable" presumption that dumping is likely to continue in violation of Article 11.3 of the AD Agreement. Neither the SAA nor the Sunset Policy Bulletin, however, mandate or preclude actions subject to the AD Agreement. Moreover, neither the SAA nor the Sunset Policy Bulletin does anything concrete, independently of any other instrument. Therefore, neither gives rise to an independent violation of WTO obligations. Instead, Japan may only challenge Commerce's actual actions in the context of the final sunset determination of corrosion-resistant steel from Japan.

20. Commerce applied a "likely" standard in the sunset review in this case. Commerce found dumping and depressed import volumes in the period prior to the sunset review. Consequently, in accordance with the obligations of Article 11.3, Commerce drew a reasonable and logical inference that this evidence was indicative of likely continuation or recurrence of dumping in the absence of a duty.

21. Japan argues that Commerce's focus on evidence of "historical dumping" is insufficient to support Commerce's finding in this case. Here, Commerce found that the subject merchandise was dumped in several periods prior to the sunset review. It stands to reason, therefore, that dumping will likely continue when there is no order in place because dumping occurred when there *was* an order in place. In fact, historical dumping in the presence of a discipline can be highly probative of the behaviour of exporters in the absence of a discipline.

22. Japan also argues that Commerce's rejection of certain information that addressed reasons for the depressed import volumes was improper. Japan is incorrect in its assertion. In the first instance, Commerce decided not to consider the information because neither the information itself nor a justification of its relevance had been supplied in a timely fashion. Consequently, Commerce did not apply the requirement for "good cause" in this case. Second, Commerce explained that, even had the information been considered, it would not have affected Commerce's ultimate determination that it was likely that dumping would continue or recur because, whatever the circumstances concerning the import volumes, there remained the evidence that exporters were dumping after issuance of the order.

23. Finally, Japan's claim that Commerce applied a different "likely" standards in this case than it does in Article 11.2 reviews is simply incorrect. Commerce's analysis, exactly like that in an Article 11.2 review, focused on the existence of dumping in the period prior to the sunset review and the likelihood of future dumping by the Japanese producers of corrosion-resistant steel. Japan has failed to identify and articulate how Commerce's application of the policies set forth in the SAA and Commerce's Sunset Policy Bulletin is inconsistent with the obligation to determine likelihood under Article 11.3 of the AD Agreement.

E. COMMERCE'S ANALYSIS OF DUMPING IN THE CONTEXT OF THE LIKELIHOOD AND "MARGIN LIKELY TO PREVAIL" DETERMINATIONS IN THIS CASE WAS CONSISTENT WITH THE AD AGREEMENT

24. Japan further attempts to undermine the determinations in this case by asserting that Commerce's reliance on pre-WTO Agreement dumping margins in analyzing the likelihood of continuation or recurrence of dumping is inconsistent with Articles 2, 11.3, and 18.3 of the AD Agreement, both as a general practice and as applied in this case. In the same vein, Japan challenges, both in general and as applied in this case, Commerce's reliance on margins from the original investigation because of the application of allegedly WTO-inconsistent methodologies in that segment of the proceeding. Japan also maintains that Commerce's sunset practice, both in general and as applied in this case, violates the AD Agreement by relying on dumping margins from the original investigation and the two completed administrative reviews which were calculated using what Japan refers to as a "zeroing" methodology, *i.e.*, a methodology in which no offset is granted to the respondent for negative differences between the normal value and export price (or constructed export price) of individual transactions. Finally, Japan contends that the approach Commerce uses to identify the rate of dumping likely to prevail in the event of revocation, both as a general practice and as applied in this case, violates Articles 2, 11.3, and 18.3 of the AD Agreement.

25. As an initial point, Japan has not demonstrated that Commerce is required by any aspect of US law to rely on any of the margin information to which Japan objects for purposes of sunset reviews. Consequently, Japan may only challenge Commerce's reliance on such information *in this case*.

26. Japan's arguments further fail because they are based on the incorrect assumption that a sunset review is a proxy for a new investigation, and that the applicable test under Article 11.3 is therefore whether, in a current investigation of the subject merchandise, the authorities could rely on the information in question. Under Article 11.3 of the AD Agreement, however, Commerce is not required to (1) conduct a new investigation, (2) quantify current or past dumping margins, or (3) apply any particular methodology to the consideration of dumping margins. Moreover, Japan's arguments regarding the use of pre-WTO margins from the investigation fail for the additional reason that the investigation was not subject to the AD Agreement. Accordingly, and consistent with its obligations under the AD Agreement, Commerce in this case *reasonably* relied on evidence of dumping and import volumes over the life of the order.

F. THERE IS NO *DE MINIMIS* STANDARD FOR SUNSET REVIEWS

27. Under Article 5.8 of the AD Agreement, Members must apply a two percent *de minimis* standard in antidumping duty *investigations*. Japan, however, argues that the Article 5.8 *de minimis* standard is also applicable in sunset reviews under Article 11.3.

28. Nothing in the text of Articles 5.8 or 11.3 requires application of the Article 5.8 two percent *de minimis* standard in Article 11.3 sunset reviews, or any other type of review. In particular, there is no reference in Article 11.3 to a *de minimis* standard and the text of Article 5.8 makes no reference to Article 11.3. Nor do the context or the object and purpose arguments Japan makes lend any support to its theory.

29. Once again, Japan completely ignores the fundamental difference between investigations, in which a *de minimis* standard is required under Article 5.8, and sunset reviews. The distinction between the purpose of an investigation and the purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer that the *de minimis* standard for investigations applies in sunset reviews.

30. Finally, Japan would have the Panel read into the use of the word "dumping" in Article 11 an implicit reference to Article 5.8 because authorities must terminate an investigation if the margin of dumping is *de minimis*. Nothing in the word "dumping," as defined in the AD Agreement, implies anything about a *de minimis* standard. Given the text of the AD Agreement, the only conclusion one can reach is that there is no obligation to apply the Article 5.8 *de minimis* standard in an Article 11.3 sunset review.

31. In an attempt to bolster its non-existent textual argument, Japan cites the fact that the United States applies a *de minimis* standard in sunset reviews as indicative of the requirement to apply a *de minimis* rule in the context of Article 11.3 sunset reviews. The United States' *de minimis* "practice" does not implicate the AD Agreement. As demonstrated above, there is no *de minimis* standard in sunset reviews. Thus, Members are free to determine what, if any, *de minimis* standard they will apply.

G. THERE IS NO OBLIGATION UNDER ARTICLE 11.3 OR ELSEWHERE IN THE AD AGREEMENT TO DETERMINE LIKELIHOOD ON A COMPANY-SPECIFIC BASIS

32. Japan maintains that sunset review determinations of whether revocation is likely to lead to continuation or recurrence of dumping must be made on a company-specific basis, citing Articles 11.3 and 6.10 of the AD Agreement.

33. However, the text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, makes no reference to determining the likelihood of dumping for individual companies. Moreover, the provisions of Article 6, as incorporated into Article 11 reviews

by Article 11.4, are not intended to have an impact on the substantive standards or criteria to be applied in sunset reviews; they are only intended to have an impact on the *manner* in which the substantive standards or criteria are applied. Consequently, there is nothing in Article 11 that even suggests standards or criteria for the likelihood of dumping determination that focus on an individual company's likelihood of continuation or resumption of dumping. The order-wide approach required by US law is therefore entirely consistent with the AD Agreement.

H. COMMERCE COMPLIED WITH THE EVIDENTIARY AND PROCEDURAL REQUIREMENTS OF ARTICLE 11.3 IN THIS CASE

34. There is no dispute that, based on Article 11.4, the provisions of Article 6 on evidence and procedure apply to sunset reviews under Article 11.3. Japan does not challenge the WTO-consistency of US law in this regard; Japan does, however, claim that Commerce failed to comply in this case with the evidentiary and procedural requirements of Article 11.3.

35. Japan alleges in several instances that the procedures followed in this case were in some way unfair, without demonstrating how the procedures in question were inconsistent with the AD Agreement. The fact is, Commerce followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Article 6.

I. THE USITC'S DECISION TO CUMULATE IMPORTS FROM VARIOUS COUNTRIES IN THIS SUNSET REVIEW IS CONSISTENT WITH THE AD AGREEMENT

36. Despite Japan's assertions to the contrary, consideration of the text of Articles 11.3, 3.3 and 5.8 of the AD Agreement, as well as the structure of the AD Agreement as a whole, shows that the AD Agreement does not require any, much less a strict, quantitative negligibility analysis in a sunset review. US law, like the AD Agreement, does not require the application of a quantitative negligibility test in sunset reviews. Moreover, US law permits, but does not require, the USITC in a sunset review to cumulate imports if it finds that certain statutory elements are met.

37. By its plain language, Article 11.3 does not contain a negligibility test. Nor is there any reference to negligibility concepts elsewhere in Article 11. The plain terms of Article 11 neither implicitly nor explicitly incorporate negligibility concepts from Article 5.8 and Article 3.3. If the negotiators of the AD Agreement had wanted to incorporate into Article 11.3 the concepts of negligibility from Article 5.8 or 3.3, they could and would have done so as they did in many express cross-references in the AD Agreement.

38. On its face, Article 3.3. applies to investigations, not reviews. Moreover, Article 3.3 refers to present events, whereas Article 11 refers to future or likely events. Article 3.3 does not refer in any manner to Article 11.3 reviews. Similarly, the plain language of Article 5.8 dispels any notion that its quantitative negligibility test applies to sunset reviews. The text of that provision indicates that it applies only to investigations. Nowhere in Article 5.8, or elsewhere in Article 5, is there any reference to Article 11.3 reviews.

39. Moreover, footnote 9 to Article 3 does not advance Japan's argument. That footnote simply provides that any reference in the AD Agreement to the term "injury" incorporates the definition of injury in Article 3. The fact that "injury" should be interpreted in accordance with Article 3 does not automatically mean that all provisions of Article 3 are applicable to Article 11. Furthermore, the text of the AD Agreement provides no support for the view that the provision to terminate an *investigation* when imports are negligible was based on any notion that negligible imports are necessarily non-injurious.

40. Additionally, an examination of footnote 9 in light of the object and purpose of the AD Agreement reveals why the negligibility requirements of Article 5.8 logically do not apply in sunset reviews. The focus of a review under 11.3 differs from that of an original investigation under Article 3. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without a remedial AD measure in place. In an original investigation, the authorities must examine the volume, price effects, and impact of unrestrained and unfairly traded imports on a domestic industry that may be indicative of present injury or threat.

41. In a sunset review, the investigating authorities, in deciding whether to remove the order, examine the *likely* volume of imports *in the future* that have been restrained for the last five years by the antidumping duty order and their *likely* impact *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years, a fact recognized by the standard of "continuation or recurrence of injury." Thus, the inquiry contemplated pursuant to Article 11.3 is counterfactual in nature, and entails application of decidedly different standards with respect to the volume, price and relevant impact factors from that applicable to original investigations. The authority must then decide the likely impact of a prospective change in the status quo, *i.e.*, the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports.

42. The absence of language regarding negligibility in Article 11.3 is consistent with the purpose of the sunset review provisions. The purpose of the antidumping duty order is to reduce or eliminate material injury caused by unfair acts in the market or to require adjustment of prices to eliminate dumping and injury. As a result of the order, dumped imports may have decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. Under Japan's argument, because certain imports cannot compete in the marketplace under the constraints of the order, *i.e.* without dumping, and as a result have declined in volume or exited the market altogether, the order should then be revoked. This result, so incongruous with the purpose of the sunset review provision, should be summarily rejected by the Panel.

J. THE ACTIONS AT ISSUE ARE CONSISTENT WITH THE AD AGREEMENT AND DO NOT VIOLATE ARTICLE XD:3(A) OF GATT 1994

43. Having failed to demonstrate that the US law and the application of that law are contrary to the AD Agreement, Japan tries to revisit its claims by turning to Article X:3(a) of the GATT 1994. Japan is apparently alleging that this Panel should find that, even if the contested decisions were consistent with the AD Agreement, they might nevertheless violate the Article X:3(a) requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner (which Japan terms "due process").

44. In considering the application of Article X:3(a) to this case, the Panel should note three things: First, Article X:3(a) is limited to the *administration* of certain laws, regulations, judicial decisions and administrative rulings of general application, *not* to the laws, regulations and administrative rulings themselves. Therefore, to the extent that Japan is complaining about laws, regulations and rulings of general application, as contrasted with their administration, its complaint is not properly founded in Article X:3(a).

45. Second, the purpose of GATT Article X:3(a) is to ensure that the administering authority has administered the law or the regulations in a uniform, impartial, and reasonable manner by ensuring that similarly situated persons are not treated differently. The purpose of GATT Article X:3(a) is not,

as Japan claims, to ensure that the administering authority administers different provisions that cover different situations in the same manner.

46. Third, a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. The Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the AD Agreement – from other Article X:3(a) disputes, in which the overall administration of some programme was alleged to be arbitrary.

47. Japan has not alleged that the overall procedure of the antidumping law of the United States is applied arbitrarily, or that Members are otherwise deprived of basic due process, such as notice and opportunity for review in antidumping proceedings. Rather, it disagrees with the specific results in this proceeding. As noted above, however, Commerce and the USITC conducted the sunset review at issue in a matter consistent with the AD Agreement.

K. US LAW IS IN CONFORMITY WITH ARTICLE XVI:4 OF THE WTO AGREEMENT

48. Congress specifically undertook to make the antidumping provisions of US law consistent with US international obligations. It adopted requirements that fully satisfy the obligations of the AD Agreement. Since US laws are in conformity with the AD Agreement, the United States is therefore not in violation of Article XVI:4 of the WTO Agreement.

L. THE SPECIFIC REMEDY SOUGHT BY JAPAN IS INCONSISTENT WITH ESTABLISHED PANEL PRACTICE AND THE DSU

49. Japan has requested this Panel to recommend that, if the Panel finds that there is insufficient evidence to determine that dumping and injury were likely to continue or recur if the order were revoked, the DSB request the United States to terminate its antidumping duty order. In so doing, Japan has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Japan on the merits, the Panel nonetheless should reject the requested remedy, and instead make a recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its antidumping measure into conformity with its obligations under the AD Agreement.

IV. CONCLUSION

50. Based on the foregoing, the United States respectfully requests that the Panel reject Japan's claims in their entirety.

ANNEX B

Third Party Submissions

Contents		Page
Annex B-1	Third Party Submission of Brazil	B-2
Annex B-2	Third Party Submission of Chile	B-12
Annex B-3	Third Party Submission of the European Communities	B-17
Annex B-4	Third Party Submission of Korea	B-27
Annex B-5	Third Party Submission of Norway	B-35

ANNEX B-1

THIRD PARTY SUBMISSION OF BRAZIL

I. INTRODUCTION

1. The Government of Japan ("Japan") challenges the consistencies of the US law and practice, which allow the continued imposition of antidumping duties in perpetuity, with the obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the GATT 1994 ("AD Agreement") and Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"). The Government of Brazil ("Brazil") fully concurs with the arguments raised by Japan and share its concerns that the US law and practice involving sunset reviews is in violation of the obligations under these agreements.

2. Brazil makes this third party submission to comment on two of the claims asserted by Japan and discuss their systematic application to all antidumping duty proceedings conducted by the United States. Specifically, Brazil addresses the application of the *de minimis* margin standard of 0.5 per cent and the use of the "zeroing" methodology.

3. Brazil has recently participated in consultations with the United States on these two issues in the context of the continued imposition of the antidumping duty on silicon metal from Brazil.[1] The consultations failed to resolve the dispute. Brazil has not yet requested the establishment of a panel with respect to its challenge.[2]

4. Brazil believes that in maintaining *de minimis* margin of 0.5 per cent and the zeroing methodology, the United States violates Articles 2.4, 2.4.2, 5.8, 11 and 18.3:

- The US regulation and application of the *de minimis* standard of 0.5 per cent to administrative reviews violate Articles 5.8, 11 and 18.3 of the AD Agreement because the definition of *de minimis* established in Article 5.8 is applicable to the consideration of whether the continued imposition of the antidumping duty is necessary.

- The US law and practice which fails to take into account any margin comparison that do not result in a positive margin, *i.e.*, zeroing, violates Articles 2.4 and 2.4.2 of the AD Agreement.

II. STANDARD OF REVIEW

5. Pursuant to Article 17.6(ii) of the AD Agreement, the Panel's approach in this dispute should be to interpret the relevant provisions of the AD Agreement in accordance with customary rules of interpretation of public international law. In the context of the practice developed by the Appellate Body and panels, the "customary rules of interpretation of public international law" has meant the application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna

[1] *See* WT/DS239/1/Rev.1.

[2] Specifically, Brazil's challenge was based on the continued imposition of the antidumping duty on Silicon Metal from Brazil with respect to one producer, Companhia Brasileira Carbureto de Cálcio. ("CBCC"). The decision of the United States to maintain the antidumping duty with respect to CBCC was based, in part, on the application of the application of the *de minimis* standard of 0.5 per cent to administrative reviews and the use of the zeroing methodology.

Convention").[3] This use of the Vienna Convention applies both under Article 11 of the DSU and Article 17.6 of the Antidumping Agreement.[4] '

6. Article 31 of the Vienna Convention provides that the words of a treaty must form the starting point of interpreting a treaty, according to their "ordinary meaning," taking into account their "context" and the "object and purpose" of the treaty. The "context" for this purpose includes other parts of the treaty under review, as well as other instruments related to the treaty at issue, any subsequent agreement, any subsequent practice, and any relevant rules of international law. Where the ordinary meaning is clear, the context, the object and purpose of the treaty, do not override the text of the treaty.[5] At the same time, the interpretation of a given text must not result in reducing whole clauses or paragraphs of the treaty to redundancy or inutility.[6]

7. Where the Panel finds that a relevant provision of the AD Agreement permits more than one possible interpretation, the Panel must find the authorities' measure to be in conformity with the AD Agreement if it rests upon one of those permissible interpretations. In the typical case, a panel or the Appellate Body has used the Vienna Convention as a tool for determining a single meaning for a particular WTO text.[7] However, "the second sentence of Article 17.6(ii) presupposes that application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the Antidumping Agreement, which, under the Convention, would both be 'permissible interpretations.' In that event, a measure is deemed to be in conformity with the Antidumping Agreement 'if it rests upon one of those permissible interpretations.'"[8]

8. Where the authorities argue that there is more than one permissible interpretation of the AD Agreement provision, the Panel must not accord any deference to the interpretation advocated by the agencies. Instead, the Panel must, as commanded by the first sentence of Article 17.6(ii), apply the interpretive rules of the Vienna Convention to the legal interpretations involved in the dispute.[9] For this reason, the Panel in this case must not give any deference to the United States Department of Commerce's ("USDOC") interpretation of the AD Agreement and must interpret the provisions according to customary rules of interpretation of public international law as embodied in the Vienna Convention.[10]

III. ARGUMENT

A. THE APPLICATION OF THE 0.5 PER CENT *DE MINIMIS* STANDARD TO ALL REVIEWS OF ANTIDUMPING MEASURES VIOLATE THE AD AGREEMENT

---

[3] *Id.* at para. 57.

[4] *Id.*

[5] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12 n. 20.

[6] Gasoline, WT/DS23/AB/R, adopted May 20, 1996, p. 23.

[7] *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, Panel Report, WT/DS99/R (January 29, 1999), para.4.44 (submission by United States).

[8] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body Report, AB-2001-2, WT/DS184/AB/R (July 24, 2001), para. 59.

[9] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body Report, AB-2001-2, WT/DS184/AB/R (July 24, 2001), para. 60.

[10] *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, Panel Report, WT/DS99/R (January 29, 1999), para.4.44 (submission by United States). para. 4.63-4.70.

1. The Definition of the *De Minimis* Margin Standard Provided in Article 5.8 of the AD Agreement Applies to the Entire AD Agreement

9. In broad terms, the AD Agreement defines the obligations of a Member with respect to three different aspects of an antidumping measure. First, Article 5 provides the rules related to the investigative phase and the decision whether to impose an antidumping duty. Once a decision to impose antidumping duty is made, Article 9 defines the requirements pertaining to the assessment and collection of the antidumping duty, while Article 11 pertains to the duration and revocation of the duty. Due to the differences in purpose, certain procedural differences exist in the three phases; however, the basic principles of the AD Agreement serve as the thread between these Articles.

10. Article 5 of the AD Agreement pertains to the investigative phase of an antidumping proceeding and sets forth the requirements needed to support an investigation and to impose antidumping measures. Specifically, Article 5.5, Article 5.7, and Article 5.8 require that the decision to continue an investigation and to impose an antidumping measure be supported by sufficient evidence of (1) dumping, (2) injury and (3) a causal link between the dumped imports and the alleged injury.

11. Article 5.8 provides in relevant part:

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price.

12. In accordance with the rules of interpretation set forth above, the terms of Article 5.8 must first be interpreted in their ordinary meaning. The first two sentences of Article 5.8 require an affirmative action, i.e., termination of the investigation, by a Member, if a condition, i.e., existence of a *de minimis* margin, is met. The third sentence defines the condition that triggers the obligation as a margin of less than 2 per cent of the export price. As such, the first two sentences impose affirmative obligations upon a Member, while the third sentence articulates a general principle. The fact that the definition contained in the third sentence serves as a condition for an obligation in the preceding clause does not mean that the condition itself is confined to the obligation.

13. The third sentence of Article 5.8 defines that a margin of less than 2 per cent is "*de minimis*," and does not state that the definition is limited to the termination of investigations, although, admittedly, it is contained in the same paragraph. According to the plain language of the sentence, it is not conditioned upon the rest of Article 5.8 and the United States cannot attach a condition that does not exist. Article 31.4 of the Vienna Convention provides that "[a] special meaning shall be given to a term if it is established that the parties so intended." Here, the parties intended to give a special definition to the term "*de minimis*." There is no other definition of "*de minimis*" contained anywhere else in the AD Agreement.. Because this sentence is clear in its ordinary meaning, it does not require a contextual analysis and is not subject to various interpretations.

14. Read in its ordinary meaning, Article 5.8 unambiguously establishes that a margin of less than 2 per cent is "*de minimis*," which, by operation of the first and second sentences, does not justify imposition of antidumping measures. Thus, by definition, a margin of less than 2 per cent does not cause actionable injury under the terms of the AD Agreement. This definition must apply to other types of proceeding contemplated under the AD Agreement.

2. The Panel's Decision in DRAMS Interpreting Article 5.8 is Not Dispositive to the Current Proceeding

15. An interpretation of the Article 5.8 *de minimis* standard was recently undertaken in *United States – Anti*-Dumping *Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea* ("DRAMS").[11] In DRAMS, the Panel rejected Korea's claim that the United States violated Article 5.8 by applying a 0.5 per cent *de minimis* standard in the context of Article 9.3 duty assessment procedures. This finding, however, does not affect the interpretation of the issue in the present proceeding.

16. The disputed issue in DRAMS, as interpreted by the panel, was as follows[12]:

> Essentially, the parties disagree as to whether the *second sentence* (and therefore the *de minimis* standard contained in the third sentence) of Article 5.8 applies to both anti-dumping investigations and Article 9.3 duty assessment procedures (referred to in US parlance as "administrative reviews"), or only to anti-dumping investigations. (Emphasis added)

17. Thus, the Panel focused its analysis to interpreting the obligation imposed by the second sentence of Article 5.8, vis-à-vis Article 9.3, rather than on the AD Agreement's definition of "*de minimis*." After concluding that the term "cases" used in the second sentence did not include Article 9.3 duty assessment proceedings, the Panel considered the implication of note 22 of the AD Agreement to Article 5.8:

> [N]ote 22 of the AD Agreement effectively provides that a finding in a US duty assessment procedures that no duty is to be levied "shall not by itself require the authorities to terminate the definitive duty." According to note 22, therefore, a finding that an Article 9.3 duty assessment procedure of a zero margin of dumping, which is *de minimis* under both the US 0.5 per cent standard and the 2 per cent standard advocated by Korea on the basis of Article 5.8, shall not by itself lead to termination of the duty. Nevertheless, by arguing that Article 5.8, including the second sentence thereof, applies in the context of Article 9.3 duty assessments, Korea is effectively arguing that a zero per cent, *i.e., de minimis*, margin of dumping shall lead to "immediate termination" of the duty.[13]

18. The Panel found that the interpretation advocated by Korea was inconsistent with note 22, to the extent that note 22 explicitly provides that a finding of no duty in the Article 9.3 duty assessment procedures "shall not" require a termination of the duty.[14] Based on this context, the Panel concluded that "Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures."[15]

19. The Panel also reasoned that the differences between investigations and Article 9.3 duty assessment procedures supported the application of a different *de minimis* standard. First, the function of the *de minimis* standard in investigation, in the context of Article 5.8, is "to determine whether or not an exporter is subject to an anti-dumping order." In comparison, a *de minimis* test in Article 9.3 duty assessment proceedings only determines whether or not an exporter should pay a duty, and does not exempt the exporter from the order.

---

[11] WT/DS99/R (19 January 1999).
[12] *Id.* at 148 (emphasis added).
[13] *Id.* at 150.
[14] *Id.*
[15] *Id*. (emphasis added).

20. The Panel's reasoning shows that its decision was narrow and limited to the applicability of the second sentence of Article 5.8 to Article 9.3 duty assessment proceedings. The only issue considered in DRAMS was whether the obligation contained in the second sentence was applicable to duty assessment reviews. The parties in DRAMS did not argue, and the Panel did not consider, the applicability of the definition of the term "*de minimis*" contained in the *third sentence* of Article 5.8 to contexts other than investigations. As discussed above, the plain meaning of Article 5.8 does not limit the definition of *de minimis* to any particular context.

3. The 2 Per Cent *De Minimis* Standard Applies in the Context of Article 11 Proceedings

(a) Article 11 reviews differ in purpose and procedure from Article 9.3 reviews

21. As noted above, the AD Agreement contemplates two different types of post-investigation proceedings, or reviews. The first type of proceeding, described under Article 9.3, is the review required to assess the actual amount of antidumping duty and to collect such duty. Distinct and separate from the Article 9.3 proceeding is the review required to determine the continued necessity of the duty, provided in Article 11.

22. Article 11.1 provides that an antidumping measure "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." In accordance with Article 11.1, Article 11.2 directs the authorities to "review the need for the continued imposition of the duty by "{examining}whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both" and to terminate immediately the duty if the review shows that the duty is no longer warranted. Similarly, Article 11.3 obligates the authorities to terminate the duty after five years, unless it is determined in a review that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

23. As shown above, a "review" for Article 11 purposes is defined as a review for "the need for the imposition of the duty" and to determine whether dumping or injury is likely to continue or recur. Thus, according to the AD Agreement, a "review" for Article 11 purpose, *i.e.*, the revocation of the duty, is to be distinguished from a "review" solely for Article 9 duty assessment purposes. The antidumping duty order can be removed, in whole or in part, following an Article 11 review, while an Article 9.3 review would not do so. Moreover, the continued imposition of duties under Article 11 requires "dumping which is causing injury," while a single Article 9 review does not, by itself, address the injury issue. Note 21 of the AD Agreement reinforces the difference between the two types of reviews: "A determination of final liability for payment of anti-dumping duties as provided for in paragraph 3 of Article 9 does not by itself constitute a review within the meaning of [Article 11]."

24. In this regard, an Article 11 review bears a close connection to Article 5. In contrast to Article 9 duty assessment reviews, both Article 5 and Article 11 are concerned with whether an order should apply at all. In contrast to Article 9, both Article 5 and Article 11 apply tests for dumping *and injury*.

(b) A dumping margin of less than 2 per cent does not constitute "dumping which is causing injury."

25. To apply the principle of Article 11.1 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," one must first determine the meaning of the term "dumping which is causing injury." Because Article 11 does not contain a separate definition of "dumping which is causing injury," the definitions established elsewhere in the AD Agreement are applicable in this context.

26. The only place in the AD Agreement that addresses the sufficiency of dumping and injury is Article 5. As noted above, Article 5.8 requires an "immediate termination" of cases where the dumping margin is less than 2 per cent. Thus, the AD Agreement establishes that a dumping margin of less than 2 per cent, by definition, cannot cause injury. Given that injury is necessary to both impose antidumping measures and to maintain such measures, a dumping margin that is insufficient to justify the imposition of antidumping measures in the first place cannot be considered sufficient to maintain such measures. Accordingly, the 2 per cent *de minimis* threshold is applicable in the context of determining the necessity of the continued imposition of the duty under Article 11. In other words, "dumping which is causing injury" must exceed 2 per cent of export price.

(c) The US regulation and practice violate Article 5.8, Article 11 of the AD Agreement

27. Pursuant to section 351.106(c) of the USDOC's regulations and by practice, the USDOC equates no dumping as less than 0.5 per cent margin of dumping, the threshold that it applies to all "reviews" of the antidumping duty order, irrespective of the purpose of the review. Thus, the United States equates "dumping which is causing injury" as less than 0.5 per cent margin when determining the continued necessity of the antidumping measures. The United States effectively maintains antidumping duties for periods during which there is no dumping which is causing injury, in violation of Article 11.1. Accordingly, Section 351.106 of the USDOC's regulations, on its face, violates Article 5.8 and Article 11 of the AD Agreement.

4. Article 18.3 Also Supports the Application of the *De Minimis* Standard to Administrative and Sunset Reviews

28. The application of a *de minimis* standard to administrative review that is different from investigations also violates Article 18.3 of the Agreement. Article 18.3 states:

> Subject to sub-paragraphs 1 and 2, the provisions of this Agreement shall apply to *investigations, and reviews of existing measures,* initiated pursuant to applications which have been made on or after the date of entry into force for a Member of WTO Agreement.

29. Read in its ordinary meaning, this paragraph does not distinguish which "provisions" are applicable to reviews or investigations. The lack of differentiation indicates the Agreement was not intended to set up different rules for reviews and investigations. Therefore, Article 18.3 further supports the conclusion that the *de minimis* standard defined in Article 5.8 is applicable to all segments of an antidumping proceeding.

B. ZEROING

30. In *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India* ("Bed Linen")[16], the Panel ruled that that the practice of "zeroing" when establishing the margin of dumping as applied by the European Communities in antidumping investigations was inconsistent with Article 2.4.2 of the Agreement. This decision was recently upheld by the Appellate Body.[17] The United States employs the same methodology of zeroing in its practice and, thus, violates Article 2.4.2 of the Agreement.

[16] WT/DS141/R (30 October 2000).
[17] WT/DS141/AB/R (1 March 2001).

1. The US Law and Methodology

31. The practice of "zeroing," as addressed in *Bed Linen*, arises in situations where the investigating authority makes multiple comparisons of export price and normal value, and then aggregates the results of these individual comparisons to calculate an overall dumping margin for the specific exporter or producer under investigation. Specifically, the US methodology of dumping margin calculation can be summarized as follows:

(i) The USDOC first identifies the product under investigation or review into a certain number of different "models" or types of that product, based on certain characteristics of that product. For example, in the silicon metal proceeding, silicon metal with 100% silicon content may be considered one "model," while silicon metal with 95% silicon content may be considered another "model."

(ii) Next, the USDOC compares the export price of each model sold in the United States to the normal value of a like model. In an investigation, the USDOC compares the weighted-average normal value with the weighted-average export price. In an administrative review, the USDOC generally compares the weighted average normal value with the export price for each sale transaction.

(iii) To calculate the dumping margin for each type or model, the USDOC subtracts export price from normal value for each model. If, for some models, normal value is higher than export price, the USDOC determines a "positive dumping margin" for those models. If, for other models, normal value is lower than export price, the result is a "negative dumping margin" for those models. Thus, the model-specific dumping margin indicates precisely how much the export price is above or below the normal value.

(iv) The USDOC then sums all model-specific dumping margins to determine the overall dumping margin the product under investigation as a whole. In doing so, any "negative dumping margins" are treated as zero, and only adds up the "positive dumping margins." This practice is generally referred to as "zeroing."

(v) Finally, the USDOC divides the sum of all positive dumping margins by the total value of the all export transactions involving all types or models of that product, resulting in the weighted average dumping margin rate for that respondent.

32. The US methodology, which is also described in the USDOC's Antidumping Manual, is identical to the practice of the European Communities ("EC") addressed in *Bed Linens.*[18]

2. The Bed Linen Decision

33. Article 2.4.2 states:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigative phase shall normally be established on

[18] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (30 October 2000), WT/DS141/AB/R (1 March 2001) ("*Bed Linen"*).

> the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, region or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

34. In *Bed Linen*, India challenged, among other claims, that the use of the zeroing methodology by the European Communities was not consistent with Article 2 obligations. The Panel agreed with India that the zeroing practice of the European Communities violated Article 2.4.2 of the AD Agreement.[19] Following an appeal by the European Communities, the Appellate Body undertook an analysis of the zeroing practice vis-à-vis the obligations under Article 2.

35. On appeal, the European Communities argued that, where the product under investigation consisted of various "non-comparable" types or models, such investigation entailed two stages in calculating margins of dumping, wherein the dumping margin was first calculated for each type or model, and, then, at the second stage, combined to calculate an overall margin of dumping for the product under investigation. The European Communities contended that Article 2.4.2 was not applicable to the second stage of calculating the overall margin of dumping for the product under investigation.

36. The Appellate Body rejected European Communities' arguments that the AD Agreement contemplated two different stages of calculating the margin of dumping. First, it began with an analysis of the ordinary meaning of Article 2.1, which states:

> For the purposes of this Agreement, a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than normal, 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.

37. Inferring from the phrase "product is to be considered to be dumped" of Article 2.1, the Appellate Body found that the AD Agreement "concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*." Having defined the *product* at issue as certain cotton-type bed linen, "notwithstanding different possible product types," the Appellate Body ruled that the European Communities was bound to establish "the existence of margins of dumping" for the *product* as it defined – cotton-type bed linen – and not for the various types or models of that product. Accordingly, "[w]hatever the method used to calculate the margins of dumping, ... these margins must be, and can only be, established for the *product* under investigation as a whole."

38. The Appellate Body then reviewed the methodology used by the European Communities to calculate the dumping margin in the investigation at issue. Under the methodology provided under Article 2.4.2, the European Communities was required to compare the weighted average normal value with the weighted average of prices of "*all* comparable export transactions." However, by using the "zeroing" methodology – *i.e.*, counting negative margins as zero, the European Communities treated the prices of those transactions involving models of merchandise with negative dumping margins "to

[19] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (30 October 2000) ("Bed Linen Panel Report").

be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value." This practice "inflated the result from the calculation of dumping."[20] The Appellate Body thus concluded:

> [T]he European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.[21]

39. For these reasons, the Appellate Body upheld the Panel's conclusion that the zeroing methodology used by the European Communities was inconsistent with the obligations under the AD Agreement.

3. In accordance with the Reasoning and the Decision of the Bed Linen Case, the US Statute, on Its Face, Violates Articles 2.4 and 2.4.2 of the AD Agreement by Not Conducting a "Fair Comparison" between Export Price and Normal Value

40. As discussed above, the United States employs the identical practice of "zeroing" when determining the margin of dumping in both investigations and reviews. Furthermore, the USDOC has asserted that "zeroing" is required by the US law.[22] Specifically, Section 771(35)(A) of the Tariff Act of 1930 defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) provides that "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter and producer." The USDOC has recently explained in a review proceeding:

> These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales.[23]

41. The reasoning of the United States that the definition of the "singular dumping margin" does not apply to the calculation of the "aggregate dumping margin" essentially echoes the arguments made by the European Communities in the Bed Linen case. The Appellate Body, as detailed above, rejected the European Communities' argument that the calculation of dumping margin entails a two-

[20] *Id.* at para. 55.
[21] *Id.*
[22] *Final Results of the Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand*, 66 Fed. Reg. 52744 (Oct. 17, 2001), Issues and Decision Memorandum at Comment 10.
[23] *Id.*

stage process. Thus, the US contentions based on the supposed distinction between "singular" and "aggregate" dumping margins are not justified under the AD Agreement.

42. To the extent that section 771(35) of the Tariff Act of 1930 requires zeroing of negative margins, the statute leads to an overall dumping margin that is not based on "all comparable transactions" as required by Article 2.4.2 of the AD Agreement, nor based on a "fair comparison" between export price and normal value, as required by Article 2.4. Thus, section 771(35) of the Tariff Act of 1930, on its face, violates Articles 2.4 and 2.4.2 of the AD Agreement, as determined by the Appellate Body.

4. The Application of the Zeroing Practice in Administrative Reviews Also Violates the AD Agreement

43. As noted above, the United States, in a review for purposes of duty assessment (or revocation) uses a different methodology to determine the margin of dumping. Instead of comparing the weighted average normal value with the weighted average export price, the margin of dumping in an administrative review, in general, is determined by comparing the price of individual export transactions with weighted-average normal value. This difference in the comparison methodology, however, does not exempt the United States from the obligations imposed by Article 2 in the context of administrative reviews.

44. First, the provisions of Article 2, which is entitled "Determination of Dumping," set forth principles and obligations to be followed in establishing the existence of dumping. The AD Agreement does not contain a separate set of provisions applicable to the determination of dumping in administrative reviews. As such, Article 2 obligations extend to the determination of dumping in all aspects of antidumping measures, irrespective of the segment of the proceeding.

45. The principle of "fair comparison" established under Article 2.4 does not distinguish whether the comparison is made on an average of all transactions basis or on a transaction-to-transaction basis. Therefore, this principle applies equally to a review as well as to an investigation, no matter what comparison methodology is used. A methodology, on a transaction basis, that assigns to an export transaction a value lower than its actual value violates this principle whether this methodology is used in an investigation or in a review.

46. In a review, the US government compares individual export transactions with normal value and aggregates the results of these multiple comparisons to determine the weighted-average dumping margin. In doing so, the US government disregards those export transactions that yield a negative margin. In effect, the US government assigns to those transactions a value equal to normal value despite the fact that, in reality, such transactions have a value higher than normal value. This methodology is identical to that used by the European Communities which the Appellate Body found to violate Article 2.4 in the Bed Linen decision. Accordingly, the US methodology of "zeroing," whether it involves an average of all transactions and transaction-to-transaction comparison basis in the context of an administrative review, violates Article 2.4 of the Agreement.

IV. CONCLUSION

47. Brazil respectfully urges the Panel to analyze the issues raised by Japan in light of the legal reasoning contained in this submission, in addition to the reasoning detailed in Japan's submission. In particular, Brazil requests the Panel to take notice of the fact that the effects of WTO-inconsistent methodologies maintained by the United States affect all administrative reviews conducted by the USDOC and not just the sunset review proceedings addressed by Japan.

ANNEX B-2

THIRD PARTY SUBMISSION OF CHILE

I. INTRODUCTION

1. Chile is grateful for this opportunity which the Panel has given it to present its views on this dispute in accordance with Article 10.2 of the Dispute Settlement Understanding. Chile has a systemic interest in the correct interpretation and application of the anti-dumping disciplines laid down in the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement" or "AD"), in order to avoid abuse of anti-dumping measures as trade barriers, contrary to the letter and spirit of the above-mentioned disciplines.

2. In this dispute Japan challenges the compatibility of United States policy, legislation, regulations and practice in the area of sunset review with its WTO obligations; or as Japan puts it, the United States legislation and practice that allow US anti-dumping duty orders to continue in perpetuity, rather than "sunsetting" after five years.[1]

3. Chile supports many of the arguments put forward by Japan in its first written submission. However, in this third party submission Chile does not wish to address the issue of the application of these policies, legislation, regulations and practices to the specific case of the review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan, as that would have involved a more detailed study of the original investigation and the contested review. In this submission, Chile wishes to raise a number of issues which it believes the Panel should take into account in settling the claim brought by Japan. These issues fall into four sections.

(i) Article 11.3 of the Anti-Dumping Agreement establishes that anti-dumping duties have a maximum duration of five years.

(ii) The review provided for in Article 11.3 is not the same as the investigation to be carried out by the national authority to determine the existence of dumping and level of injury, even when the effect or consequences of both is the same.

(iii) Without prejudice to the above, the standards applied by the authorities in the review cannot be lower than the standards applied during the investigation; in other words, the reference point in both cases must be the disciplines of the Anti-Dumping Agreement.

(iv) The lack of explicit disciplines in this respect has been a matter of concern to WTO Members, who have identified this as one of the provisions that need to be "clarified and improved" within the negotiating process currently under way.

A. ANTI-DUMPING DUTIES EXPIRE AFTER FIVE YEARS

4. Pursuant to AD Article 11.3, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition. The use of the imperative "shall" indicates that this is a binding provision. In other words, any anti-dumping duty expires or is terminated within five years at most from its application. This is further confirmed in the second part of the provision, which

[1] First written submission of Japan, paragraph 1.

establishes that the authority may decide that the measure should remain in force if it determines that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

5. Article 11.3 authorizes, as an exception to the general rule ("unless"), the authority to maintain the measure if, prior to its expiry, it determines that the termination of the measure would be likely to lead to continuation or recurrence of dumping and injury. This determination must be the result of a review.

6. The language used by the AD is very different from that used in other WTO agreements. For example, Article 7 of the Agreement on Safeguards refers to the extension of the period of application of a safeguard measure; while Article 5.3 of the Agreement on Trade-Related Investment Measures provides that the Council for Trade in Goods may extend the transition period for the elimination of TRIMS. Only the Agreement on Subsidies uses wording similar to that of the AD (Article 21).

7. This is particularly important for defining the nature of the review provided for in AD Article 11.3. It certainly does not establish a right to an extension or prolongation, whether automatic or not. If that had been the case, the negotiators would have used similar language to that of other agreements.

B. THE REVIEW PROVIDED FOR IN ARTICLE 11.3 IS NOT THE SAME AS THE INVESTIGATION TO BE CARRIED OUT BY THE NATIONAL AUTHORITY TO DETERMINE THE EXISTENCE OF DUMPING AND LEVEL OF INJURY. NEVERTHELESS THE EFFECT COULD BE THE SAME AS THAT OF THE ORIGINAL INVESTIGATION

8. As Japan points out, Article 11.3 reviews are not exactly the same as original investigations, but they are analogous.[2] Both the title of Article 11 and the text of its paragraph 3 refer to a review, and not to an investigation as occurs throughout the AD, for example in Articles 1 and 5. The conclusion that may be drawn from this is that these are two different processes which serve different objectives. Nevertheless, it should be borne in mind that the effect could be the same, in other words, application of an anti-dumping measure.

9. In the case of investigations, the objective is to determine the existence and amount of dumping, level of injury and causal relationship between the two. Its consequences are the application, or not, of anti-dumping duties (or price undertakings). On the other hand, the review provided for in Article 11.3 is aimed at determining whether the termination of an anti-dumping duty upon its expiry would give rise to continuation or recurrence of dumping and injury; and its consequences are the termination, or not, of the anti-dumping duty.

10. Perhaps the most important difference is that the sunset review presupposes the prior existence of an investigation. For without such a prior investigation determining that dumping effectively exists (above *de minimis* levels) and that it is causing injury to the domestic industry, there could be no anti-dumping duty. Without such a duty, there is nothing to expire after five years and nothing to be the object of a sunset review.

11. Furthermore, Article 11.4 had to explicitly state that the provisions of Article 6 regarding evidence and procedure apply to any review carried out under Article 11.3.

12. Unlike an investigation, Article 11.3 calls for a prospective analysis enabling the authority to determine whether the expiry of the duty would lead to continuation or recurrence of dumping and injury. In other words, the authority has to analyse on the basis of concrete evidence whether the importer, after the duty has been terminated, will continue or resume dumping. To carry out this

[2] First written submission of Japan, paragraph 178.

analysis, it is not enough to engage in mere conjecture or analyse past events, or still less consider only the information in the original investigation. The imposition of an anti-dumping duty for five years will certainly have produced some effects on the market and on producers. In other words, it has changed reality. These elements cannot be disregarded by the investigating authority.

13. In United States legislation and practice, what matters for the analysis (except in very specific and rarely applied circumstances) is (1) whether dumping still exists or not, and (2) the evolution of imports. Furthermore, only if the former has been eliminated and the latter have been maintained or increased will the authority in principle be convinced that expiry of the anti-dumping duty would not lead to recurrence of the dumping. We wonder, for example, how the United States authority takes into account the fact that a dockworkers' strike at major United States ports leads to a fall in imports, which would make it impossible to fulfil the second requirement for determining whether or not an anti-dumping duty should be terminated?

14. The standard applied by the United States authorities is so absurd as to be contrary to the text of AD Article 11.3. Article 11.3 provides that the purpose of the sunset review is to determine whether the expiry would lead to continuation or recurrence of dumping and injury. In other words, it provides for two scenarios, a first in which dumping still exists (and may continue) and a second in which dumping no longer exists (but may recur). In both cases the duty should be terminated unless it is determined that dumping may continue or recur. On the other hand, the United States legislation and regulation does not provide for the first possibility, i.e. that dumping exists and the review will determine whether or not it will continue. The only possibility contemplated by the legislation and regulations is that dumping must have ceased (so that the review is confined to determining whether it will recur).

15. In addition to this prospective analysis, the practice of the authority establishes a presumption that dumping will continue or recur and it is up to the importers to prove that this will not happen. This violates the pro-active, good-faith approach which any objective and impartial investigating authority should adopt, in accordance with the letter and spirit of the Anti-Dumping Agreement.

16. Even though the legislation and practice permits importers to submit information and show there is good cause for the authority to take other factors into consideration, the precedents show that what exists on paper is not always reflected in reality. As indicated in the case Cut-to-Length Carbon Steel Plate from Canada[3], the Department of Commerce found that other factors did not need to be taken into account when dumping still exists after the order has been issued, as this is evidence of the possible continuation or recurrence of dumping. This is borne out in the case Grey Portland Cement and Cement Clinker from Venezuela[4], where the Department of Commerce was clearer still in concluding that, except in very isolated cases, it did not find good cause for examining other factors except in the case of agreements on price undertakings. Consequently, our question is: if termination is only appropriate where dumping no longer exists (in addition to imports having been maintained or increased), in what circumstances would the Department of Commerce agree to analyse other factors? Or, in other words, when does the Department of Commerce consider that good cause exists?

17. The reply to these questions appears to be given in the case Sugar and Syrups from Canada.[5] In this case, the USDOC not only considered that there was not "good cause" for accepting other factors submitted by the domestic industry, but then, having seen that the conditions were fulfilled for terminating the measure, in its final determination it did examine other factors to conclude that dumping had not been eliminated and therefore the anti-dumping measure should be maintained. In other words, the authority considers whether or not good cause exists and uses or does not use other

[3] Annex JPN-24b.
[4] Annex JPN-25k.
[5] Annex JPN-25m.

factors when doing so or not doing so would always allow it to reach the same conclusion: that the anti-dumping duty should not be terminated. The authority thus not only violates its obligations under the WTO but also its own legislation and regulations.

C. THE STANDARDS APPLIED BY THE AUTHORITIES IN THE REVIEW CANNOT BE LOWER THAN THE STANDARDS APPLIED DURING THE INVESTIGATION

18. Considering that the effect of the investigation and of the review is the same - in other words, application/continuation or removal of the anti-dumping duty - the fact that the review is not exactly the same as the investigation does not entail disregarding the implications of using, in the review, standards lower than those used in the investigation. This is particularly true in the case of aspects previously identified in the AD and which are applied in a manner that is incompatible with the WTO. The likely consequence is that in the majority of cases there are abuses.

19. To illustrate the above, we shall mention some of the inconsistencies mentioned by Japan in its first written submission.

20. *De minimis*. There is no justification or logic for maintaining that the use of *de minimis* margins of less than 2 per cent is authorized in the case of reviews. Accepting this leads to cases where for the purposes of a review margins which, in the original determination, were not taken into account because the threshold is higher, are taken into account or included for the review. The result is that exporters previously not subject to AD duties because of the *de minimis* margins would be subject to them following the review. The establishment of the 2 per cent *de minimis* threshold is the result of negotiation, as reflected in the AD. The idea is that dumping margins below 2 per cent do not cause injury and hence do not need to be subject to an AD duty whose purpose is to counter dumping causing injury to the domestic industry. A similar reasoning applies to *negligible imports*.

21. *Order wide basis.* The sunset review must be carried out on the basis of specific firms. As in the case of the original measure, and all the more so in the case of a sunset review, it is not appropriate to apply or continue applying an AD duty to enterprises which are not engaging in dumping. Although this is not explicitly stated in Article 11.3, in principle the AD measure should be terminated after five years for all firms, with the exception to the rule being that the duty should be maintained solely for enterprises where the termination of the duty "would lead to continuation or recurrence of dumping and injury".

22. *Sending the USITC the originally calculated dumping margins*. If imports have not taken place during the established period, the practice of the Department of Commerce is to send the USITC the original margins. After five or more years of application of an AD measure, the reality has changed. How does the investigating authority ensure that the anti-dumping duty will remain in force only to the extent necessary to counteract dumping which is causing injury? For the purposes of the Article 11.3 Review, the authority cannot have resource once again to the original margins.

23. The above comment is all the more valid where the original margins were calculated using obsolete methodologies (i.e. that pre-date the entry into force of the Anti-Dumping Agreement) or which are incompatible with the WTO. This can lead to the absurd case where the USDOC transmits to the USITC margins calculated on bases which a WTO panel or the Appellate Body have found to be inconsistent with the WTO (such as zeroing or other *de minimis* percentages).

D. THE TOPIC OF SUNSET REVIEW IS PART OF THE NEGOTIATING PROCESS CURRENTLY UNDER WAY, REFLECTING MEMBERS' INTEREST IN THIS ISSUE

24. Paragraph 28 of the Doha Ministerial Declaration provides for the holding of "negotiations aimed at clarifying and improving disciplines" under the AD. It also states that "in the initial phase of

the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase".

25. Two of the contributions submitted to the Negotiating Group on Rules refer to the issue of sunset reviews. Document TN/RL/W/10 indicates that the lack of explicit rules cannot lead to the arbitrary introduction by the authorities of procedures and methodologies that differ substantially from those used in initial investigations. In other words, although there are no explicit rules, in the provisions relating to reviews in general and sunset reviews in particular, this does not mean that each investigating authority can establish its own procedures in this respect. When the provisions of the initial investigation under the AD are applicable to reviews, the authorities should take such provisions as a benchmark. When they are not, they should seek new standards which, on the grounds set out above, should be higher than those used in the initial investigation. Further guidelines will probably emerge from the negotiations on this latter aspect.

26. Document TN/RL/W/6 refers explicitly to sunset reviews, asking the following questions: "Should such an AD duty be continued? How can the absence of exports be deemed to establish the likelihood that injurious exports will resume in the future? Is mere allegation or remote possibility enough? Under these facts, when would the order ever be terminated? If the order is never terminated, what is the meaning of a sunset procedure?" It is precisely the answers to these questions which we wish to clarify during the negotiations on rules.

II. CONCLUSION

27. In light of the foregoing, Chile respectfully requests the Panel to take into consideration the elements set out above and rule that the sunset review provided for in Article 11.3 of the Anti-Dumping Agreement is an exceptional review which allows authorities to maintain an anti-dumping duty in very specific circumstances. Otherwise, the duty shall expire in any case within five years at most of its imposition. The lack of precise rules does not entitle an investigating authority to impose or apply standards which differ from those existing in the AD and in no case lower standards than those used during the initial investigation, since while the sunset review and the initial investigation are not exactly the same, their effects are.

ANNEX B-3

THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. The European Communities (hereinafter "the EC") welcomes this opportunity to present its views in the proceeding brought by Japan over the consistency with Articles VI and X of the General Agreement on Tariffs and Trade (hereinafter, the "GATT 1994"), and with Articles 2, 3, 5, 6, 11, 12 and 18 of the Agreement on Implementation of Article VI of the GATT (hereinafter, the "AD Agreement"), as well as with Article XVI:4 of the Marrakech Agreement establishing the World Trade Organization (hereinafter, the "WTO Agreement") of both the decision by the United States (hereinafter, the "US") not to terminate the imposition of the anti-dumping duties on imports of corrosion-resistant steel from Japan, and the provisions, procedures and practices of the US on which the decision was based.

2. The EC has decided to intervene as third party in this case because of its systemic interest in the correct interpretation of the AD Agreement. The interest of this case, in fact, goes well beyond this single measure and covers the interpretation and application by the US of the AD Agreement with regard to sunset reviews. The lines of similar cases brought by the EC against the US shows the high concern that the relevant US laws[1], regulations[2] and administrative procedures and practice[3] on sunset reviews of anti-dumping and countervailing duties, as well as the way in which they have been applied, violate several provisions of the WTO Agreements.

3. Many of the issues in dispute relate to questions of fact on which the EC is not in a position to comment. Accordingly, the EC will limit its submission to a number of issues of legal interpretation raised by some of the claims submitted by Japan and which are of particular interest to the EC. In doing so, the EC will follow the sequencing of claims of the submission by Japan.

A. THE EVIDENTIARY STANDARDS REQUIRED BY ARTICLE 5.6 FOR SELF-INITIATION OF SUNSET REVIEWS APPLY ALSO TO SUNSET REVIEWS (JAPAN'S CLAIM 1)

4. Japan has submitted to the Panel that the US law and Sunset Regulations, in particular Sections 751(c)(1) and (2) of the Act and Sections 351.218(a) and (c)(1) of the Sunset Regulations, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 of the AD Agreement because they mandate that USDOC automatically initiate sunset reviews without any evidence. In particular, Japan has argued that the ordinary meaning of the text of Article 11.3, read in its context, that is Articles 11.1, 12.1, 12.3 and 5.6 of the AD Agreement, and in light of its object and purpose, requires sufficient evidence to justify the initiation of a sunset review.[4]

5. In US law and practice, sunset reviews are always automatically initiated five years after the date of publication of an anti-dumping duty order; of a notice of suspension of an investigation; of a determination of injury in an administrative review; or of a sunset review determination to continue an

---

[1] The Tariff Act of 1930 (hereinafter, the "Act"), as amended and codified in 19 USC. §1202 through 1677n.

[2] The Implementing Regulations on anti-dumping and countervailing duties issued by US Department of Commerce (hereinafter, "USDOC"), now Section 351 of Title 19 of the US CFR (hereinafter the "*Sunset Regulations*").

[3] The USDOC Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders (hereinafter, the "Sunset Policy Bulletin").

[4] Section A (para. 45 et seq.) of the First Written Submission by Japan.

anti-dumping duty[5]. Section 751(c)(2) of the Act mandates DOC to publish a "notice of initiation" in the Federal Register "no later than the 30 days before the fifth anniversary" of one of these dates. The same obligation is found in §351.218(c)(1) of the Sunset Regulations, which provides:

> No later than 30 days before the fifth anniversary date of an order or suspension of an investigation (see section 751(c)(1) of the Act), the Secretary will publish a notice of initiation of a sunset review (see section 751(c)(2) of the Act)

6. The EC agrees with the argument put forward by Japan that the US automatic self-initiation of sunset reviews unavoidably leads to a violation of Article 11.3 of the AD Agreement.

7. It is well-established that the fundamental rules of treaty interpretation have received their most authoritative and succinct expression in Articles 31 and 32 of the Vienna Convention which have attained the status of rules of customary or general international law[6]. These imply the need for a comprehensive interpretation of the text and context and object and purpose,[7] and for the respect of the principle of good faith interpretation, which flows directly from the principle of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention and directs the interpreter to prefer the interpretation that enables the treaty to fulfil its object and purpose, i.e. an effective interpretation[8].

8. In this light, Japan is right in proceeding to an analysis of the text and context of Article 11.3, as well as of the object and purpose of the AD Agreement.

9. In particular, the EC considers that, although Article 11.3 does not contain any explicit reference to evidentiary requirements for the initiation of sunset reviews, it mandates domestic authorities to engage in a review to "determine" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury. The verb "to determine" is commonly understood to mean to find out, to ascertain, to establish, or, in more articulated terms, to carry out all those activities necessary to reach a decision, i.e. to investigate and decide. Thus, in this light, the very text of Article 11.3 already contains a clear and precious indication of the substantive activities to be undertaken in a sunset review and therefore of the context which is relevant to it.

10. In particular, the immediate context of Article 11.3, i.e. Article 11.1 sets out a fundamental obligation, i.e. that an anti-dumping duty must remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. Articles 11.2 and 11.3 are, in fact, further articulations of the ongoing obligation contained in Article 11.1. Article 11.2 provides the modalities for compliance with this obligation during the period of application of an anti-dumping duty, while Article 11.3 provides the modalities for compliance with this obligation upon expiry of that period. Both provisions emphasise the basic object and purpose of the imposition of anti-dumping duties, i.e. that they can only apply where dumping causes or is likely to cause injury.

11. The direct consequence of this is therefore that the omission in the text of Article 11.3 is justified by the fact that it appears obvious from the overall context and architecture of the AD Agreement that the guarantees so forcefully established for the initiation of an original investigation for the imposition of an anti-dumping duty apply as well to the initiation of a sunset review, which, in

---

[5] 19 USC §1675(c)(1)(A) and (B).

[6] See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline ("United States – Gasoline")*, WT/DS2/AB/R, adopted 20 May 1996, page 15, and Appellate Body Report, *Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages")*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, page 9.

[7] See ILC Commentary on the draft Articles 31 and 32 of the *Vienna Convention* (then numbered as Articles 69 and 70), *YILC*, 1966.

[8] See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline ("United States – Gasoline")*, WT/DS2/AB/R, adopted 20 May 1996, page 21.

virtue of Article 11.1, takes place at a time when the presumption is that of termination of that anti-dumping duty.

12. Furthermore, Japan rightly points out that sunset reviews and new investigations have the same effect, i.e. they result in the imposition of anti-dumping duties for a period of five years[9]. Both new proceedings and sunsets, in fact, involve a large amount of investigation by the domestic authorities with a view to determining whether anti-dumping duties should be put into effect. And the role that Articles 5.2 and 5.6 prescribe both for the domestic industry and the domestic authorities is a proactive role marked by a precise evidentiary burden. As this evidentiary burden is explicitly recalled by Article 11.3 for the domestic industry, why should it be excluded for the domestic authorities but only at sunset review stage?

13. Another textual element that should be considered is the combine reading of Articles 12.1 and 12.3. Article 12.1 provides that:

> When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 5, the … interested parties … shall be notified and a public notice shall be given.
>
> And Article 12.3 provides that:
>
> The provisions of this Article apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 11 …

14. It is clear from the terms of Article 12.3 that the same guarantees that apply to the initiation of an original investigation apply to the initiation of a sunset review. In particular, when read in conjunction with Article 12.1, it clearly disposes that even in a sunset review domestic authorities must be satisfied to have sufficient evidence before they self-initiate sunset reviews. In the contrary case, and unless a valid request is made by the domestic industry, they should leave ADD orders to expire.

15. In conclusion, a proper analysis of the text, context, and object and purpose of Article 11.3 reveals that all provisions of the AD Agreement are potentially applicable mutatis mutandis to it, to the extent that they are relevant to sunset reviews and that their application to Article 11.3 does not create a situation of conflict or is not specifically excluded. The reasons why Article 11.3 does not contain any detailed procedural rule, in fact, is rightly that these are established somewhere else in the Agreement, for instance in Article 5.

B. THE AD AGREEMENT REQUIRES A "LIKELY" AND NOT AN "UNLIKELY" DETERMINATION OF CONTINUATION AND RECURRENCE OF DUMPING AND INJURY (JAPAN'S CLAIM 2)

16. Japan has submitted to the Panel that the Sunset Regulations, and in particular Section 351.222(i)(1)(ii), are not in conformity with Article 11.3 AD Agreement.[10] In particular, Japan has argued that whereas Article 11.3 AD Agreement requires that anti-dumping duties be terminated no later than five years from their imposition "unless the authorities determine [...] that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury"[11], the Sunset Regulations require USDOC to effectively apply a "not likely" standard.

---

[9] Para. 50 et seq. of the First Written Submission by Japan.
[10] Section B.1 (para. 94 et seq.) of the First Written Submission by Japan.
[11] Emphasis added.

17. The EC agrees with the legal views of Japan in this respect. It may be recalled that the pertinent Section of the Sunset Regulations is drafted as follows:

> "[i]n the case of a sunset review under §351.218, the Secretary will revoke an order or terminate a suspended investigation: [...] (ii) Under section 751(d)(2) of the Act, where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of a countervailable subsidy or dumping."[12]

It may also be recalled that the "not likely" standard was introduced in 1998 by amendment of Section 351.222(i)(1) of the Sunset Regulations which provided: "[i]n the case of a sunset review under §351.218, the Secretary will revoke an order or terminate a suspended investigation, unless: (i) the Secretary makes a determination that revocation or termination would be likely to lead to continuation or recurrence of a countervailable subsidy or dumping (see section 752(b) and section 752(c) of the Act)" (emphasis added).

18. The US argues that "that provision, 19 CFR 351.222(i)(1)(ii), is ministerial in nature and addresses the timing of revocation after Commerce has made a negative final sunset determination under section 751(d)(2)."[13] This statement contradicted by the Explanation of Particular Provisions, which states in respect of the amendments to Section 351.222(i) : "These revisions are intended to clarify the circumstances under which the Department will revoke an order or terminate a suspended investigation and the effective date of revocation." (emphasis added)[14].

19. A textual comparison of Section 351.222(i)(1)(ii) with Article 11.3 AD Agreement shows that the standard for revocation of an anti-dumping duty in a sunset review under the Sunset Regulations is different from that required by Article 11.3. Article 11.3 provides that the anti-dumping duty shall be terminated or revoked unless it is likely that this would lead to recurrence or continuation of dumping and injury. By contrast, under USDOC regulations, the anti-dumping duty will be revoked where it is not likely that this would lead to continuation or recurrence of dumping.

20. In the view of the EC, these differences are by no means semantic only. Rather, the Sunset Regulations require USDOC to apply a standard which is patently more demanding than that prescribed by Article 11.3 AD Agreement. The requirement that continuation or recurrence of dumping or injury must be "likely" implies a higher degree of probability than the requirement that the duty be revoked "where it is not likely" that this would lead to continuation or recurrence of dumping. In the first case, a higher degree of certainty is required than in the second, where it is necessary only for the continuation or recurrence of dumping not to be "unlikely".

21. That a "likely" standard implies a higher degree of certainty than a "not likely" standard has also been confirmed by the Panel in US DRAMs, as quoted in paragraph 96 of the first written submission of Japan. As the Panel stated in its report, there is a conceptual difference between establishing something as a positive finding, and failing to establish something as a negative finding.[15]

22. In other words, a finding that someone is likely to dump always implies that the same person is not "unlikely" to dump. However, the reverse conclusion does not hold true: the fact that someone is "not unlikely" to dump does not necessarily imply that the same person is also "likely" to dump.

---

[12] 19 C.F.R. §351.222(i)(1)(ii) (emphasis added).

[13] Para. 101 of the First Written Submission by the US.

[14] Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, Interim final rules, 20 March 1998, Federal Register No. 63 FR 13519

[15] See Panel Report, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea ("United States – DRAMS")*, WT/DS99/R, adopted 19 March 1999, para. 6.45.

23. The European Community submits that this reasoning, which the Panel applied in interpreting Article 11.2 AD Agreement, is perfectly transposable to Articles 11.3. Article 11.2 governs the review of the continued necessity of an anti-dumping duty on the own initiative of the authorities or upon request by any interested party during the normal lifetime of a duty in place. In contrast, the sunset provision of Article 11.3 stipulates that any definitive anti-dumping duty shall be terminated at the latest after five year from its imposition, and only exceptionally authorises the authorities to maintain them where the requirements of Article 11.3 are fulfilled.

24. In other words, whereas under Article 11.3 the expiry of the duty is the rule and its maintenance the exception, this is not the case under Article 11.2. Given this systematic relationship between Articles 11.2 and 11.3, it is not conceivable that a stricter standard for the revocation of duties would apply under Article 11.2 than in the context of a sunset review under Article 11.3.

25. For these reasons, the European Community considers that as under Article 11.2, a "not likely" standard is incompatible with Article 11.3. Accordingly, Section 351.222(i)(1)(ii) of the *Sunset Regulations* is not compatible with the US obligations under the *AD Agreement*.

C. THE SUNSET REVIEW DETERMINATION HAS TO BE BASED ON A "PROSPECTIVE" ANALYSIS (JAPAN'S CLAIM 3)

26. Japan has submitted that USDOC in its practice in sunset reviews fails to "determine" whether dumping is "likely" to occur.[16] In particular, Japan has argued that USDOC determinations are not based on a prospective analysis of positive evidence ascertaining that continuation or recurrence will be probable.

27. The EC agrees with Japan's argument that Article 11.3 requires that the "likelihood" of the continuation or recurrence of dumping must be established on a prospective basis.[17] By definition, an assessment of the "likelihood" of continuation or recurrence of dumping requires the authorities to make a judgement about events in the future. Such a judgement about future events cannot be carried out by merely assuming that the current situation will continue unchanged or that the pre-AD order situation will recur. Rather, it will be necessary to establish, on the basis of all current information available, what the likely course of future events might be.

28. The need for a prospective, rather than a retrospective, analysis has been confirmed by the Panel in US-DRAMs.[18] Even though the Panel reached this finding in the context of Article 11.2 AD Agreement, as the EC has already stated, it is not conceivable that the standards for the maintenance of anti-dumping duties in sunset reviews would be any less strict than those for a review under Article 11.2, which is completed during the original lifetime of an anti-dumping duty.

29. The EC also agrees in principle with Japan that a "determination" of the likelihood of continuation or recurrence of dumping and injury must be based on positive evidence.[19] Of course, the EC recognises that given the "prospective" character of the likelihood determination, which concerns events in the future, evidence for such a determination can never be fully conclusive, and will not lead to complete certainty. Article 11.3 therefore does not require absolute certainty about the continuation or recurrence of dumping. However, it does require the authorities to take into account all available evidence in order to determine whether continuation or recurrence of dumping is "likely". An authority would fail to meet this standard if, in a determination in a sunset review, it

[16] Section B.2 (para. 107 et seq.) of the First Written Submission by Japan.

[17] Para. 108 of the First Written Submission by Japan.

[18] Panel Report in *US DRAMs*, cited above, para. 6.28; quoted in para. 110 of the First Written Submission of Japan.

[19] Para. 112 of the First Written Submission of Japan.

based itself purely on the fact that dumping had occurred in the past, without addressing the question of whether dumping is likely to also recur or continue in the future.

30. The EC is not in a position to comment on the USDOC's determinations regarding the Japanese producers concerned. However, the Community is of the view that the US law with respect to likelihood determinations in sunset reviews of anti-dumping orders, as well as the USDOC's general practice based on it, as described in its Sunset Policy Bulletin,[20] falls short of the requirements of Article 11.3 AD Agreement.

31. As set out by Japan, according to Section II.A.3 of the Sunset Policy Bulletin, USDOC normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where:

(a) dumping continued at any level above *de minimis* after the issuance of the order or the suspension agreement, as applicable;

(b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or

(c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly.

32. According to Section II.A.4 of the Sunset Policy Bulletin, USDOC will normally determine that revocation of an anti-dumping order or termination of a suspended investigation is not likely to lead to continuation or recurrence of dumping "where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased".

33. Finally, Section II.C of the Sunset Policy Bulletin states that USDOC will consider "other factors" only if "good cause" is shown. With reference to the SAA, the Sunset Policy Bulletin indicates that such other factors might include "the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilisation; any history of sales below cost of production; changes in manufacturing technology in the third country; and prevailing prices in relevant markets". The Sunset Policy Bulletin goes on to state that the burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question.

34. Incidentally, the EC considers that these factors are already predetermined by US law, in particular by Section 752(c)(1) and (2) of the Act, which read:

> (1) In general – In a review conducted under section 751(c) of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under section 734 of this title would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

[20] 63 Fed. Reg. 18871 (16 April 1996) (Exhibit JPN-6).

> (2) Consideration of other factors – If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.

35. The European Community agrees with Japan that this general policy of USDOC as set out in the Sunset Policy Bulletin falls foul of the standard for likelihood determinations in Article 11.3 AD Agreement. Of the three cases in which USDOC normally will determine that a likelihood of continuation or recurrence of dumping exists, the second and the third clearly do not appear adequate to establish such likelihood. The fact that imports of the subject merchandise ceased after issuance of the order or the suspension agreement as such is in no way indicative of whether the producers of the product concerned will again begin dumping after the duty is terminated. Similarly, it is not clear why the fact that dumping was eliminated after the issuance of the order, and import volumes for the subject merchandise declined significantly, as such should indicate that the producers will again start dumping after the duty is removed.

36. This inadequacy of the standard applied by USDOC becomes even more obvious in the positive formulation of the same standard. The requirement that "dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased", defies all economic theory. It is clear that if an anti-dumping duty is imposed, this will necessarily have an anti-competitive effect for the products concerned. If, notwithstanding the imposition of an anti-dumping order, imports remain stable or increase and dumping ceases, then this must be due to factors unrelated to dumping. However, in this case, the scenario is in no way different from scenario (c), in which dumping also ceases, and from scenario (b), for which the continuation of dumping is irrelevant.

37. It is interesting to note that with respect to sunset reviews in countervailing duty proceedings, the Sunset Policy Bulletin does not refer to the import volumes during the period the CVD is in place, but rather to the question of the continuation of the subsidy programme.[21] It is not clear why trends in import volumes should have a decisive importance for antidumping duties, but not for countervailing duties. It therefore appears that US practice in this respect is not only incompatible with the AD Agreement, but also inherently inconsistent.

38. In the view of the EC, USDOC, by giving primary importance to trends in import volumes, is basing itself on a factor which is not primarily related to dumping, and which therefore cannot be conclusive for establishing the likelihood of continuation or recurrence of dumping. In exchange, USDOC makes no attempt to inquire into the economic and other incentives for producers to make renewed recourse to dumping practice likely or unlikely. On the contrary, by requiring "good cause" for the examination of all other factors, USDOC shuts the door to a meaningful likelihood determination.

39. By conditioning the determination concerning the likelihood of continuation or recurrence of dumping on what Japan has rightly referred to as "a commercially impractical scenario",[22] USDOC is presenting producers with a nearly impossible task. The practical effect of this policy is to perpetuate anti-dumping orders. In short, the policy of USDOC can be described by "once a dumper, always a dumper". However, this is not compatible with the sunset provisions of Article 11.3 AD Agreement, which specifically provide that antidumping duties are not perpetual, and must in principle not be extended beyond five years.

40. Overall, USDOC practice as set out in the Sunset Policy Bulletin does not appear compatible with the "likely" standard in Article 11.3.

---

[21] Section III.A.3.a.

[22] Para. 124 of the first written submission of Japan.

D. THE *DE MINIMIS* REQUIREMENT OF ARTICLE 5.8 ALSO APPLIES IN THE CONTEXT OF A SUNSET REVIEW (JAPAN'S CLAIM 7)

41. Japan has claimed that the US requirement to treat as *de minimis* in sunset reviews only those margins that are less than 0.5 per cent is inconsistent with the 2 per cent *de minimis* rule contained in Articles 5.8 and 11.3 AD Agreement.

42. The EC agrees with Japan's claim. However, it considers that this WTO-inconsistent behaviour is already mandated by US law.

43. In making a preliminary or final anti-dumping duty determination in an initial investigation, the US authorities will apply the *de minimis* standard which is set forth in section 1673b(b)(3) of the Act.[23] This standard provides that:

> In making a determination under this subsection, the administering authority shall disregard any weighted average dumping margin that is *de minimis*. For purposes of the preceding sentence, a weighted average dumping margin is *de minimis* if the administering authority determines that it is less than 2 per cent *ad valorem* or the equivalent specific rate for the subject merchandise.

44. In sunset reviews, section 1675a(c)(4)(B) of the Act provides that:

> For purpose of this paragraph, the administering authority shall apply the *de minimis* standards applicable to reviews conducted under subsections (a) and (b) of Section 751. (emphasis added)

Section 751(a) of the Act provides for periodic review of the amount of any antidumping duty and Section 751(b) for the review of the final determination or suspension agreement for change in circumstances.

45. Section 351.106(c)(1) of the Sunset Regulations provides that:

> In making any determination other than a preliminary or final … anti-dumping duty determination in an investigation …, the Secretary will treat as *de minimis* any weighted average dumping margin … that is less than 0.5 per cent *ad valorem*, or the equivalent specific rate.

46. Section II.A.5 of the Sunset Policy Bulletin provides that:

> In accordance with section 752(c)(4)(B) of the Act and 19 CFR 351.106(c)(1), the Department will treat as *de minimis* any weighted average dumping margin that is less than 0.5 per cent *ad valorem* or the equivalent specific rate.

47. It follows from the above description that the relevant US laws and administrative practice is to apply a 2 per cent *de minimis* rule in the initial determination of a dumping margin and to apply, as a general rule, a 0.5 per cent *de minimis* rule in all reviews, including sunset reviews. The SAA accompanying the URAA[24] explained that:

> The requirements of Article 5.8 apply only to investigations, not to reviews of anti-dumping duty orders or suspended investigations.

---

[23] See 19 USC §1673b(b)(3) and 1673d(a)(4).
[24] At pg. 845.

The SAA also explained that:

> The Administration intends that Commerce will continue its present practice in reviews of waiving the collection of estimated cash deposits if the deposit rate is below 0.5 per cent *ad valorem*, the existing regulatory standard for *de minimis*.[25]

48. With regard to the parallel provisions in the field sunset reviews for countervailing duties, the Panel in *US – Corrosion-resistant carbon steel from Germany* confirmed that the US law in itself is contrary to the WTO Agreements[26].

E. THE REQUIREMENTS OF ARTICLE 3.3 AND 5.8 FOR THE CUMULATION OF EXPORTS IN AN INJURY DETERMINATION ALSO APPLY WITHIN THE CONTEXT OF A SUNSET REVIEW (JAPAN'S CLAIM 10)

49. Japan has submitted to the Panel that the USITC's decision to cumulate imports from various countries in this sunset review is inconsistent with Article 3.3, 5.8 and 11.3 AD Agreement.

50. The EC does not consider itself in a position to comment on the appropriateness of the inclusion of imports from Japan into the cumulation.

51. However, the EC agrees with the view expressed by Japan that the requirements of Articles 3.3 and 5.8 for the cumulation of exports in an injury determination also apply within the context of a sunset review under Article 11.3 AD Agreement.

52. Article 11.3 mandates that antidumping duties shall be terminated unless the authorities determine that this would be likely to lead to continuation or recurrence of dumping and injury. The continuation or recurrence of injury is therefore part of the preconditions for the continuation of an antidumping duty.

53. As Japan has already set out in its submission, the term injury is defined, for the purposes of the entire Agreement, in Article 3 AD Agreement. Paragraph 3 of Article 3 sets out the conditions under which the effects from imports from more than one country may be cumulatively assessed, and requires, among others, that the volume of imports from each country must not be negligible. The only place where a definition of when the volume of dumped imports shall be considered "negligible" is Article 5.8.

54. The European Community sees no reason why these provisions should not apply in the context of sunset reviews. The Panel findings in *US DRAMs* has no relevance to the present case[27]. This Panel addressed the question of whether a *de minimis* standard applied in a duty assessment procedure under Article 9.3 of the AD Agreement. Whether a *de minimis* standard applies in a sunset review was answered positively by *US – Corrosion-resistant carbon steel from Germany* (see above at 46). The same panel also expressly considered that a literal reading would limit provisions such as Article 15.3 "in ways that would negatively affect the operation of the Agreement, particularly in respect of sunset reviews, something that cannot have been intended by the drafters"[28]. Article 15.3 is the parallel provision of Article 3.3 AD Agreement in the SCM Agreement.

---

[25] The 0.5 per cent *ad valorem* was the DOC's previous *de minimis* threshold for new investigations

[26] Panel Report, *United States - Countervailing Duties on Certain Corrosion-resistant Carbon Steel Flat products from Germany*, WT/DS213/R, published on 14 June 2002, para. 8.80.

[27] Para. 185 of the First Written Submission of the US

[28] Ibid note 27, paras. 8.16 and 9.20

55. Therefore, the Community is of the opinion that negligible imports must not be included into a cumulative assessment of injury unless the authorities have determined that these imports are likely to become non-negligible upon revocation of the duty.

LIST OF EXHIBITS

Exhibit EC-1 Uruguay Round Agreement Act – Statement of Administrative Action ("SAA") – extracts

ANNEX B-4

THIRD PARTY SUBMISSION OF KOREA

I. INTRODUCTION

1. At the conclusion of the Uruguay Round, the adoption of Article 11.3 of the AD Agreement, which provided for the termination of anti-dumping measures after 5 years absent a finding that termination would lead to continuation or recurrence of dumping and injury was widely welcomed. This "sunset" provision was hailed as a major step towards preventing abuse of the anti-dumping remedy which allowed measures to remain in effect long after they had ceased to serve their intended purpose. However, the implementation of the sunset provision over the past seven years has not lived up to the original expectations, leading to widespread cynicism that sunset termination of anti-dumping measures has turned out to be the exception rather than the rule.

2. A review of the USDOC's record in this regard is very revealing. Korea notes that 305 sunset reviews were initiated in the United States. Out of these 305 cases, the USDOC revoked the measure in 73 cases on the ground that the domestic industry did not respond to USDOC's notice of initiation.[1] For all of the remaining 232 cases, the USDOC found that the termination of the measure would be likely to lead to continuation or recurrence of dumping. In other words, the USDOC ruled against revocation of the measure in every single case that was contested by the domestic industry.

3. In Korea's view, the USDOC's blatantly lop-sided record in these reviews establishes clearly that either the US sunset rules *per se* or the manner in which they are applied in particular cases, or both, are inconsistent with the AD Agreement. While Korea agrees generally with the points made by Japan in its first submission, Korea will in this submission elaborate on the following four points, which are discussed below in chronological order:

- First, the USDOC's initiation of sunset reviews is automatic, and does not comply with the evidentiary requirements of the Agreement.
- Second, the USDOC applies a 'not likely' standard to the sunset termination of a dumping order, in contrast to the 'likely' standard of Article 11.3;
- Third, the USDOC's presumption of likelihood of dumping is made on the basis of insufficient facts and through the application of arbitrarily pre-determined rules and assumptions; and
- Fourth, the USDOC maintains the presumption and reach a determination by imposing an arbitrary and impossibly high 'good cause' burden upon respondents' presenting facts adverse to the presumption.

4. As Korea will elaborate below, the rules and procedures governing each of the above four steps in US sunset reviews are heavily biased in favor of continuation of the anti-dumping measure. When combined together, these rules and practices have imposed an insurmountable barrier on all interested parties that have sought a USDOC finding that termination of a dumping measure would not lead to continued dumping. The failure of the USDOC *ever in 233 cases* to find that revocation of an order would not lead to recurrence of dumping is, in itself, *prima facie* evidence that the USDOC's rules and practices are not consistent with its WTO obligations. It is worth noting, in this regard, that

[1] See Data Compilation of All Sunset Reviews Conducted by USDOC (Ex. JPN-31).

USDOC made these 233 determinations at a time of unprecedented strength and high consumer spending in the US economy.

5. Finally, Korea will argue below that disciplines applying to initial anti-dumping investigations must apply *mutatis mutandis* to sunset reviews. In particular, the disciplines on the prevention of zeroing of negative margins, stipulated in Article 2.4, and on *de minimis* standards, stipulated in Article 5.8, apply to sunset reviews with equal force as they do to initial investigations.

II. AUTOMATIC INITIATION OF SUNSET REVIEW WITHOUT SUFFICIENT EVIDENCE

6. Section 751(c)(1) of the Tariff Act of 1930, as amended (the "Act"),[2] mandates that the US authorities "*shall*" conduct a sunset review in every instance and mandates automatic initiation of such a review without requiring any evidentiary finding that the review is justified or necessary. Moreover, the Statement of Administrative Action ("SAA") expressly states that this "automatic initiation will avoid placing an unnecessary burden on the domestic industry and promote efficiency of administration."[3] As a textual matter, this provision for automatic initiation reverses the presumption contained in Article 11 that anti-dumping measures normally expire after 5 years. Moreover, the practical effects of automatic initiation further undermine this presumption in two ways. First, automatic initiation removes, at least in part, the burden on parties favoring continuation of the measure to show that termination would result in continued dumping and injury by removing the threshold step of showing evidence supporting such a likelihood. Second, automatic initiation increases the burden on parties seeking termination of a measure by forcing them to participate in reviews that might not otherwise be initiated. In this section, Korea will argue that the automatic initiation is contrary to the United States' obligations under Articles 11.3 and 12.1 of the AD Agreement.

A. TEXTUAL ANALYSIS OF ARTICLE 11.3

7. The text of Article 11.3 provides two different means through which a sunset review can be initiated; first, "on their [the authorities'] own initiative" *or*, second, "upon a duly substantiated request made by or on behalf of the domestic industry (…)." With respect to a review initiated at the authorities' own initiative, Article 11.3 is silent about the threshold of evidence that should be met before a review is initiated. As noted above, the United States has interpreted this silence to mean that there is no threshold at all, and, as noted, its interpretation is reflected in section 751(c)(1) of the Tariff Act and in the SAA.[4]

8. Article 11.3 does not provide that there must be a review in every case. To the contrary, the primary clause of the first sentence of Article 11.3 provides that measures "shall be terminated" after five years . . . "unless" the appropriate finding is made. (emphasis added). The correct interpretation of this sentence is that measures will normally terminate, except when an alternative determination is made.[5] Thus, Article 11.3 contemplates that measures may terminate without any review being conducted. By providing for automatic initiation of reviews in every case, US law makes the conduct of a review a *sine qua non* of termination and precludes the possibility of a measure terminating under the normal operation of the Article 11.3.

---

[2] 19 USC. §1675a(c)(1).

[3] Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, page 879.

[4] SAA at 879

[5] Webster's dictionary offers as the following primary definitions of "unless": "if it be not that, were it not the fact that; if not; except when; except that." *See* Webster's New Universal Unabridged Dictionary, 2nd Ed. (1983), p. 2001.

9. Moreover, nothing in the text of Article 11.3 supports the US position that a review may be initiated *automatically* in every case. Contrary to the arbitrary interpretation of the US, the text does not provide that "the authorities shall conduct a review every five years." In this sense, Article 11.2 may be contrasted with Article 11.2, which states that the authority "*shall*" conduct a review "where warranted." Thus, Article 11.2 imposes an affirmative burden to conduct a review in certain circumstances, while Article 11.3 contains no such mandatory burden. By claiming the right to conduct a review, which it initiates automatically in every case, the United States' law goes well beyond any reasonable construction of the language and meaning of Article 11.3.

B. TEXTUAL ANALYSIS OF ARTICLE 12.1, WHICH PROVIDES A CONTEXT FOR THE INTERPRETATION OF ARTICLE 11.3

10. Further support for Korea's interpretation of Article 11.3 is found in the text of Article 12.3, which stipulates that "the provisions of the Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11". (emphasis added).

11. With respect to the disciplines governing the initiation of reviews, Article 12.1 provides that "when the authorities are satisfied that there is *sufficient evidence* to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members […] shall be notified and a public notice shall be given." (emphases added) It should be noted here that Article 12.1 does not attempt to differentiate in any way between reviews initiated at the authorities' own initiative *or* by or on behalf of the domestic industry. Thus, the obligation to have "sufficient evidence" before initiating a review must be construed to apply in either case.

12. US law is not consistent with Article 12.1 in this respect. Under section 751(c)(1) of the US law, the USDOC *shall publish* in the Federal Register a notice of initiation of a sunset review not later than 30 days before the fifth anniversary of a dumping order. This requirement to publish a notice of initiation without any supporting evidence is clearly inconsistent with Article 12.1, which provides that public notice may only be given, "when the authorities are satisfied that there is *sufficient evidence* to justify the initiation of an anti-dumping investigation pursuant to Article 5."

13. Furthermore, since Article 12.1 applies to the initiation of reviews under Article 11, the absence of a reference to "sufficient evidence" in Article 11.3 itself cannot be interpreted to mean that authorities may automatically initiate the review process without any evidence. Thus, the US law is inconsistent with Article 11.3 as well as Article 12.1.

14. Article 12.1.1 also provides helpful context for the interpretation of Articles 11.3. and 12.1. Article 12.1.1 provides that "a public notice of the initiation of an investigation shall contain (…) *adequate information* on the following:". (emphasis added) The items on which adequate information is required include: 'the basis on which dumping is alleged in the application" and "a summary of the factors on which the allegation of injury is based". If an authority were permitted to initiate a sunset review automatically without a prior determination of the sufficiency of the evidence, there would be no reason for requirement that the authority provide in the public notice *adequate information* on the basis of the alleged dumping and injury. Again, since Article 12.1.1 applies to the initiation of reviews under Article 11, the absence of a reference to "sufficient evidence" in Article 11.3 cannot be interpreted to mean that authorities can automatically initiate the review process without any evidence.

C. THE OBJECTIVE AND PURPOSE OF THE AD AGREEMENT

15. The objective and purpose of the AD Agreement is to establish multilateral disciplines over the application of anti-dumping measures. Thus, Article 1 of the AD Agreement, titled 'Principles',

reads; "the following provisions *govern* the application of Article VI of GATT 1994." (emphasis added)

16. The initial investigation can lead to the imposition of a dumping order, valid for five years. The AD Agreement provides detailed and specific rules applying to the imposition of the order, in order to establish multilateral disciplines over it. The sunset review can lead to the imposition of a dumping order, valid for another 5 years. Since the objective and purpose of the AD Agreement is the establishment of multilateral disciplines over the application of Article VI of GATT, the absence from Article 11.3 of particular rules for sunset reviews cannot be interpreted to mean that investigating authorities are free to establish their own arbitrary rules for sunset reviews and to initiate such reviews in every case without any showing of sufficient evidence.

17. Narrowing the focus, the objective and purpose of Article 11.3 is to establish multilateral discipline over a sunset review. The discipline is that a dumping order is normally to be terminated in five years, *except when (n.4)* there is a good reason to believe that the termination of the measure is likely to lead to continuation or recurrence of dumping and injury.

18. In the *US – Byrd Amendment* case, a panel opined on the importance of the principle of good faith as a general rule of conduct in international relations and stated that "good faith requires a party to a treaty to refrain from acting in a manner which would defeat the objective and purpose of a treaty as a whole or the treaty provision in question.[6]" The automatic initiation of a sunset review, without any evidence, defeats the objective and purpose of Article 11.3, because it imposes additional burden upon the normal sunset termination, without any justification in the form of evidence to justify the initiation of the review.

III. THE 'NOT LIKELY' STANDARD OF THE USDOC

19. USDOC's regulation 19 C.F.R. 351.222(i)(1)(ii) sets forth a WTO-inconsistent "not likely" standard for sunset reviews. As a panel on *US-DRAMS* found, a finding that an event is "likely" implies a greater degree of certainty that the event will occur than a finding that the event is not "not likely." As the same panel pointed out, the fact that an event is not "not probable" does not by itself render that event "probable."[7] Since the USDOC regulation uses a standard of "not likely" rather than the "likely" standard of Article 11.3, the USDOC's standard is biased in favor of the continuation of the dumping order and therefore inconsistent with the WTO obligation of the US.

20. The United States may argue that the difference between "likely" and "not likely" is simply an issue of mere semantic differences, and that in effect, a failure to find that continued dumping is likely is the same thing as a finding that continued dumping is not "not likely". However, this difference in terminology critically alters the burden of proof imposed on the parties in sunset reviews. The statement that measures "shall terminate" and "likely" standard of Article 11.3 both require that the administering authority make an affirmative determination that dumping is likely to continue. By switching this to a "not likely" standard, the United States in effect flips the burden of proof on its head and requires respondent to prove that termination of the measure will not result in continued dumping. This unjustified shift of burden can readily be seen in the practices of the USDOC. As will be illustrated in the following section, the DOC applies the arbitrarily pre-established test provided in the Sunset Policy Bulletin and unjustifiably shifts the burden arising from Article 11.3 by presuming that dumping is *likely* to continue. Then, the DOC requires respondents to demonstrate that dumping is *not likely* to continue, imposing an impossibly high threshold.

---

[6] WT/DS217,234/R, para.7.64

[7] US-DRAMS, at para 6.46

21. This impermissible burden placed on respondents is extremely unfair. In this connection, Korea recalls the admonition of the Appellate Body in the *US – Hot Rolled Steel*, where it stated that "under Article 2.4, the obligation to ensure a 'fair comparison' lies on the investigating authorities, and not the exporters."[8] By the same logic, the obligation under Article 11.3 to *determine* whether termination would be likely to lead to continued dumping also lies on the investigating authorities, and should not be transferred to the exporters by means of unjustified presumption allowed under the Sunset Policy Bulletin.

22. In the *US – DRAMS* case, the United States accepted the panel's finding that "not likely" standard is not consistent with "likely" standard and amended its regulations in connection with Article 11.2 of the AD Agreement[9]. However, while amending the regulation, the United States did not amend other rules and regulations related with the implementation of the amended regulation, thus distorting the US implementation of the DSB ruling. In the instant case, the US should be required to amend not only the 'not likely' standard enshrined in the USDOC regulation but also other relevant rules and regulations, including the Sunset Policy Bulletin cited above.

IV. THE USDOC PRESUMES "LIKELIHOOD" THROUGH THE APPLICATION OF ARBITRARILY PRE-DETERMINED SCENARIOS

23. The Sunset Policy Bulletin directs the USDOC to examine whether the facts of the particular sunset review fall into one of four factual scenarios. If facts fall under one of the three factual scenarios identified below, dumping is "likely" to continue or recur:

- there has been continued dumping at any level above *de minimis* (i.e., 0.5 per cent) after the imposition of the anti-dumping duty order;
- imports ceased after the imposition of the anti-dumping duty order; or
- dumping ceased thereafter, but import volumes declined significantly from pre-order level.[10]

A. USDOC'S SCENARIOS CREATE AN IRREFUTABLE PRESUMPTION

24. As Japan has correctly argued, the commercial reality is that in practice these three scenarios cover every case.[11] The only scenario, under which dumping is presumed to be unlikely, is commercially impractical – *where* dumping was completely eliminated and import volumes remained steady or even increased in terms of relative market share since the imposition of the order[12]. Thus, the Sunset Policy Bulletin invariably leads to an unjustified and effectively irrefutable presumption of the likelihood of dumping.

25. Article 11.3 stipulates that dumping order shall be terminated, unless the authorities *determine* that the expiry of duty would be likely to lead to continuation or recurrence of dumping and injury. As noted above, applying the statements of the Appellate Body stated in *US – Hot Rolled Steel*, this obligation to make this determination lies on the investigating authorities. The authorities cannot fulfill this obligation properly or fairly where they pre-judge the outcome by restricting the circumstances that will be deemed to justify an affirmative determination to arbitrary, pre-determined

---

[8] *US-Hot Rolled Steel*, WT/DS184/AB/R, para.178
[9] Ex. JPN-7
[10] Ex. JPN-6
[11] Japan's first submission to the panel, para 120
[12] Ibidem, para 124

and commercially implausible scenarios, and by limiting their determination to a narrow analysis of circumscribed facts (*i.e.*, the margin of dumping and the trends in import volumes.)

26. The Appellate Body, with respect to the obligation arising from Article 4.2 of the Safeguards Agreement, has stated that a panel's assessment has two aspects. First, a panel must review whether the competent authorities have, as a *formal* matter, evaluated all relevant factors and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a reasoned and adequate explanation of how the facts support their determinations.[13] Article 17.6(i) of the AD Agreement, which governs the standard of review applicable to the review of a dumping order, contains both *formal* and *substantive* requirements as well.

27. The US laws and practices fail to meet these standards. They limit authorities' obligation to gather positive facts to just two of those facts – the changes in dumping margins and the trends in the import volumes. They replace the process of making unbiased and objective assessment of facts with the consideration of these limited facts that must satisfy arbitrarily pre-determined scenarios in order to support an affirmative determination. Thus, the US laws and practices fail to meet either the *formal* or the *substantive* standards by which they must be reviewed.

28. The United States might argue that the respondents can rebut the presumption of likelihood of dumping by placing other evidence on the record. This does not cure the inconsistency with Article 11.3. First of all, as we have seen, this requirement turns the burden of proof on its head: while Article 11.3 provides explicitly that it is the authorities that should *determine* the likelihood of continued dumping, the USDOC's rules articulated in the Sunset Policy Bulletin transfers this burden to the respondents. Second, even if the respondents may place other evidence on the record, the USDOC's policies make clear that two facts – the margins of dumping and trends in import volumes – will be accorded greater weight in the analysis than any other facts the respondents may produce. Finally, and more importantly, as will be elaborated in the following section, the USDOC places an arbitrarily high "good cause" barrier upon respondents, making it practically impossible for the respondents to cross the barrier to rebut the presumption.

B. THE "GOOD CAUSE" BARRIER REINFORCES USDOC'S IRREFUTABLE PRESUMPTION

29. The depth of the bias of US laws and regulations in favor of finding of continuation of dumping, elaborated above in the chronological order of a US sunset review, is completed by the arbitrary and impossibly high burden placed upon respondents to show "good cause" in order to rebut the irrefutable presumption against termination established by the pre-determined scenarios in the Sunset Policy Bulletin.

30. Section II.C of the Sunset Policy Bulletin states that "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."[14] (emphasis added)

31. In this quotation, other factors refers to factors other than the USDOC's preferred two facts, i.e., the changes in the margin of dumping and the import volume. Given its obligation under Article 11.3 to determine the likelihood of dumping, there is no reason why the USDOC should not consider other – indeed, all relevant[15] – factors in its analysis from the beginning. There is no basis in the AD Agreement for the USDOC to limit arbitrarily the scope of its initial consideration of facts.

---

[13] *US-Safeguards on Lamb Meat*, WT/DS177,178/AB/R, para.141

[14] Ex JPN-6

[15] See, for example, Article 3.4, which calls for consideration of "all relevant economic factors" in determining injury.

This error is compounded by the fact that the USDOC does not simply accept evidence regarding other factors later in the proceeding, but imposes an additional burden – also not supported by the text of Article 11.3 – that respondents must make a showing of "good cause" before evidence on these factors will be considered. The failure of the USDOC simply to accept all relevant evidence submitted by the parties constitutes a systematic failure to meet the *formal* conditions identified by the Appellate Body for the investigating authority. The US sunset rules are therefore inconsistent with US obligations under Article 11.3.

32. Furthermore, practical experience shows that the burden of proof imposed by the "good cause" requirement is impossibly high. Of the 233 contested cases reviewed by the USDOC, it considered whether "good cause" existed in only 15 cases. And, of those 15 cases, the USDOC actually found "good cause" to exist in only 5 cases. Notwithstanding its consideration of "other factors" in those 5 cases, the USDOC found the other facts insufficient to negate the presumptions prescribed by the Sunset Policy Bulletin[16]. This incorrigibly lop-sided record establishes beyond doubt that the US standards, contained in the USDOC regulations and in the Sunset Policy Bulletin, impose burdens of proof not found in the text of the AD Agreement, unjustifiably limit the evidence that will be considered, and unfairly pre-judge the outcomes of sunset reviews. These measures are thus not consistent with US obligations under Article 11.3.

V. THE DISCIPLINES APPLYING TO AN INITIAL INVESTIGATION AND A SUNSET REVIEW

33. In its first submission to the Panel, Japan has argued that disciplines applying to the initial investigation of dumping should also apply with equal force to the sunset review of dumping. In particular, Japan argues that the practice of "zeroing," prohibited under Article 2.4, is also prohibited under Article 11.3,[17] and that the use of a 2 per cent threshold for *de minimis* margins, applied under Article 5.8, also applies to Article 11.3.[18]

34. Korea supports Japan's position on these points. In this final section, Korea shall provide its views on the objective and purpose of the AD Agreement and, in this connection, why the disciplines applying to the initial investigation apply mutatis mutandis to sunset review as well.

35. The AD Agreement contains detailed and complex provisions on the rules applying to various phases of anti-dumping proceedings. The imposition of an anti-dumping measure depends on the proper establishment, and unbiased and objective evaluation, of detailed facts and arguments presented by petitioners and respondents. Given that these facts are highly technical in nature, and are normally presented in an adversarial manner, they must be assessed pursuant to detailed procedural and substantive rules governing the imposition of anti-dumping measures.

36. If these detailed rules are biased in one way or the other, or lack sufficient clarity, it will be difficult to expect the outcome of anti-dumping investigations, whether initial investigations or subsequent reviews, to be fair and consistent. Therefore, it was necessary for the drafters of the AD Agreement to agree on the detailed provisions to prevent and cure any biases in the national rules and to establish multilateral control over the anti-dumping measures.

37. Article11.3, *per se,* does not contain detailed substantive provisions governing the conduct of a sunset review. To enable the investigating authorities to assess detailed facts and arguments presented in a sunset review, therefore, *either* the detailed provisions provided elsewhere in the AD Agreement should be applied to the sunset review, *or* each investigating authority is free to develop

[16] Japan's first submission, paras.131-133
[17] *Ibidem*, para.175
[18] *Ibidem*, para.187

its own detailed rules for these reviews. The second option would, of course, lead to a proliferation of 140 different rules governing a sunset review, resulting in the complete loss of multilateral control over these reviews.

38. Korea does not believe that the drafters of the AD Agreement intended the latter scenario. In Korea's view, the detailed substantive provisions provided elsewhere in the AD Agreement should apply to a sunset review in the same manner as to the initial anti-dumping investigation.

ANNEX B-5

THIRD PARTY SUBMISSION OF NORWAY

I. INTRODUCTION

1. The present case concerns whether the US basic anti-dumping duty law, Tariff Act of 1930 (hereinafter the Act), Sunset regulations and policy practices, Sunset Policy Bulletin, and their concrete application to imports of certain corrosion-resistant steel products from Japan are inconsistent with the United States Government's (hereinafter the USG's) obligations under the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994") and the Agreement on Implementation of Article VI of GATT 1994 (hereinafter the "AD Agreement"), and Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "WTO Agreement"). Moreover, whether the US statutes and regulations implementing sunset reviews are on their face and as applied, both as a general practice and in this case, inconsistent with numerous substantive provisions of these agreements.

2. Norway has systemic interests in the interpretation and application of the "sunset provisions" of the AD Agreement, and thus reserved its third party rights in this case during the Dispute Settlement Body meeting on 22 May 2002.[1]

3. As a third party, Norway would like to address, in our view, certain critical issues. They will be presented below as follows:

- The US standard for initiation for sunset reviews (chapter II)
- The US standard for the subsequent investigation in sunset reviews (chapter III)
- The US standard of dumping margins and *de minimis* requirement in sunset reviews (chapter IV)
- The US ensurance of the conformity of its laws with their WTO obligations (chapter V)

II. THE UNITED STATES DEPARTMENT OF COMMERCE (USDOC) STANDARD FOR INITIATION OF SUNSET REVIEWS – AUTOMATIC INITIATION AND THE "SUFFICIENT EVIDENCE" STANDARD

4. Sections 751(c)(1) and (2) of the Act and Sections 351.218(a) and (c)(1) of USDOC regulations mandates that USDOC automatically initiate all sunset reviews *without requiring that there be sufficient evidence to justify such initiation.* In accordance with the statute and its regulations, USDOC automatically initiated the sunset review in this case. These provisions of the Act and regulations, and the applications by USDOC of these provisions to this sunset review, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 of the AD Agreement on their face and as applied in this case.

5. Below Norway will set forth its legal analysis of the abovementioned provisions of the AD Agreement and the violations committed by the United States.

[1] WT/DS244/5.

A. 2.1 THE REQUIREMENTS OF ARTICLE 11.3 OF THE AD AGREEMENT IN RESPECT OF SUFFICIENT EVIDENCE TO INITIATE A SUNSET REVIEW.

6. Article 11.3 of the AD Agreement provides in pertinent parts:

> "..any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (...), 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". (emphasis added)

7. The question in this case is which evidentiary standard is applicable to sunset reviews, given that Article 11.3 of the AD Agreement is silent on this point. The United States maintains that there are no requirements, as nothing is spelt out in the provision itself. As Norway will demonstrate below, this is not the case, and the standard in Article 5.6 applies equally to sunset reviews. This is because any provision must be interpreted according to recognized principles of public international law on treaty interpretation, as found inter alia in the Vienna Convention on the Law of the Treaties.

8. Article 31 of the Vienna Convention on The Law of Treaties, requires treaty provisions to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the *light of its object and purpose*".

1. The Object and Purpose of the Sunset Provisions in the AD Agreement

9. Article 11.1 provides the general objective applicable to all decisions to continue imposing an anti-dumping duty – that the duty may remain in force only as long as necessary to counteract injurious dumping.

10. Under Article 11.3 of the AD Agreement, WTO Members are required to terminate anti-dumping duties on a date no later than five years from their imposition, unless it is determined in a review, that the expiry of the duties would be likely to lead to continuation or recurrence of dumping and injury. This corresponds to the purpose of Article 11.1 of the AD Agreement which provides that an antidumping duty shall be maintained only as long as necessary and to the extent to counteract dumping which is causing injury.

11. It follows from Article 11.3 that as a main rule anti-dumping duties shall be terminated no later than five years from their imposition – the presumption being that dumping is counteracted after such period.

12. A review is meant only to take place in exceptional circumstances when there is a clear indication based on the situation existing at the time of review that the expiry of the duty would be likely to lead to continuation or recurrence of both dumping and injury. The purpose of "initiating" a sunset review, which as has been mentioned is an exceptional occurrence, is thus not only to begin analyzing whether continuation of the order is necessary, but also to determine if "initiation" itself is necessary.

13. Therefore, the object and purpose of Article 11.3 first requires that the administering authority make a threshold decision as to whether to begin a sunset review at all. Initiation is not an empty or automatic decision.

2. The Context in which Article 11.3 of the AD Agreement Applies

14. As stated above, the absence of the words "sufficient evidence" in article 11.3 in the AD Agreement, does not mean that there are no standards for initiation of sunset reviews. The absence of any specific language in Article 11.3 with respect to how an administering authority is to initiate sunset reviews is not conclusive; the absence simply confirms that one must look elsewhere in the Agreement for those specific rules. This is evident from the object and purpose of the sunset provision in the AD Agreement.

15. Furthermore the textual context of the provision mandates clearly what the evidentiary standard is.

16. There is an abundance of textual context that confirms the existence of a "sufficient evidence" standard before initiating a sunset review, as is the case for the initial investigation. A proper analysis of the context of Article 11.3 reveals that no provision of the AD Agreement can be read in isolation, and that all provisions are applicable mutatis mutandis to Article 11.3 to the extent that they are relevant to sunset reviews. Moreover, each provision of the AD Agreement must be interpreted in the context of all the other provisions of the Agreement.

17. There are in particular three textual links that the Government of Norway would like to mention in support of the above interpretation of the provision based on its object and purpose and context.. Firstly, the textual link in Article 12.3 of the mutatis mutandis application of article 12 to article 11, secondly the reference to Article 5 in Article 12.1. and thirdly the footnote 1 to the AD Agreement.

18. Norway submits that the text and reference in Article 12.1 and Article 12.3 reflects the contextual point that the "sufficient evidence" standard applies to all announcement to initiate by the authorities, not just announcements of original investigations.

19. The text and context of Article 12 explicitly requires that the authorities have "sufficient evidence" to initiate sunset reviews under Article 11.3. The *mutatis mutandis* application of Article 12.1 in accordance with Article 12.3 to Article 11.3 establishes that, once the authorities are satisfied that there is "sufficient evidence" to justify initiation, the authorities must provide public notice of the initiation of the sunset review. To give Article 12 its proper meaning, therefore, the authorities must satisfy the "sufficient evidence" standard to initiate sunset reviews.

20. Because of the *mutatis mutandis* application of the Article 12 to Article 11.3, the language "pursuant to Article 5" in Article 12.1 requires that Article 5.6 must also apply to sunset reviews. Article 5.6 requires that the sufficient evidence standard defined in Article 5.2 must also apply to instances where the administering authorities self-initiate. In this way, the text and context of Article 5.6 also requires that the administering authorities have "sufficient evidence" to initiate sunset reviews under Article 11.3.

21. In Article 5.6, the authorities do not have carte blanche to automatically initiate investigations without first having "sufficient evidence." It is illogical to imagine that the AD Agreement only limits administering authorities' ability to self-initiate in some instances but not in others.

22. Thirdly, we would also like to point to the fact that footnote 1 to the AD Agreement, in which it is stated that:

> "The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5."

23. The word "initiated" in Article 11 shall thus be understood as a procedural action in accordance with Article 5. This makes it, in our view, clear that Article 5.6 must apply to a sunset review.

24. Therefore, the "sufficient evidence" rule, apply to all self-initiations by the authorities in both original investigations and sunset reviews.

3. 2.1.3 The Prior Panel Decision on Article 21.3 of the SCM Agreement is Not Persuasive

25. With all due respect, Norway submits that the panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*,[2] erroneously interpreted the consistency of the automatic initiation of sunset reviews with Article 21.3 of the SCM Agreement, the corollary to Article 11.3 of the AD Agreement. This Panel should not follow the prior panel's decision.

26. The CVD panel did not consider Article 21.3 in its proper context, and in light of its object and purpose as mandated by the recognized principles of Public International Law relating to treaty interpretation. Furthermore, the CVD panel never discussed or even mentioned Article 22.1 of the SCM Agreement (the corollary to Article 12.1 of the AD Agreement), which provides for the "sufficient evidence" standard, and also establishes a textual link to Articles 21.3 through 22.7 of the SCM Agreement. This point is now before the Appellate Body, which held its oral hearing on 11 October 2002. Norway trusts that the Appellate Body will correct this error by the Panel in that case.

B. 2.2 CONCLUSION

27. For the reasons stated above, the proper interpretation of Article 11.3 in accordance with its context, object and purpose requires a sunset review initiated by the authorities to be based on "sufficient evidence." Although the standard of "sufficient evidence" may vary from case to case, automatic self-initiation by the authorities without any evidence cannot be within the scope of the "sufficient evidence" standard.

28. The Act and regulations mandating automatic initiation of sunset reviews without any evidence, therefore, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 on its face. Further, USDOC's automatic initiation of the sunset review in this case, on 1 September 1999, pursuant to the Act and regulations is also inconsistent with these provisions of the AD Agreement.

III. THE UNITED STATES DEPARTMENT OF COMMERCE (USDOC) STANDARD OF THE SUBSEQUENT INVESTIGATION IN SUNSET REVIEWS – THE "LIKELY" STANDARD

A. 3.1 THE USDOC'S REFUSAL IN SUNSET REVIEWS TO UNDERTAKE A SERIOUS PROSPECTIVE EXAMINATION OF THE PROBABILITY OF FUTURE DUMPING BASED ON POSITIVE EVIDENCE IS INCONSISTENT WITH ARTICLE 11.3, ON ITS FACE, AS A GENERAL PRACTICE AND AS APPLIED IN THIS CASE.

29. Article 11.3 of the AD Agreement provides that:

> "..any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition...unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by

[2] WT/DS213/R, adopted 3 July 2002

> 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". (emphasis added)

30. This represents a positive obligation upon the domestic authorities to "determine" the likelihood of continuation or recurrence of subsidisation. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence that there is a probability, not some remote possibility, that dumping will continue or recur in the future.

31. In the case *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead Bismuth Carbon Steel Products Originating in the United Kingdom* the Appellate Body considered that (in the context of a review under Article 21.2 of the SCM Agreement, the corollary to Article 11.2 of the AD Agreement)[3]:

> "In order to establish the continued need for countervailing duties, an investigating authority will have to make a finding on *subsidisation* i.e. whether or not the subsidy continues to exist".

32. When such requirements are applied to a review under Article 21.1 of the SCM Agreement – and thus also to Article 11.2 of the AD Agreement – which is not obligatory and takes place during the life time of the original duty, it should be clear that a positive finding on dumping is necessary also in the context of an Article 11.3 investigation.

33. In an Article 11.3 investigation the basic obligation is the termination of the original duty, while the possibility of continuing a duty following a sunset review constitutes the exception. In the opinion of the Norwegian government the latter requires an unbiased review independent of the results of the original investigation to be undertaken in full conformity with all the procedural and substantive requirements for an initial determination of dumping and injury set forth in Articles 1 *et sec*. There is no reason to understand the requirement of "determination" of dumping and injury differently in Article 11.3 as compared to *inter alia* Articles 3 and 5. This is also supported by Article 11.1 and the purpose of the AD Agreement.

B. 3.2 THE US REGULATIONS

34. Section 351.222(i)(1)(ii) of the US regulations mandate explicit application of a "not likely" standard, even though a prior panel in *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one Megabit or Above from Korea,*[4], has made clear that a "not likely" standard does not comply with the "likely" standard of Article 11.

35. Notwithstanding this previous panel decision and the US's own acceptance of this decision, the US continues to maintain the "not likely" standard in regulations with respect to sunset reviews. Because the US regulation mandates termination of an anti-dumping duty based on the "not likely" standard, USDOC's regulation is thus inconsistent with Article 11.3.

C. 3.3 THE SUNSET POLICY BULLETIN

36. The US 's WTO-inconsistency on this issue does not stop at the provisions of the regulations. The Sunset Policy Bulletin impermissibly restrict any real factual investigation to determine prospectively whether dumping is "likely" to continue or recur, nonetheless the terms "likely" and

---

[3] See Panel Report WT/DS138/R, adopted 7 June 2000, at para. 6.18, as upheld by the Appellate Body Report, WT/DS138/AB/R, adopted 7 June 2000, at para. 51.

[4] WT/DS99/R, adopted 29 January 1999

"determine" in Article 11.3 require that the authorities undertake a prospective analysis of positive evidence to establish whether dumping is likely to continue or recur. Instead of looking forward, as a general practice the USDOC looks backwards.

37. The USDOC examines only historical dumping margins and import volumes. The Sunset Policy Bulletin thus impermissibly restricts the USDOC's analysis to a retrospective analysis. This restrictive, static, and retrospective approach creates an irrefutable presumption that dumping will continue or recur.

38. According to the written submission of Japan the USDOC applied this practice to the sunset review to determine that dumping is likely to continue in this case. In reaching its determination, USDOC refused to consider any information submitted by the Japanese company Nippon Steel Corporation (NSC). NSC presented facts showing that NSC would not export the subject product at dumped price and submitted information showing that the export volume had been lowered due to the production of subject product at its joint-venture in the United States.

39. According to the Japanese submission the USDOC had even known of the existence of these facts since the original investigation and subsequent administrative reviews.

D. 3.4 CONCLUSION

40. For the reasons stated above, Norway considers that, USDOC does not take the proper prospective approach to determine whether dumping is likely to continue in a sunset review and therefore acts inconsistently with Article 11.3 as a general practice and in this case.

IV. THE USDOC STANDARD OF DUMPING MARGINS AND *DE MINIMIS* RULE

A. 4.1 THE USDOC'S USE OF DUMPING MARGINS INCLUDING THE "ZEROING" METHODOLOGY IS INCONSISTENT WITH ARTICLES 2.2.1, 2.2.2, 2.4.2, 11.3 AND 18.3 BOTH AS A GENERAL PRACTICE AND AS APPLIED IN THIS CASE

41. Article 2 sets forth the fundamental definition of "dumping," which governs throughout the rest of the AD Agreement. At the same time, Article 18.3 requires that each Member conduct its sunset reviews in accordance with the provisions of the AD Agreement. Consequently, the US is under an obligation to apply Article 2-consistent dumping margins in its sunset reviews.

42. In accordance with the Sunset Policy Bulletin, however, USDOC continues to apply to sunset reviews, including this case, dumping margins calculated in the original investigations prior to the WTO Agreement. These margins were calculated pursuant to Article-2 inconsistent methodologies. USDOC uses these WTO-inconstant dumping margins to determine the likelihood of dumping in sunset reviews without any attempt to bring these margins into conformity with Article 2.

43. The Appellate Body in the case *EC – Bed Linens*,[5] found that Articles 2.4 and 2.4.2 oblige the authorities to make a dumping determination without "zeroing" negative dumping margins. Yet, as a general practice USDOC has consistently calculated dumping margins in original investigations and subsequent reviews using the zeroing methodology for more than fifteen years. In accordance with the Sunset Policy Bulletin, USDOC uses these dumping margins upon which it bases its likelihood determination, contrary also to the requirement of Article 18.3 of the AD Agreement that requires that the present Agreement be applied to all cases – including reviews – after the creation of the WTO.

[5] WT/DS141/AB/R 2001,

1. 4.1.1 Conclusion

44. By applying these WTO-inconsistent dumping margins, the US acts inconsistently with its obligation under both Articles 2, and 11.3 and 18.3 as a general practice and as applied in this case.

B. USDOC'S REGULATIONS APPLYING A 0.5 PER CENT *DE MINIMIS* STANDARD TO SUNSET REVIEWS, RATHER THAN THE PROPER 2.0 PER CENT *DE MINIMIS* STANDARD AS PROVIDED FOR IN ARTICLE 5.8, ARE BOTH ON THEIR FACE AND AS APPLIED IN THIS CASE INCONSISTENT WITH THE US'S OBLIGATIONS UNDER ARTICLES 5.8 AND 11.3.

45. As stated above Norway considers that Article 5 of the AD Agreement is applicable also for sunset reviews. Article 5 is part of the context within which Article 11.3 operates. A proper interpretation of Article 11.3 in accordance with its context and its object and purpose, interpreted in accordance with the general principles of public international law as embodied *inter alia* in Article 31 of the Vienna Convention on the Law of Treaties, leads to the natural interpretation that the same *de minimis* standard shall be applied to all cases.

46. Article 5.8 of the AD Agreement provides in the context of original investigations:

> "[...] There shall be immediate termination in cases where the amount of dumping is *de minimis*.[...] For the purpose of this paragraph, the amount of a subsidy shall be considered to be *de minimis* if the subsidy is less than 2 per cent ad valorem."

47. The Member States of the WTO have agreed that dumping below this threshold does not permit a countervailing action. There is no exception to this rule, and immediate termination shall be the result in such cases.

48. The relevant US laws and administrative practice is to apply a 2 per cent *de minimis* rule in the initial determination of dumping as required by the AD Agreement, but to apply, as a general rule, a 0.5 per cent *de minimis* rule in all reviews, including sunset reviews.

49. Reviewing the need for a duty to continue under Article 11.3, in conjunction with Articles 11.1 and 5.8 has the same implications as determining whether the original substantive conditions on the basis of which it was initially imposed continue to exist**.**

50. The *de minimis* standard in the AD Agreement is based on the fact that a dumping margin of less than 2 per cent is presumed incapable to cause injury. If this dumping cannot cause injury in an original investigation, it is logically and legally unavoidable to conclude that it cannot cause injury in a sunset investigation. Consequently the United States should have lifted the anti-dumping duties and changed the *de minimis* threshold to 2 per cent in all review processes.

51. The panel in *US – German Steel CVD Sunset* supports this interpretation. The panel found that the same *de minimis* standard under Article 11.9 of the SCM Agreement should apply to both original investigations and to sunset reviews of countervailing duty orders under Article 21.3 of the SCM Agreement. The same rationale applies in this case. Further, the panel in *US – DRAM*s also supports that a *de minimis* standard of two per cent applies to sunset reviews.

52. According to the facts submitted by the Japan in its written submission in the present case, if the proper *de minimis* standard were applied to WTO-consistent dumping margins in this sunset review respondents would be found to be *de minimis*, resulting in the termination of the anti-dumping duty.

C. 4.2.1. CONCLUSION

53. Based on the above, Norway submits that the 0,5per cent *de minimis* standard used by the United States for sunset reviews represents a clear violation of Article 11.3 of the AD Agreement read in conjunction with Article 5.8 of the AD Agreement both as a general practice and as applied in this case.

V. US ANTI-DUMPING LEGISLATION IS INCONSISTENT WITH ARTICLE 18.4 OF THE AD AGREEMENT AND ARTICLE XVI:4 OF THE WTO AGREEMENT

54. Article 18.4 of the AD Agreement provides that:

> "Each member shall ensure not later than the date of entry into force of the WTO Agreement for it, the conformity of it laws, regulations and administrative procedures with the provisions of this Agreement."

55. Furthermore, Article XVI:4 of the WTO Agreement requires that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

56. Thus, by being inconsistent with Article 11 and related articles of the AD Agreement as they apply to a sunset review, the US law, regulations and practices as such, and as applied to the products in question in this case, are also inconsistent with Article 18.4 of the AD Agreement and Article XVI:4 WTO Agreement.

VI. CONCLUSION

57. For the reasons stated in the submission, Norway respectfully request the Panel to consider the US law, regulations and practices inconsistent with the obligations of the United States under: Article 11 and related articles of the AD Agreement as they apply to a sunset review, Article 18.4 of the AD Agreement and Article XVI:4 WTO Agreement.

58. Finally Norway respectfully requests the Panel to recommend that the United States bring its legislation into conformity with the corresponding covered agreements.

ANNEX C

Second Written Submissions by the Parties

Contents		Page
Annex C-1	Executive Summary of the Second Written Submission by Japan	C-2
Annex C-2	Executive Summary of the Second Written Submission by the United States	C-12

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. This submission responds to the First Written Submission of the Government of the United States (the "USG") filed with the Panel on 7 October 2002, and the USG's Oral Statement presented at the Panel's first meeting.

II. GENERAL PRACTICE

2. Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement explicitly require that each WTO Member conform its statutes, regulations, and "administrative procedures" to its WTO obligations. Therefore, the WTO Agreement and the AD Agreement contemplate general practice claims regarding a Member's WTO-inconsistent administrative procedures.

3. The USG argues that if an "administrative procedure" is discretionary it cannot be challenged. The USG claims that the Sunset Policy Bulletin is a non-binding statement by the agency that carries the same weight as other agency determination precedent. The USG, however, conveniently ignores the origins of the Sunset Policy Bulletin. The Sunset Policy Bulletin establishes rules for the conduct of sunset reviews and was crafted precisely to narrow the scope of sunset reviews in accordance with the Statement of Administrative Action("SAA").

4. The rationale of previous panels supports the argument that the Sunset Policy Bulletin is subject to this Panel's review under Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement. The panel in *US – Steel Plate from India* indicated that "pre-established rules" are "administrative procedures" under Article 18.4 of the AD Agreement. The Sunset Policy Bulletin was published on 16 April 1998 in the Federal Register, more than two months before the initiation of the first sunset review by the USG. Further, not unlike other USDOC rules establishing "administrative procedures", the Sunset Policy Bulletin requested public comments. Therefore, the Sunset Policy Bulletin could only be amended like other "administrative procedures" through the notice and comment requirements of US administrative law. These characteristics distinguish the Sunset Policy Bulletin from ordinary USDOC practice in which USDOC is able to deviate from its practice in an individual proceeding by simply explaining its reasoning. The Sunset Policy Bulletin represents a pre-established codification of USDOC's "general practice."

5. Further, the Sunset Policy Bulletin is a concrete independently operational instrument, and therefore, as interpreted by the panel in *US – Export Restraint*, is able to give rise independently to a violation of WTO obligations. USDOC has rigidly applied the Sunset Policy Bulletin to all prior 228 sunset reviews in which the domestic industry participated, and found that dumping was "likely" to continue in every single case. This fact demonstrates the directives of the Sunset Policy Bulletin are essentially mandatory provisions.

6. The panel in *US – Countervailing Measures* found that the mere appearance of executive discretion alone is insufficient to find a law WTO-consistent. "[W]hat is important is whether the government has effective discretion to interpret and apply its legislation in a WTO-consistent manner." USDOC's continued adherence to the Sunset Policy Bulletin establishes a complete lack of any "effective discretion" on the part of USDOC.

7. This reasoning is further supported by the panel's findings in *US – Section 301*. The panel in *US – Section 301* analyzed that administrative procedures may be WTO-inconsistent even where the statutory provisions grant discretion to the authorities to act consistently with its WTO obligations. The nature of the Sunset Policy Bulletin is identical to procedures the panel analyzed in *US – Section 301*.

8. Finally, the Appellate Body in the *US – CVD Sunset* case has implicitly stated that "information as to the number of sunset reviews that have been conducted, the methodology employed by USDOC in other reviews, and the overall results of such reviews" can establish a "consistent practice" challengeable before the panel. Japan has satisfied these requirements.

III. SUBSTANTIVE CLAIMS

A. AUTOMATIC SELF-INITIATION

9. Japan showed in its first submission that the US statute and regulations mandated automatic initiation of sunset reviews without any evidence, and thus is inconsistent with Article 11.3. The USG, however, believes there is no such requirement in Article 11.3 because there is no explicit use of the phrase "sufficient evidence" or a direct cross reference to Article 5.6. This is simply wrong. The sufficient evidence requirements of Article 5.6 are incorporated within Article 11.3 through Article 12.1 and 12.3.

10. The primary objective of Article 11.3 is that all anti-dumping duties terminate after five years. Article 11.3 only allows continuation of an anti-dumping duty in the exceptional circumstance where a sunset review is properly initiated and conducted. The Appellate Body in the *US – CVD Sunset* case has confirmed this interpretation in the context of Article 21.3 of the SCM Agreement stating that "{a}n 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."

11. Perhaps the most important explicit textual and contextual link is provided by Article 12. Although Article 12.1 does not itself "create" substantive obligations, the language does reflect the substantive obligations imposed by Article 5 to justify initiation by providing "sufficient evidence."

12. The USG offers no explanation for how the first clause of Article 12.1 could not apply to sunset reviews – as set forth in Article 12.3 – without reflecting the sufficient evidence standard for initiating such reviews. Even the USG in its first submission in this case recognizes that the provisions of Article 12 "shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11."

13. The USG, however, blurs the difference between "sufficient evidence" to begin the sunset review and the factual basis needed to make the final determination. Under the USG's interpretation, the authorities need no evidentiary showing at all to trigger the sunset review proceeding. "Sufficient evidence" merely reflects the need for some threshold showing to justify the action. The finding that dumping is *likely* to continue is for the final determination of a sunset review. Articles 11.3 and 12, however, require the authorities have some factual basis to initiate a sunset review. Initiation is not an empty or automatic decision.

14. The USG tries to dismiss the explicit textual link of Article 5, claiming that the provision "pursuant to Article 5" in Article 12.1 does not incorporate Article 5 into Article 12.3, notwithstanding the *mutatis mutandis* language. This is wrong. The *mutatis mutandis* application of one provision requires interpreters to apply all the obligations of one article to the other. It makes no sense not to apply the obligations of Article 5 to Article 11.3 in light of the operation of Article 12.3.

15. The USG improperly focused its interpretation of Article 5.6 only in the context of Article 5 by asserting that the use of the term "investigation" in Article 5.6 indicates that the obligations of the Article only apply to investigations. The language in Article 12.1 and Article 12.3 indicates, however, that Article 5.6 does apply to sunset reviews through the *mutatis mutandis* language of Article 12.3. Japan is arguing that the *mutatis mutandis* language is evidence of the existence of the "sufficient evidence" standard within Article 11.3.

16. Footnote 1 further provides a textual link from Article 5.6 to Article 11.3, as argued below.

17. The USG tries to distinguish the imposition of duties in the original investigation from the continuation of duties in a sunset review. In both instances, however, the authority is deciding whether a duty should exist. The issue before the Panel is whether there is a need to establish a threshold level of evidence before initiating at all. Thus, the initiation decision, in the original investigation and the sunset review is functionally equivalent. The USG also ignores the fact that the original investigation, which is now more than five years old, has little relevance to predicting the future.

18. The Appellate Body's decision in the *U.S – CVD Sunset* case is not controlling here. The Appellate Body's decision with respect to the USG's automatic initiation of sunset reviews without sufficient evidence, did not benefit from an analysis of the significance of the cross reference from Article 5 to Article 11.3 in footnote 1 of the AD Agreement (the corollary to footnote 37 of the SCM Agreement). Absent this analysis, the Appellate Body mistakenly found that the drafter of the SCM Agreement did not intend the evidentiary standards for self-initiation of investigations to apply to self-initiation of sunset reviews.

19. Footnote 1 of the Agreement defines the term "initiated" to mean the procedures a Member employs pursuant to Article 5 to commence an action. It also explicitly provides that this definition of "initiated" applies to the entire AD Agreement. Article 11.3 then provides that a sunset review is "a review initiated." Consequently, the use of the term "initiated" in Article 11.3 demonstrates that the AD Agreement contemplates that a sunset review must be initiated in accordance with the procedural requirements under Article 5, including the sufficient evidence requirement in Article 5.6.

B. PROPER PROSPECTIVE LIKELIHOOD DETERMINATION

20. USDOC's regulations and the Sunset Policy Bulletin prevent USDOC from making truly prospective determinations. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence. The Appellate Body in *US – CVD Sunset* supports this conclusion. Yet, USDOC focuses on retrospective evidence when making its sunset review determinations. Consequently, USDOC acts inconsistently with the USG's obligations under Article 11.3.

1. Section 351.222(i)(1)(ii) of USDOC Regulations

21. Japan demonstrated that section 351.222(i)(1)(ii) of USDOC's regulations is inconsistent on its face with the USG's obligations under Article 11.3. Previous panels have determined that the term "likely" in Article 11.3 requires that an administering authority must find that dumping will probably continue or recur upon revocation. The "likely" standard requires a much greater degree of certainty than a standard requiring that dumping be "not likely" to occur in the future. Notwithstanding these previous panel decisions and the USG's own acceptance of the panel decision, the USG continues to maintain the "not likely" standard in USDOC's regulations with respect to sunset reviews.

22. The USG tries to hide completely behind the wording of the statute. The USG argued that since the statute uses the word "likely", there is no issue. The USG also claims that section § 351.222(i)(1)(ii) is ministerial in nature. These arguments are inconsistent with the USG's own statement in the Sunset Regulations "Procedures for Conducting Five-year ("Sunset") Reviews", the text of the regulations, and its own previous explanation. The preamble and the text of the regulations demonstrate that USDOC will only revoke an anti-dumping duty order where it determines that dumping is "not likely." No other provisions of the Sunset Regulations provide any other situations in which USDOC will revoke an anti-dumping duty order. The USG explained in *US – Export Restraint*, at para. 8.111 that the preamble to USDOC's regulations evidences "an agency's contemporaneous understanding of its proposed rules", which "may be consulted to determine the proper interpretation of an agency's regulations." The text of the regulations incorporated this intention. USDOC confirmed this in *Brass Sheet and Strip from the Netherlands*, stating "the Department is required to revoke the order if, based on the record of the proceeding, the Department determines that dumping is not likely to recur."

23. This "not likely" standard is imbedded in the Sunset Policy Bulletin. The Sunset Policy Bulletin in section II.A.4, sets forth a single scenario in which USDOC will determine that dumping is "not likely", while section II.A.3 sets forth three other scenarios in which USDOC will determine that dumping is "likely." No other scenarios are provided for in the Sunset Policy Bulletin. These scenarios show that USDOC distinguishes the "not likely" standard from the "likely" standard. Consistent with the regulations, the "not likely" scenario is the only scenario in which satisfaction of it will result in revocation.

24. The fact that statutory section 751(c) of the Act uses the term "likely" does not insulate USDOC's regulation from WTO challenge. The USG conveniently ignores its own history with respect to Article 11.2 reviews and section 351.222(b) in connection with the panel's determination in *US – DRAMs*, finding that USDOC's "not likely" regulations were WTO-inconsistent. The USG accepted the panel's determination, and amended its regulations to reflect "likely" standard.

2. The Sunset Policy Bulletin

25. Article 11.3 calls for a careful, prospective analysis of the prospects of the likelihood of future dumping. Both the panel and the Appellate Body in the *US – CVD Sunset* case confirmed that the authorities are obligated to take an active role in collecting evidence in sunset reviews. The Sunset Policy Bulletin, however, *de facto* mandates that USDOC examine past dumping margins and import volumes without conducting a prospective analysis. The Bulletin takes a retrospective approach by restricting USDOC to such historical data.

26. By mechanically examining only historical facts and not collecting or examining other positive evidence, the provisions of the Sunset Policy Bulletin ignore the USG's WTO obligations. A determination based on "positive evidence" requires more than simply reviewing a respondent's past import volume and previously calculated dumping margins. The three scenarios in section II.A.3 of the Sunset Policy Bulletin, which are based only on import volumes and dumping margins, create the "presumption" that dumping is likely to continue or recur, as USDOC admitted. USDOC will not even consider "positive evidence", or as the USG calls it "other factors", unless respondents submit such information to establish "good cause." By shifting the burden to respondents to rebut the presumption and then excessively restricting respondents' ability to present "other factors" (or some sort of "positive evidence"), the Sunset Policy Bulletin creates an irrebutable presumption that dumping is likely to continue or recur.

27. The most revealing piece of evidence is the sheer number of times USDOC has found that dumping is likely to continue. In every single case among all 228 sunset reviews in which the domestic industry actively participated, USDOC found dumping was "likely" to continue or recur. In

all of these cases USDOC followed the provisions of the Sunset Policy Bulletin. This also means that nearly every case fit one of the three "likely" factual scenarios. This confirms that USDOC's concrete and *de facto* binding requirements contained in the Sunset Policy Bulletin do not allow USDOC to deviate from the presumption.

3. Application of the Sunset Policy Bulletin to this Case

28. As in the other 228 sunset reviews, USDOC acted inconsistently with its WTO obligations in this sunset review because it strictly applied the Sunset Policy Bulletin, and the "not likely" standard under section 351.222(i)(1)(ii). USDOC based its determination on only past import volumes and dumping margins without making any effort to consider other information. USDOC stated "the fact that NSC reduced its dumping margins during the same time that its import levels have remained stable does not lead us to conclude that dumping is *unlikely* to occur in the future." The USG claimed that, even if USDOC had considered other factors presented by NSC, "the factors do not provide sufficient evidence that NSC is *not likely* to dump in the future." Such a statement does not mitigate the USG's WTO-inconsistent practice. In fact, it shows that USDOC would ignore any changed circumstance and adhere to the preconceived notion that where dumping has existed at all for the past five years dumping is likely to continue in the future. This application of the Sunset Policy Bulletin, which is based only on historical import volumes and dumping margins, without considering any other factors is inconsistent with Article 11.3.

4. Submission of all Information/Argument within 30 Days from Initiation

29. Japan argued that application of the 30-day requirement to submit all substantive argumentation, in addition to information showing "good cause", impermissibly restricted the respondent's ability to properly defend its interests in this sunset review, and thus was inconsistent with Articles 6.1, 6.2, and 6.6. In response to Japan's argument, the USG claimed that Japan had "sufficient opportunity" to gather information and present its argument as well as any supporting information including its "good cause" argument. This argument ignores the facts of this case and fails to address Japan's argument that the 30-day rule is unnecessarily restrictive. Further, USDOC's conditional request for information without specifying what information is sufficient to show good cause is inconsistent with Article 6.1.1 and the panel decision in *Ceramic Tiles*.

C. USDOC'S USE OF IMPROPER DUMPING MARGINS

1. USDOC's Use of Pre-WTO Agreement Margin

30. Dumping margins established prior to the passage of the URAA were calculated in accordance with methodologies, which are no longer consistent with the USG's current obligations, and therefore are not an appropriate basis to make determinations with respect to sunset reviews. The USG has initiated all sunset reviews in or after 1998. Therefore, all sunset reviews are "reviews of existing measures" under Article 18.3. The sunset review determination, thus, must be in accordance with the current Agreement. A dumping margin that was calculated pursuant to those old methodologies, therefore, may not be employed in USDOC's likelihood determination.

31. The USG argues that Article 11.3 does not require USDOC to quantify dumping margins. We disagree. Article 2, which is applicable throughout the AD Agreement, sets forth the requirements for calculating dumping margins and defines how dumping must be determined. Article 2.1 provides that a product is considered dumped if the export price is lower than its normal value. The difference is the margin of dumping. The existence of dumping could not be determined unless the authorities calculate a dumping margin. The authorities, therefore, could not find dumping without quantifying the margin of dumping.

32. The USG attempts to refute Article 18.3's application to sunset reviews through the panel's findings in *US – DRAMs*. The panel report specifically states that "the AD Agreement applies to those parts of a pre-WTO measures that are included in the scope of a post-WTO review." A sunset review determines, and therefore its scope is, the likelihood of "dumping" and "injury." Thus, the panel in *US – DRAMs* supports Japan's position that the basis for determining likelihood must be WTO-consistent.

33. The USG assertion that Article 18.3 is simply a timing provision is baseless and wrong. Article 18.3 dictates how and to what extent the obligations of the AD Agreement will be applicable to existing anti-dumping duty orders. Article 18.3.2, together with the chapeau of Article 18.3, requires a Member to terminate the imposition of all previously existing antidumping duties five years after the effective date of the WTO Agreement, unless the Member conducts sunset reviews upon the expiry of these measures. As such, while this provision does have aspects of a timing provision to transition from one regime to the next, it also carries substantive obligations. Article 18.3 attempts to avoid the situation of having all existing anti-dumping duties becoming WTO-inconsistent when the WTO entered into effect. Article 18.3, however, does not immunize those old anti-dumping duty orders forever.

2. Zeroing and the Findings in *EC – Bed Linens*

34. Use of dumping margins with "zeroed-out" negative margins as the basis of sunset review determinations is inconsistent with Article 2.4 and 11.3. The practice of "zeroing" selectively calculates margins only for those sales of products with a positive margin and rejects sales with negative margins. This methodology thus creates an artificially high margin.

35. The Appellate Body's findings in *EC – Bed Linens* clarified that authorities must make all dumping determinations without "zeroing" negative dumping margins. Article 2.4 sets forth how the comparison should be made between the export price and normal value to establish the dumping margin. Article 2, including Article 2.4, applies to all dumping determinations. The dumping margins in all proceedings, including sunset reviews, thus must be established in accordance with the fair comparison requirement under Article 2.4.

36. The Appellate Body in *EC – Bed Linens* stated "from the wording {Article 2.1}, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a *product'*" The report of the DSU Article 21.5 recourse panel in *EC – Bed Linens* confirmed that "the calculation of a dumping margin pursuant to Article 2 constitute a determination of dumping." The Appellate Body proceeded to clarify that Article 2.1 informs the interpretation of Article 2.4 and the "fair comparison" and "price comparability" requirements. Essentially these requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The practice of zeroing in establishing dumping margins, therefore, is inconsistent with Article 2.4 of the AD Agreement.

37. The Sunset Policy Bulletin, however, effectively mandates that USDOC apply WTO-inconsistent dumping margins calculated using the zeroing methodology in original investigations and subsequent reviews. As demonstrated in our first submission, USDOC has applied the zeroing methodology to the calculation of dumping margins in original investigations and subsequent reviews. The dumping margins used in sunset reviews by USDOC for its dumping determination and for the magnitude of dumping are therefore skewed by zeroing and do not provide a "fair comparison" between the prospective future export price and normal value. The Sunset Policy Bulletin is therefore inconsistent with Articles 11.3 and 2.4.

38. The key point to *EC – Bed Linens* is that the finding has little relevance with whether the "fair comparison" is made on an average-to-average basis or an average-to-transaction basis. Zeroing in any type of comparisons is distortive and does not provide a fair comparison.

39. Importantly, if zeroing had not been applied in this case, NSC would have had a negative dumping margin in its latest administrative review, thus affecting USDOC's likelihood analysis. As a result, the USG's determination of the likely magnitude of dumping in this sunset review based on dumping margins that contained "zeroed-out" negative margins is inconsistent with Articles 2, 11.3, and 18.3.

3. The *De Minimis* Standard

40. The USG asserts that the 2.0 per cent *de minimis* standard is not applicable to sunset reviews because there is no direct textual link between Article 5.8 and Article 11.3. The USG mistakenly believes that Article 5.8 and Article 11.3 can be read in isolation. The USG ignores the contextual relevance, as well as the object and purpose of Articles 5.8 and 11.3. Article 11.3 refers to both "dumping" and "injury." Because the *de minimis* standard is inseparable from the concepts of "dumping" and "injury", and Article 11.3 incorporates these concepts, the *de minimis* standard is incorporated within Article 11.3.

41. Further, the decision of the Appellate Body in *US – CVD Sunset* does not control the decision in this case because of the cross-reference by Article 5 to Article 11.3 through footnote 1, and the differences in the treaty text and characteristics of *de minimis* dumping and subsidization between the SCM Agreement and the AD Agreement. As the Appellate Body has so often noted, differences in text must have some meaning. The fact that the SCM Agreement has a limiting phrase but the AD Agreement does not, and the fact that the limiting phrase was affirmatively removed from the AD Agreement, strongly suggests that Article 5.8 of the AD Agreement has a different meaning. The scope of the *de minimis* rule thus was "considered in the negotiations" regarding Article 5.8 and a broad scope was affirmatively adopted. That textual difference must be respected by this Panel.

42. First, the lack of the limiting phrase "for the purpose of this paragraph," which appears in Article 11.9 of the SCM Agreement yet does not appear in the third sentence of Article 5.8, distinguishes the AD Agreement from the SCM Agreement. The negotiating history reveals that this limiting phrase was once in several drafts, but was finally affirmatively removed from the final text of the AD Agreement.

43. Second, unlike the SCM Agreement, the AD Agreement has only the single *de minimis* standard in Article 5.8. The 2 per cent standard in the AD Agreement applies to all respondents in all cases. The Appellate Body in *US – CVD Sunset* gave weight to Articles 27.10 and 27.11 of the SCM Agreement, and stated "this unreasonable implication casts further doubt on the 'rationale' attributed by the Panel to Article 11.9's *de minimis* standard." The Appellate Body's rationale does not apply to the AD Agreement.

44. Third, the Appellate Body was not given the chance to review the significance of footnote 37 of the SCM Agreement (the corollary to the footnote 1 of the AD Agreement). As discussed above, the definition of the term "initiated" in footnote 1 provides an explicit cross-reference to Article 5 and to sunset reviews "initiated" under Article 11.3. The Appellate Body in *US – CVD Sunset*, however, without having a chance to review the significance of footnote 37, concluded "we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9." (emphasis added). In this case, there is such a textual link.

45. Finally, the definition of footnote 1 also influences the proper interpretation of the term "cases" in Article 5.8 of the AD Agreement. The cross-reference further shows that this term means

not only investigations but also sunset reviews. The Appellate Body report in *US – CVD Sunset* does not address the role of this textual guidance.

D. USDOC'S REPORTING OF IMPROPER MARGINS TO THE USITC

46. As effectively mandated by the Sunset Policy Bulletin, USDOC never reports probable future dumping margins to the USITC for its injury determination in sunset reviews, including in this specific case. USDOC usually reports to the USITC dumping margins from the original investigation. The Appellate Body report in *US – CVD Sunset* pointed out, that the "{m}ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient." These WTO-inconsistent dumping margins taint the USITC's injury determinations and are inconsistent with Article 11.3.

47. The USG asserts that there is no requirement within Article 11.3 that limits how the margin likely to prevail must be identified. This argument would require the USITC to determine injury in a vacuum and is directly contrary to the obligations of Article 3 and 11.3. Footnote 9 provides that Article 3 applies to all injury determinations. Article 3.4 specifically requires the authorities to consider "the magnitude of margins of dumping" in injury determinations. The authorities must find some factual basis to link the magnitude of dumping in a particular case to the injury being suffered. The magnitude of dumping, therefore, is directly relevant to the USITC's analysis of the future "effects" of dumping in a sunset review under Article 11.3.

E. USDOC'S LIKELIHOOD DETERMINATION ON A ORDER-WIDE BASIS

48. Japan submitted that USDOC was under an obligation to make company-specific dumping determinations in sunset reviews. Article 6.10 explicitly directs the authorities to "determine an individual margin of dumping for each known exporter." Article 11.4 then expressly incorporates this obligation into Article 11.3. The Sunset Policy Bulletin, however, expressly mandates that USDOC "will make its determinations of likelihood on an order-wide basis." USDOC follows this instruction rigidly and always makes an order-wide determination. Therefore, USDOC's general practice of making its likelihood determination on an order-wide basis, and applying that practice in this case, is inconsistent with the USG's WTO obligations under Article 11.3.

49. The USG attempts to refute Japan's argument by claiming that the text of Article 11.3 contemplates a review on only an order-wide basis and that the "substantive" requirements of Article 6.10 do not apply to Article 11. All of the provisions of Article 6, however, establish different types of procedural requirements to some degree. The USG is effectively arguing that, even though all of the provisions of Article 6 have various procedural aspects, Article 6.10 should not be applied to sunset reviews because its procedural aspects will substantively alter how the USG conducts its sunset reviews. Contrary to the USG's argument, the mere fact that some of those procedural requirements, when applied to other provisions, have substantive implications does not foreclose their procedural effect.

50. Previous panels and the Appellate Body support the conclusion that the dumping determination must be made on a company-specific basis. The Appellate Body report in *US – CVD Sunset* has confirmed that the provisions of Article 6 generally apply to sunset reviews. The report of the DSU Article 21.5 recourse panel in *EC – Bed Linens* further clarified that the dumping determination must be made on a company-specific basis.

51. Further, Articles 9.2 and 11.1 provide contextual support for this conclusion. Article 9.2 provides that anti-dumping duties are to be imposed on *all sources* that are found to be dumped. Article 11.1 of course requires that anti-dumping duties be imposed only to the "extent necessary to counteract dumping." Contrary to the USG's allegation, therefore, taking these two provisions

together, if there is no likelihood that an individual company will dump in the future, then continuation of the anti-dumping duty order is no longer necessary to counteract the injurious effect of that company's dumping.

F. USITC'S DECISION TO CUMULATE IMPORTS WITHOUT ASSESSING NEGLIGIBILITY

52. Japan demonstrated in its first submission that the obligations in Articles 3.3 and 5.8 are included in sunset reviews under Article 11.3. The USG accuses Japan of a convoluted interpretation. In fact, Japan's interpretation is quite straightforward. Since Article 3 is titled "determination of injury", and since footnote 9 requires that "injury" is to be applied consistently throughout the Agreement, the same concept must apply to sunset reviews. The Appellate Body in *US – CVD Sunset* has confirmed our position. Thus, the USITC's cumulative analysis without considering whether Japanese imports were negligible under Articles 3.3 and 5.8 was inconsistent with the USG's obligations under Articles 3.3, 5.8, and 11.3.

53. The USG claims that application of Article 3.3 is limited to original investigations. This is incorrect. Article VI:1 of GATT 1994 states that imports from **one country** may be condemned if such imports cause material injury to the domestic industry of the importing country. The basic concept of an injury determination is thus on an individual country basis. Article 3.1 of the AD Agreement confirms this. The only exception to this rule is the narrowly defined circumstances in Article 3.3. If Article 3.3 applies to investigations only, then there is no permission under the AD Agreement for the authorities to cumulate imports at all in sunset reviews.

54. The USG claimed that no quantification of import volumes is required for the injury determination in sunset reviews. This argument ignores the fact that Article 3.3 refers to "assessing the effects of such imports." Article 3.1 requires that the injury determination be based on the volume of the dumped imports. Article 3.4 also requires the authorities to consider "the magnitude of dumping" and the "effect of the dumped import." Article 3.5 then requires the authorities to consider whether the dumped imports injure the domestic industry "through the effects of dumping." These concepts are inseparable and must be evaluated in conjunction with one another. Indeed, how could the authorities cumulatively assess the effects of dumping from multiple countries without quantifying the import volume from the respective countries?

55. The USITC has considerable experience collecting and assessing data related to future injury through its threat of injury determination. Therefore, there is no reason why the USITC could not also collect data to prospectively evaluate a country's potential future negligibility.

G. ARTICLE X:3(A) OF GATT 1994

56. The following GATT 1994 Article X:3(a) inconsistencies have occurred in the US administration of its sunset review statute, regulations, and rules: (1) USDOC's automatic initiation of sunset reviews, which is both "unreasonable" and "partial", as it reduces the burden on domestic parties at the expense of respondents; (2) USDOC's refusal to accept and consider other evidence outside of a respondent's substantive response, which was both "unreasonable" and "partial", as USDOC demands respondents provide more information in less time; and (3) USDOC's approach to termination decisions under Article 11.2 and Article 11.3, which is "non-uniform", as both previous panels and US courts recognize the same "likely" standard exists in both reviews.

57. The USG asserts that the examination of measures under Article X:3(a) of the GATT 1994 is limited to the overall application of those measures and not to the specific results of those measures in the current proceeding. Japan, however, does not argue that the specific substantive results in this sunset review are inconsistent with the Article X:3(a). Japan has demonstrated in its first submission

that all three of the issues for which Japan has raised Article X:3(a) claims involves administration of substantive sunset review rules.

IV. CONCLUSION

58. For these reasons, Japan respectfully requests that the Panel: (1) find that specific USG statutory provisions, regulations, and determinations are inconsistent with various enumerated provisions of the AD Agreement, GATT 1994 and the WTO Agreement; (2) recommend that the Dispute Settlement Body request that the USG amend its sunset statute, regulations, and the Sunset Policy Bulletin to conform with its obligations; and (3) find that compliance with its WTO obligations requires that the USG terminate the anti-dumping duty order on corrosion-resistant steel products from Japan.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The United States will use this submission to highlight the major legal and factual errors underlying Japan's claims. In addition, the United States will emphasize the significance of the Appellate Body's recent report in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*Corrosion-Resistant Steel from Germany*"), in which the Appellate Body rejected many of the same arguments Japan presents here.

2. At the outset, the United States reiterates that Japan has misconstrued the appropriate scope of review under WTO law and practice. Japan claims that review by this Panel "extends to administrative procedures that ignore relevant WTO obligations," including the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act and the Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin ("Sunset Policy Bulletin"). Japan calls these its "general practice" claims. Japan's arguments in this regard ignore the well-established principle that in order for a measure as such to breach an obligation of the Marrakesh Agreement Establishing the World Trade Organization and/or the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), that measure must mandate WTO-inconsistent action or preclude WTO-consistent action. Japan has made no effort to demonstrate that the "general practices" it purports to identify mandate WTO-inconsistent action or preclude WTO-consistent action. Consequently, those claims cannot be sustained.

3. Most of the remainder of Japan's claims fail because they rely on obligations not found in Article 11.3 of the AD Agreement. Japan asserts that the following obligations must be read into Article 11.3 and applied in sunset reviews: (1) the initiation standards and *de minimis* requirement of Article 5 of the AD Agreement, (2) restrictions on the permissible methodology for calculating aggregate dumping margins found by the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), and (3) the strict quantitative negligibility assessment that is required in investigations for the cumulation of imports. These assertions, however, find no support in the AD Agreement and run afoul of basic principles of treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which "neither require nor condone the imputation into a treaty of words that are not there[.]" The Panel should reject Japan's claims and refuse to impute into Article 11.3 of the AD Agreement "words that are not there."

4. Japan is also wrong with respect to its claims that (1) the Department of Commerce's ("Commerce") regulations establish a "not likely" standard for likelihood of dumping determinations and (2) Commerce failed to apply the substantive and procedural requirements of the AD Agreement in the instant sunset review. In fact, the "likely" standard required under Article 11.3 of the AD Agreement is fully implemented under US law. Moreover, in determining that dumping was likely to continue or recur in the event of revocation, Commerce followed the substantive and procedural requirements of the AD Agreement. Commerce found, based on the results of two completed assessment reviews, that Japanese producers/exporters had continued to dump throughout the life of the order and that import volumes were significantly lower than pre-order volumes.

A. SELF-INITIATION OF SUNSET REVIEWS IS NOT INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT

5. Japan alleges that the provisions of US law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with the AD Agreement. The Appellate Body, however, recently affirmed a panel's rejection of a similar claim by the EC that the provisions of US law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). Although that case, *Corrosion-Resistant Steel from Germany*, dealt with Article 21.3 and other provisions of the SCM Agreement, the relevant provisions of the AD Agreement are essentially identical to those of the SCM Agreement, and the Appellate Body's reasoning is equally valid in this proceeding.

6. Specifically, the Appellate Body found that, "when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may be taken." The United States observes that both Article 21.3 of the SCM Agreement and Article 11.3 of the AD Agreement refer, without qualification, to the self-initiation of sunset reviews.

7. The Appellate Body also referred to the lack of any explicit cross-reference to evidentiary rules relating to initiation, and found that the negotiators of the AD Agreement did not intend to make such rules applicable to the self-initiation of reviews under Article 21.3 of the SCM Agreement. The same may be said of Article 11.3 of the AD Agreement, which is the parallel provision of Article 21.3 of the SCM Agreement and which also contains no explicit cross-reference to evidentiary rules relating to initiation.

8. In analyzing the context of Article 21.3 of the SCM Agreement – Articles 21.2 and 21.4, which are paralleled in the AD Agreement by Articles 11.2 and 11.4 – the Appellate Body found no reason for applying any rules for initiation in the context of sunset reviews. The Appellate Body also looked at Article 22 of the SCM Agreement, and found that none of its provisions establishes any evidentiary standards applicable to the initiation of sunset reviews. The United States notes that Article 12 of the AD Agreement is perfectly analogous to Article 22 of the SCM Agreement, and neither do any of its provisions establish any evidentiary standards applicable to the initiation of sunset reviews.

9. Finally, the Appellate Body turned to Article 11 of the SCM Agreement and found no indication of an intent to apply evidentiary requirements for the initiation of investigations to the ability of authorities to self-initiate sunset reviews. The same conclusion applies to the analogous provision in the AD Agreement, Article 5.

10. Japan argues that the authorities should not be able to self-initiate reviews unless they have first satisfied the evidentiary requirements for the initiation of an investigation under Article 5, citing Article 12.1, footnote 1, and what makes "sense." As pointed out in *Corrosion-Resistant Steel from Germany*, however, there is no textual link between Article 11.3 and the initiation standards in Article 5. Moreover, as the Appellate Body found in *Corrosion-Resistant Steel from Germany*, there is no other link, express or implied, to any standard that might limit the ability of authorities to self-initiate sunset reviews.

11. Japan posits that the AD Agreement *indirectly* incorporated a link between the investigation and sunset review provisions. The Members, however, found it necessary to provide a *direct and explicit* link in Article 11.4 between Article 6 and the conduct of sunset reviews. Plainly, the Members chose not to incorporate by reference into Article 11.3 the initiation requirements of Article 5. The Panel should decline Japan's request to create an evidentiary obligation for self-

initiation in sunset reviews conducted pursuant to Article 11.3 that has no basis in the text of the AD Agreement.

B. US LAW IS CONSISTENT WITH THE OBLIGATION IN ARTICLE 11.3 OF THE AD AGREEMENT TO DETERMINE WHETHER DUMPING IS LIKELY TO CONTINUE OR RECUR IN THE EVENT OF REVOCATION

12. The statutory language governing the obligation to determine likelihood of dumping in sunset reviews is found in section 751(c) of the Tariff Act of 1930, as amended (the "Act"). That language is essentially identical to the language in Article 11.3 of the AD Agreement and is therefore consistent with Article 11.3. In addition, US sunset review regulations, as such, provide for a determination of "likelihood" of continuation or recurrence of dumping.

13. The Appellate Body in *Corrosion-Resistant Steel from Germany* found that the EC did not satisfy its burden of showing that US law mandates Commerce to act inconsistently with Article 21.3 of the SCM Agreement, or that such law restricts in any way Commerce's discretion to make a determination consistent with Article 21.3. The Appellate Body, therefore, upheld the panel finding that, "US law is not inconsistent with Article 21.3 of the SCM Agreement with respect to the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review." The Panel should likewise find that US law is consistent with Article 11.3 of the AD Agreement.

14. Japan, citing Commerce's regulations at 19 C.F.R. 351.222(i)(1)(ii), claims that US law in regard to sunset reviews requires the application of a "not likely," as opposed to a "likely," standard. While it is true that section 351.222(i)(1)(ii) provides for revocation "where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of ... dumping," the provision is purely procedural in nature and does not in any way alter the substantive requirements of the statute and regulations.

15. The final sunset determination in this case applied the principle set forth in the Sunset Policy Bulletin that Commerce will normally determine that revocation of an antidumping order is likely to lead to continuation or recurrence of dumping where:

(a) dumping continued at any level above *de minimis* after the issuance of the order;

(b) imports of the subject merchandise ceased after issuance of the order; or

(c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.

16. If there is evidence that dumping has continued under the discipline of the order, it is reasonable for Commerce *normally* to conclude that dumping will continue without the discipline of the order. This conclusion is not a presumption that dumping is likely to continue or recur in every case until proven otherwise. Rather, it is Commerce's reasonable determination, based on evidence of behaviour after the order was put in place, that this condition is indicative of future behaviour in the absence of an order.

17. Japan argues that Commerce makes a retrospective, rather than a prospective, likelihood determination and that the "good cause" standard for consideration of "other factors" in the likelihood analysis precludes a prospective analysis. Neither of these statements is an accurate representation of the facts. Commerce considers the behaviour of producers/exporters and whether that behaviour is likely to continue or recur. In the instant case, Japanese producers/exporters have continued to dump since the imposition of the antidumping order. Japan does not dispute this fundamental fact.

Furthermore, there was no evidence to support an inference that Japanese producers/exporters would stop dumping if the discipline of the order were removed. No such evidence was offered by any party, and none was apparent to Commerce. Japan's arguments as to the "good cause" standard cannot obscure this fundamental deficiency in the evidence presented to Commerce by the Japanese companies, nor can they obscure the relevance of the evidence relied upon by Commerce, especially the evidence of continued dumping over the life of the order.

18. During the course of the sunset review proceeding, Nippon Steel Corporation ("NSC"), one of the Japanese producers/exporters, did provide Commerce with evidence regarding the reduced import volumes. This evidence was not, however, presented in NSC's substantive response. Rather, NSC waited until it submitted its case brief to present the evidence and never explained a "good cause" basis for consideration, thus violating both of the requirements of 19 C.F.R. 351.218(d)(3)(iv). Japan also suggests that there was some other evidence in Commerce 's records that Commerce should have considered in connection with the likelihood determination. The United States, and the Panel, should not be left to guess as to what that evidence might be.

19. Moreover, Japan suggests that whether dumping is likely to continue or recur in the event of revocation is necessarily dependent on the magnitude or level of dumping. This is not, in fact, the case. Commerce's approach to the likelihood of dumping determination is qualitative, not quantitative. A qualitative approach is entirely consistent with the requirements of Article 11.3.

C. US LAW, AS SUCH AND AS APPLIED BY COMMERCE, IS CONSISTENT WITH THE ARTICLE 6 OBLIGATION TO PROVIDE INTERESTED PARTIES WITH AMPLE OPPORTUNITY TO PRESENT EVIDENCE WHICH THEY CONSIDER RELEVANT

20. There is no dispute that the procedural and evidentiary provisions of Article 6 of the AD Agreement apply to sunset reviews under Article 11.3. Thus, each of the procedural and evidentiary requirements of Article 6 is reflected in US sunset review requirements.

21. Japan maintains that Commerce violated Article 6 by imposing unfair procedural burdens on NSC. Japan challenges, in particular, Commerce's rejection of a claim by NSC regarding "other factors" that allegedly accounted for, *inter alia*, the reduction in import levels since the imposition of the antidumping duty order. Japan's challenge is without merit.

22. First, Commerce's promulgation of a 30-day deadline for the submission of substantive responses is entirely consistent with the AD Agreement. Second, rather than discussing "other factors" in its substantive response and explaining why "good cause" existed for their consideration – as is required under 19 C.F.R. 351.218(d)(3)(iv) – NSC waited until the filing of its case brief to bring its evidence to Commerce's attention and, even at that late date, failed to provide a "good cause" basis for consideration of that evidence. Third, even if NSC had been uncertain as to what constitutes "good cause," the facts of this case are that it made *no effort* to establish grounds for considering its "other factors" submission.

D. CONSISTENT WITH THE AD AGREEMENT, COMMERCE REPORTS THE MAGNITUDE OF THE DUMPING MARGIN LIKELY TO PREVAIL IN THE EVENT OF REVOCATION TO THE US INTERNATIONAL TRADE COMMISSION ("USITC") FOR USE IN ITS INJURY ANALYSIS

23. In accordance with US law, in making its sunset injury determination, the USITC "may consider the magnitude of the margin of dumping." In order for the USITC to have the option of doing this, Commerce must report the margin(s) likely to prevail in the event of revocation.

24. In the instant case, Commerce found that, while dumping had continued throughout the life of the order, import volumes had decreased. This pattern indicated that changing prices in response to

the dumping order had likely harmed the exporters' sales volumes. Consequently, under US law, there was no basis to report lower, more recently calculated margins to the USITC, and Commerce therefore reported the margins from the original investigation. This action was consistent with the obligations of Article 11.3 of the AD Agreement. Specifically, there is no provision of the Agreement that requires or precludes the USITC from considering the magnitude of the margin of dumping likely to prevail in the event of revocation, and there is no provision of the Agreement that limits how such a margin might be determined. Rather, under Article 11.3, the authorities must simply determine whether "expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury." Article 11.3 plainly does not require the quantification of a dumping margin in sunset reviews and does not include any specifications regarding the methodology or methodologies that must be employed in such reviews. Commerce reports the margin likely to prevail in the event of revocation to the USITC purely as a matter of US domestic law.

25. Japan's fallacious claim regarding the quantification of dumping margins forms the basis of its claim regarding "zeroing." Japan's reliance on *EC Bed Linen* is unpersuasive for three reasons. First, and most importantly, Japan ignores the fact that Article 11.3 of the AD Agreement does not require administering authorities to calculate or recalculate dumping margins in sunset reviews. Second, Japan assumes incorrectly that the *magnitude* of the dumping margins in the original investigation and over the life of the antidumping order had an impact on Commerce's analysis of the likelihood of continuation or recurrence of dumping in this case. Finally, *EC Bed Linen* involved (1) an *investigation* subject to the AD Agreement, (2) average-to-average price comparisons under Article 2.4.2 of the AD Agreement, and (3) consideration of the EC's dumping calculation methodology. *None* of those circumstances was present in the case at hand.

26. In sum, Japan's claims regarding Commerce's identification of the margin likely to prevail in the event of revocation have no basis in the AD Agreement and should be rejected by the Panel.

E. THERE IS NO *DE MINIMIS* STANDARD FOR SUNSET REVIEWS IN THE AD AGREEMENT

27. Japan claims that the *de minimis* standard for antidumping investigations found in Article 5.8 of the AD Agreement is also applicable to sunset reviews under Article 11.3. In *Corrosion-Resistant Steel from Germany*, the Appellate Body rejected a similar claim by the EC that the *de minimis* standard for countervailing duty investigations is also applicable to countervailing duty sunset reviews. In so doing, the Appellate Body reversed the panel on this point because a finding that "the *de minimis* standard of Article 11.9 is implied in sunset reviews under Article 21.3 would upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3."

28. In examining the text of Article 21.3 of the SCM Agreement – which has a direct parallel in the text of Article 11.3 of the AD Agreement – the Appellate Body recognized that "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning.'" Thus, the lack of any indication in the text of Article 21.3 that a *de minimis* standard must be applied in sunset reviews serves, at least at first blush, to indicate that no such requirement exists. The Appellate Body also examined the text of Article 11.9 of the SCM Agreement – which has its parallel in the text of Article 5.8 of the AD Agreement, which establishes a *de minimis* standard for antidumping investigations – and found no suggestion of applicability beyond the investigation stage.

29. The Appellate Body found further support for its conclusion in the lack of any textual link between Articles 21.3 and 11.9 of the SCM Agreement; similarly, there is no textual link between Articles 11.3 and 5.8 of the AD Agreement. In analyzing the context of Article 21.3 of the SCM Agreement – Articles 21.1 and 21.4, which are paralleled in the AD Agreement by Articles 11.1 and 11.4 – the Appellate Body also found no indication that the *de minimis* standard applicable to investigations is applicable to reviews.

30. The Appellate Body then went on to consider the object and purpose of the SCM Agreement, and concluded that, "[t]aken as a whole, the main object and purpose of the SCM Agreement is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures." Given the similar structure and wording of the AD Agreement, it may be concluded that an object and purpose of the AD Agreement is to increase and improve GATT disciplines related to the use of antidumping duties. Moreover, as the Appellate Body remarked with respect to the SCM Agreement, it can similarly be said that, although the AD Agreement is aimed at striking a balance between the right to impose antidumping duties and the obligations that Members must respect in order to do so, this understanding of the purpose of the Agreement does not help in resolving the *de minimis* issue.

31. Turning to the panel's analysis, the Appellate Body stated that it does "not believe that there is a clear 'rationale' behind the 1 per cent *de minimis* rule of Article 11.9 that must also apply in the context of reviews carried out under Article 21.3." The Appellate Body also rejected the panel's finding that it would yield irrational results if the *de minimis* standard applied to investigations but not to sunset reviews, because of the fundamental contrast between the purpose of an original investigation and the purpose of a sunset review. Precisely the same analysis is applicable to the AD Agreement. There is no clear rationale behind the *de minimis* rule of Article 5.8 that must also apply in the context of sunset reviews; no irrational results follow from interpreting Article 11.3 according to its plain meaning and not interpolating a *de minimis* standard; and the determination required under Article 11.3 differs in certain essential respects from the nature of the determination to be made in an original investigation.

32. The function of the *de minimis* standard in Article 5.8 is to determine whether dumping warrants the imposition of antidumping duties in the first instance, not to regulate likelihood determinations in sunset reviews. Japan's claim that a *de minimis* standard exists for sunset reviews under Article 11.3 of the AD Agreement is without merit. Applying the customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the AD Agreement.

F. CONDUCT OF SUNSET REVIEWS ON AN ORDER-WIDE BASIS IS CONSISTENT WITH THE AD AGREEMENT

33. As the United States explained in its first written submission, Commerce makes the likelihood of dumping determination on an order-wide basis. This approach is entirely consistent with the requirements for sunset reviews under Article 11.3 of the AD Agreement. The text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, makes no reference to determining the likelihood of dumping for individual companies. Indeed, the text does not distinguish between the specificity required for the likelihood of dumping determination and the specificity required for the likelihood of injury determination, and the latter determination is *inherently* order-wide. Moreover, the provisions of Article 6 incorporated into Article 11 reviews by Article 11.4 are not intended to have an impact on the substantive standards or criteria to be applied in sunset reviews. Those provisions are only intended to have an impact on the *manner* in which the substantive standards or criteria are applied. Consequently, there is nothing in Article 11 that even suggests standards or criteria for the likelihood of dumping determination focusing on individual companies' likelihood of continuation or resumption of dumping. Commerce's order-wide approach is therefore consistent with the AD Agreement.

34. Japan argues that one cannot make a clear distinction between the procedural/evidentiary obligations and the substantive obligations of Article 6. Japan's argument, however, is at odds with the Appellate Body's findings in *Corrosion-Resistant Steel from Germany*. In that case, the Appellate Body made the distinction relied upon here by the United States, albeit in the context of interpreting

Article 12 of the SCM Agreement (which is parallel to Article 6 of the AD Agreement). As the Appellate Body found, "Article 12 sets out obligations, *primarily* of an evidentiary and procedural nature, that apply to the conduct of an *investigation*." Similarly, Article 11.4 of the AD Agreement is only intended to incorporate for purposes of Article 11 reviews those provisions of Article 6 that are of a procedural/evidentiary nature, not those of a substantive nature. Japan's request to have Article 6.10 incorporated by reference into Article 11.4 *for substantive purposes* should therefore be rejected by this Panel.

G. THE USITC'S DECISION TO CUMULATE IMPORTS FROM THE VARIOUS COUNTRIES IN THIS SUNSET REVIEW IS CONSISTENT WITH THE AD AGREEMENT

35. As the United States detailed in its first written submission, the AD Agreement does not require application of a negligibility test in deciding whether to cumulate imports in sunset reviews. Specifically, the United States emphasized that in applying the basic rules of treaty interpretation neither the text of the AD Agreement nor its object and purpose support Japan's assertion that the AD Agreement requires a negligibility assessment in Article 11.3 reviews. Indeed, the Appellate Body in *Corrosion-Resistant Steel From Germany* rejected the panel's conclusions that were premised on arguments similar to those presented by Japan in this dispute.

36. In its oral statement at the first meeting with the Panel, Japan repeated its assertion that the AD Agreement requires the same strict quantitative assessment in sunset reviews as it does in original investigations. In so doing, Japan relies on an interpretation of Articles 3, 5.8, and 11 of the AD Agreement that cannot be reconciled with the text of these provisions. In addition, Japan offers unpersuasive reasons as to why it believes the US position is incorrect.

37. Japan contends that sunset determinations under Article 11.3 are also subject to the provisions of Article 3, in particular the conditions for cumulation under Article 3.3 and by cross-reference in that paragraph, the negligibility requirements under Article 5.8. Therefore, Japan asserts that the USITC was required to address in its sunset review the threshold question of whether imports from individual countries are negligible before reaching the issue of cumulation.

38. The Appellate Body in *Corrosion-Resistant Steel from Germany* found that the *de minimis* standard in Article 11.9 of the SCM Agreement, the counterpart provision to Article 5.8 of the AD Agreement, did not apply to Article 21.3, the SCM provision pertaining to sunset reviews. Applying the same reasoning underlying the Appellate Body's report compels the conclusion here that the negligibility standards of Article 5.8 of the AD Agreement do not apply to Article 11.3 sunset reviews.

39. Starting with the text, Article 11.3, on its face, does not contain a negligibility standard, nor is there a reference to the negligibility concept anywhere in Article 11. Furthermore, the plain terms of Article 11 neither implicitly nor explicitly incorporate the negligibility provisions of Article 3.3 or Article 5.8. Similarly, neither Article 3.3 nor Article 5.8 contains any cross-reference to Article 11.3.

40. Turning to context, the Appellate Body found no indication in Article 21.4 of the SCM Agreement that the drafters intended the obligations of Article 11 of the SCM Agreement to apply to Article 21.3 countervailing duty sunset reviews. Analogously, there is nothing in Article 11.4 of the AD Agreement that would indicate that the drafters intended the obligations of Article 5 of the SCM Agreement to apply to Article 11.3 antidumping duty sunset reviews.

41. Japan, in the alternative, contends that the negligibility standards of Article 5.8 are incorporated into Article 11.3 reviews via footnote 9 to Article 3. In *Corrosion-Resistant Steel from Germany*, the Appellate Body found that the text of Article 15 of the SCM Agreement, including its footnote 45, which is identical to footnote 9, does not support the conclusion that a *de minimis* subsidy

is inherently non-injurious. Likewise, Article 3 and its footnote 9 do not make any reference to any specific level of dumped imports, and neither do any of the other provisions in the AD Agreement. Moreover, the text of the AD Agreement as a whole provides no support for the view that a negligibility assessment is an interpretation of injury or that negligible imports are equivalent to no injury.

42. The Appellate Body also rejected the panel's conclusion that an interpretation that the same *de minimis* rate could be considered injurious in the original investigation stage but not at the sunset review stage would lead to irrational results, and observed that original investigations and sunset reviews are distinct processes with different purposes, and that this may explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.

43. The negligibility standard in Article 5.8 simply is an agreed rule that if imports are found to be negligible in an *original investigation*, authorities are obliged to terminate their investigation, with the result that no antidumping duty be imposed on such imports. Japan's argument that the Article 5.8 negligibility requirements are applicable to Article 11.3 sunset reviews should be rejected by the Panel.

44. Japan also contends that because the USITC does not make a quantitative negligibility assessment in sunset reviews, the USITC does not engage in any quantitative analysis in sunset reviews. Japan's contention is misplaced.

45. As an initial matter, in the context of this dispute, Japan has raised a challenge to the USITC's decision to cumulate Japanese imports with imports from other subject countries in the circumstances of its corrosion-resistant sunset review. Thus, any claims that Japan raises generally with respect to the conduct of sunset reviews by the USITC, or specifically with respect to the corrosion-resistant sunset review, that go beyond the decision to *cumulate* are simply outside the Panel's terms of reference and should not be substantively decided by this Panel.

46. Moreover, as a factual matter, Japan is incorrect that the USITC does not engage in any quantitative analysis in deciding whether to cumulatively assess the likely impact of dumped imports in sunset reviews. Under US law, the USITC "shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry." As the USITC explained in its determination, with respect to the "no discernible adverse impact" provision, it considers both "the likely *volume* of the subject imports and the likely impact of those imports on the domestic industry." In deciding that imports from Japan and other subject countries were likely to have "discernible adverse impact" on the domestic industry, the USITC discussed the volume of subject imports and cited to a table that identified the *quantity* of subject imports for the original investigation period and the years leading up to the sunset review. Thus, Japan's argument that the USITC does not consider import volume in determining whether to cumulate imports from various countries is without merit.

H. THE US CONDUCT AT ISSUE WAS CONSISTENT WITH THE OBLIGATION IN ARTICLE X:3(A) OF GATT 1994 TO ADMINISTER ITS LAWS IN A UNIFORM, IMPARTIAL, AND REASONABLE MANNER

47. The United States' actions in this case were consistent with GATT Article X:3(a) because Commerce and the USITC implemented *by its terms and provisions* the US sunset review regime.

48. The United States notes that, to the extent that Japan is complaining about laws, regulations, and rulings of general application, as contrasted with their administration, Japan's complaint is not properly founded in Article X:3(a). As shown in our first written submission, Article X:3(a) is limited

to the administration of certain laws, regulations, judicial decisions and administrative rulings of general application, not to the laws, regulations, and administrative rulings themselves.

II. CONCLUSION

49. Based on the foregoing, the United States renews its request that the Panel reject Japan's claims in their entirety.

ANNEX D

Oral Statements, First and Second Panel meetings

Content		Page
Annex D-1	Executive Summary of the Oral Statement of Japan – First meeting	D-2
Annex D-2	Executive Summary of the Oral Statement of the United States – First meeting	D-7
Annex D-3	Third Party Oral Statement of Brazil	D-11
Annex D-4	Third Party Oral Statement of Chile	D-16
Annex D-5	Third Party Oral Statement of the European Communities	D-19
Annex D-6	Third Party Oral Statement of Korea	D-25
Annex D-7	Third Party Oral Statement of Norway	D-29
Annex D-8	Executive Summary of the Oral Statement of Japan – Second meeting	D-33
Annex D-9	Executive Summary of the Oral Statement of the United States – Second meeting	D-38

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF JAPAN – FIRST MEETING

I. INTRODUCTION

1. Japan believes the US sunset statute, regulations, and "administrative procedures" are inconsistent with the United States' obligations under various provisions of the WTO Agreements, including Article 11.3 of the AD Agreement. Before addressing the details of our claims, however, it is first necessary to discuss three key interpretative issues in this case: (1) basic treaty interpretation; (2) the standard of review; and (3) Japan's general practice arguments.

2. With respect to treaty interpretation, the parties disagree about what the interpretive principles within Article 31 of the Vienna Convention mean. The United States argues that, absent a specific clarification either within the provision itself or through an explicit cross-reference to some other provision, the authorities are free to interpret the provision any way they wish. Japan believes, however, that proper treaty interpretation requires that each provision of the AD Agreement be viewed in the context of the entire Agreement, taking into account the object and purpose of the Agreement as well. As previous panels have found, silence is not dispositive. The text of the provision is only the beginning of the analysis. Article 11 does not provide detailed substantive or procedural rules anywhere within the article. Therefore, one must look to the rest of the AD Agreement to find these requirements.

3. The parties also have divergent views with regard to the proper standard of review. The text of Article 17.6(i) of the AD Agreement is clear. The Panel is required to examine whether: (1) the "establishment of the facts was proper;" (2) the evaluation was unbiased; and (3) the evaluation was objective. There is no deference with respect to the establishment of the three factors themselves. Any factual conclusions by the United States in this case must be viewed from this perspective.

4. Lastly, the United States asserts that Japan's general practice claims regarding the Sunset Policy Bulletin are inappropriate and that the Panel's decision should not deviate from the narrow facts of this case. Japan disagrees. Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement explicitly require each WTO Member to conform its statute, regulations, and "administrative procedures" to its WTO obligations. Japan believes that review by this Panel should extend to "administrative procedures" that ignore relevant WTO obligations. "Administrative procedures" that are followed, without exception are de facto "binding." USDOC's Sunset Policy Bulletin establishes a rigid "administrative procedure" for evaluating sunset reviews and is strictly followed by USDOC in case-after-case, including this one. These facts distinguish the administrative procedures in this case from other discretionary laws and practices considered in previous panel determinations.

A. DETAILED ARGUMENTS ABOUT CLAIMS

5. The proper interpretation of Article 11.3 requires that "termination shall occur." After this basic obligation to terminate, the text provides for a possible exception to the basic rule – continuation only if a sunset review reveals that injurious dumping is likely to occur in the future. The grammatical relationship between these two concepts confirms that one phrase is the rule, the other phrase is the exception. When interpreting Article 11.3, it is therefore critical that the exception not be allowed to swallow the basic rule.

1. Automatic Initiation of Sunset Reviews

6. The first sentence of Article 11.3 sets forth the rule that a finding of injurious dumping in the original investigation is effective for only five years. After five years, the original finding has lost its factual and legal relevance, and the order shall be terminated. The automatic initiation, which is made because the original affirmative finding is still effective, permits a Member to completely rewrite the rule of the 5-year effective period to a longer period. Such an unreasonable result does not reflect a proper interpretation.

7. Proper treaty interpretation dictates one must examine the textual links from other provisions to Article 11.3 and the broader context in which Article 11.3 operates. Japan believes that it is simply not possible to interpret Article 11.3 correctly without reading the obligations explicitly provided for in Article 12. Articles 12.1 and 12.3 make no sense unless the "sufficient evidence" standard also applies to sunset reviews.

8. The United States attempts to hide from this obligation by misinterpreting the mutatis mutandis language in Article 12. The ordinary meaning of the term is "with necessary changes having been made." The proper interpretation would simply replace "investigation" with "review" in Article 12.1, and all remaining words would apply equally to Article 11.3.

9. In addition, footnote 1 provides a further textual link from Article 5.6 to Article 11.3. The footnote defines the term "initiated" to mean the procedures a Member employs pursuant to Article 5 to commence an action. Article 11.3 then provides that a sunset review is "a review initiated." Consequently, the use of the term "initiated" in Article 11.3 demonstrates that the AD Agreement contemplates that a sunset review must be initiated in accordance with the procedural requirements under Article 5, including the sufficient evidence requirement in Article 5.6.

10. It is also necessary to examine the object and purpose of Article 11.3. The presumption of termination discussed above, coupled with the general requirement in Article 11.1 – that the AD duty may remain in force only as long as necessary – contemplates that some AD duties will terminate without any sunset review. When there is no threshold evidence showing the need for the review, the review should not go forward. Therefore, Article 11.3 first requires that the authorities make a threshold decision as to whether to begin a sunset review.

2. "Likelihood" of Continuation or Recurrence of Dumping

11. USDOC's regulations and Sunset Policy Bulletin create a myriad of WTO-inconsistencies by preventing any sort of prospective analysis. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence. Yet USDOC's regulations explicitly mandate application of a "not likely" standard, which was already found to be WTO-inconsistent by the panel in DRAMs. Even though the United States accepted the DRAMs panel decision, the United States did not amend its regulations with respect to sunset reviews under Article 11.3. The US argument that because the statute uses the word "likely" there is no WTO-inconsistency is specious. Simple recitation of WTO-consistent language in the statute does not mean the US regulations comply with its WTO obligations. Moreover, the US assertion that the provision is ministerial in nature is completely contradicted by its own publication, which states that "{t}hese revisions are intended to clarify the circumstances under which the Department will revoke an order."

12. This WTO-inconsistent standard is also reflected in the Sunset Policy Bulletin. The Sunset Policy Bulletin establishes four scenarios to determine whether dumping is likely, or unlikely, to continue or recur. All of these factual scenarios, however, only examine historical dumping margins and import volumes. Of these four scenarios, there is only one in which respondents may be deemed "not likely" to dump in the future. This single scenario, however, is virtually impossible to satisfy. In

228 sunset reviews, where the domestic industry participated, USDOC found one of the other three "likely" scenarios to be applicable in every single case.

13. If a respondent satisfies one of the three "likely" scenarios, USDOC's regulations and the Sunset Policy Bulletin make it virtually impossible to rebut the presumption of "likely" future dumping through the "good cause" requirement. USDOC hardly ever finds "good cause" to examine other evidence that may rebut this presumption. Consequently, the Sunset Policy Bulletin constrains USDOC by forcing it to make a mechanical examination of only historical facts, while shutting down the collection and analysis of other positive prospective evidence. The United States does not address the fact that USDOC uses the "good cause" standard to shut down any sort of prospective analysis.

14. The panel's decision in US – CVD Sunset (DS213) supports Japan's argument. In that case the panel found that historical import volumes and subsidization rates are only part of the analysis. It is also appropriate to examine changes in the subsidy programme as well as socio-economic and political changes. In this case, however, USDOC rigidly applied the Sunset Policy Bulletin and only reviewed historical import volumes and dumping margins and then refused to consider other evidence submitted.

15. The United States' claim that Japan had "sufficient opportunity" to gather information and present its argument and supporting information, including its "good cause" arguments, is irrelevant. Respondents should not have to go through the time and expense of preparing such argumentation, when it is unclear whether the domestic industry will even participate. In fact, Japanese respondents only had 15 days after they knew the domestic industry would participate in which to file their substantive response. Moreover, Japanese respondents cannot be faulted for not providing information establishing "good cause" because USDOC's regulations and Sunset Policy Bulletin failed to indicate the type of information necessary to establish "good cause."

3. Use of WTO-Inconsistent Dumping Margins and Reporting Those Margins to the USITC for Purposes of Its Injury Analysis

16. The United States first determines whether dumping is "likely" to occur in the future without quantifying at what rate. USDOC then chooses a dumping margin from the results of previous proceedings, usually the original investigation. USDOC then reports this dumping margin to the USITC for purposes of its injury determination in accordance with the Sunset Policy Bulletin. USDOC never reports probable future dumping margins to the USITC.

17. USDOC's policy completely ignores the current conditions of the market. The United States argues that the current reality of the market is irrelevant in predicting future levels of dumping. The current reality of the market, however, has a greater impact on the future evolution of the market – and, in turn, whether respondents will be likely to dump in the future – than a five-year old dumping margin that reflects only historical market conditions.

18. The margins USDOC used were an inappropriate basis for these determinations in the first place. All dumping margins calculated before passage of the Uruguay Round Agreements Act ("URAA"), as in this case, were calculated pursuant to WTO-inconsistent methodologies. Nonetheless, in accordance with the Sunset Policy Bulletin, USDOC bases its likelihood determination and the magnitude of dumping reported to the USITC on these historical WTO-inconsistent dumping margins.

19. Article 18.3 is more than just a timing provision. All sunset reviews are "reviews of existing measures" under Article 18.3. The sunset review determination thus must be in accordance with the current Agreement. An old dumping margin from a pre-WTO proceeding is an inappropriate basis for

making a determination, and its use is inconsistent with the United States' obligations under the AD Agreement.

20. In addition, USDOC's general practice of calculating dumping margins in original investigations and subsequent reviews by zeroing negative dumping margins is WTO-inconsistent. The Appellate Body in EC – Bed Linens found that the zeroing of negative dumping margins does not make a "fair comparison" under Article 2.4. Indeed, both anti-dumping investigations and sunset reviews determine whether a product under consideration as a whole is, or is likely to be, dumped. Zeroing, which disregard certain sales of a product to create an artificially high margin, may not be used irrespective of the dumping margin calculation methodologies. This obligation, therefore, applies to all determinations of dumping, not just original investigations.

21. USDOC also applies the wrong de minimis standard to sunset reviews. Article 5.8 applies to sunset reviews under Article 11.3. The use of the terms "dumping" and "injury" in Article 11.3 incorporates the concepts and rules of Articles 2 and 3 as part of Article 11.3. When read together, these provisions confirm that the authorities may not determine "dumping" or "injury" where the dumping margin is found to be de minimis. Therefore, the US effort to interpret Article 11.3 without considering Articles 2 and 3 is simply wrong. In fact, the text of Article 5.8 itself indicates that the de minimis standard applies to "cases" and is not just limited to "investigations," as the United States believes.

4. USDOC's Order-Wide Basis Dumping Determination

22. The Sunset Policy Bulletin explicitly states that USDOC will make its likelihood determination on an order-wide basis. As a result, USDOC always makes its determination on an order-wide basis, including in this case. This approach is inconsistent with the company-specific evaluation of facts required by Article 6.10. Articles 9.2 and 11.1 also provide Article 11.3 with contextual support. The US attempt to distinguish between procedural and substantive applications of the obligations of Article 6 is disingenuous. All of the provisions of Article 6 establish different types of procedural requirements to some degree. The mere fact that those procedural requirements, when applied to other provisions, have substantive implications does not foreclose their effect. Therefore, Article 11.4's inclusion of the evidentiary and procedural requirements of Article 6 to sunset reviews does not change this analysis.

5. The USITC's Cumulative Assessment of Negligible Imports

23. The US statute grants the USITC discretion to determine whether to cumulate respondent countries' imports when determining injury in a sunset review. The USITC exercised this discretion in this case when it decided to cumulate imports. Nowhere in the USITC's determination, however, did the USITC ever consider the negligibility of imports, or import volume, in deciding whether to cumulate imports from Japan with other imports.

24. This is inconsistent with the United States' obligations under Articles 3.3, 5.8, and 11.3. The United States believes that Article 3.3 is limited by its terms only to investigations. One must consider, however, the interplay of Article 2 and Article 3, which identifies "dumped imports" from a single country for the injury determination. The only exception to this rule is the narrowly defined circumstances in Article 3.3. These obligations are then incorporated into Article 11.3 through the term "injury."

25. Any provision of the AD Agreement, which requires the authorities to evaluate injury, must refer to the obligations under Article 3, including the negligibility standards for cumulation under Article 3.3. The US argument, therefore, that no quantitative analysis is required for injury determinations is wrong. Article 3.4 specifically requires the authorities to consider "the magnitude

of dumping" to determine injury. Article 3.5 also requires the authorities to consider whether the "effects of dumping" have caused injury. Consequently, these Articles require quantification of import volume to assess the cumulative effects of "dumping" to determine injury.

6. The United States is Not Conducting Sunset Reviews in a Uniform, Impartial, and Reasonable Manner

26. For the reasons discussed below, the United States, as a general practice and in this case, does not conduct its sunset reviews in a uniform, impartial, and reasonable manner in violation of Article X:3(a) of GATT 1994. By requiring USDOC to automatically initiate sunset reviews, the United States administers its sunset reviews in favor of the domestic industry. Such administration is not impartial. The automatic initiation of sunset reviews without any grounds is also an "unreasonable" administration of its substantive sunset review laws.

27. Further, the administration of USDOC's 30-day submission rule is both unreasonable and biased. The administration of the 30-day rule places a greater burden on respondents to report much more-in-depth and detailed information in the same period of time as the domestic industry.

28. Finally, USDOC treats revocation reviews under Article 11.2 and sunset reviews under Article 11.3 differently. Yet, both types of proceedings share the same "likely" standard to determine if future dumping will occur. Therefore, by maintaining two different standards for revocation proceedings under Article 11.2 and sunset reviews under Article 11.3, USDOC fails to administer these two proceedings in a uniform manner as required by Article X:3(a) of GATT 1994.

II. CONCLUSION

29. For these reasons, Japan respectfully request that the Panel: (1) find that the United States specific statutory provisions, regulations, and determinations are inconsistent with the various enumerated provisions of the AD Agreement, GATT 1994 and the WTO Agreement; (2) recommend that the Dispute Settlement Body request that the United States amend its sunset statute, regulations and the Sunset Policy Bulletin to conform with its obligations; and (3) find that compliance with its WTO obligations requires that the United States terminate the anti-dumping duty order on the subject product from Japan.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES – FIRST MEETING

1. This proceeding presents essentially six basic questions. First, did the United States act inconsistently with Article 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") by self-initiating a sunset review without regard to the evidentiary provisions of Article 5.6 of the AD Agreement? Second, did the United States act inconsistently by not applying the Article 5.8 *de minimis* standard in sunset reviews? Third, did the United States apply a "not likely" standard in its determination of likelihood of continuation or recurrence of dumping? Fourth, did the United States act inconsistently with Article 11.3 in its use of dumping margins calculated prior to the WTO agreements? Fifth, did the United States act inconsistently with Article 11.3 by making its likelihood determination on an "order-wide" basis? Finally, did the United States act inconsistently with Article 11.3 by not applying a quantitative negligibility analysis before it cumulated imports in making its likelihood of injury determination? The answer to all six of these questions is "no." There is no support in the AD Agreement for any of these claims for a simple, yet fundamental reason – it is impossible to act inconsistently with obligations that do not exist.

2. First, however, we address generally Japan's claims with respect to the US Department of Commerce's ("Commerce") final sunset determination and whether Commerce's determination was based on an appropriately conducted review of all relevant and properly submitted facts. An "objective assessment" of Commerce's findings and actions supports an answer in the affirmative.

3. Article 11.3 of the AD Agreement defines the point in time at which the authorities must take stock of or terminate a duty – that is every five years. Article 11.3 also defines the circumstances under which maintaining a duty may be considered "necessary" – that is when continuation or recurrence of dumping and injury is likely. An authority's decision to maintain a duty must be supported by evidence of these requisite circumstances.

4. What does it mean to determine likelihood of continuation or recurrence of dumping and injury? First, consider the words establishing the circumstances under which maintaining a duty may be considered necessary. The word "continuation" expresses a temporal relationship between past and future; something that is happening may continue in the future. The word "recurrence" also expresses a temporal relationship between past and future; something that happened in the past may happen again in the future.

5. Considered together then, these words indicate that in making a determination of the likelihood of continuation or recurrence of dumping and injury, the administering authority must determine what are the prospects of dumping and injury in the future. Without the discipline of the duty, are dumping and injury likely to continue or recur? The analysis required in a sunset review, therefore, is necessarily prospective in nature.

6. In Commerce's final sunset determination, Commerce found likelihood based on two unrefuted facts. The first fact is the continued existence of dumping by the Japanese producers despite the imposition of the discipline. The second fact is the significantly reduced import levels of the Japanese producers evident after the imposition of the discipline. Based on these facts, Commerce determined that dumping was likely to continue if the duty were revoked.

7. Japan also argues that there are a number of substantive and procedural flaws in Commerce's sunset determination. Japan's main procedural claim concerns whether the Japanese producer, NSC, was afforded "ample opportunity" to participate in the underlying sunset review.

8. Rather than demonstrating that Commerce's findings or procedural actions were inconsistent with the AD Agreement, Japan essentially presents a story that is not supported by the record. Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 17.6 of the AD Agreement, however, direct panels to make an "objective assessment" of the facts of the case and of the applicability and conformity with relevant agreements. This "objective assessment" must necessarily focus on the consistency of the sunset review with the requirements of Article 11.3 and Article 6 of the AD Agreement.

9. Japan has not demonstrated how Commerce's actions in this regard are inconsistent with any of the evidentiary and procedural requirements of Article 6. NSC was on notice of the relevant information requirements and options, as well as the applicable deadlines, at least 15 months prior to the initiation date for the sunset review. Fifteen months provides "ample opportunity" to gather and present any evidence NSC considered pertinent to Commerce's sunset determination. Also, fifteen months is longer than the normal deadline in Article 11.4 for the conduct and completion of sunset reviews. That NSC failed to avail itself of the opportunity to present evidence cannot be blamed on Commerce's actions in this case.

10. Next, with respect to each of the six legal issues in this dispute, Japan's arguments run afoul of the fundamental proposition that the customary rules of treaty interpretation neither require nor condone the imputation into a treaty of words that are not there.

11. With respect to the self-initiation issue and the *de minimis* issue, Japan's argument places the legitimate expectations of the Members as a whole, as expressed in the agreed text of the treaty, at risk. According to Japan, the requirements of Article 5 of the AD Agreement are made applicable to Article 11.3 sunset reviews by virtue of the fact that Article 12.1 mentions Article 5, and Article 12.3 applies to reviews under Article 11. Apparently, according to Japan, the mere mention of Article 5 in Article 12 creates an obligation to apply Article 5 in Article 11.3 sunset reviews. Treaty interpretation does not and cannot work that way. Rather, the basis for interpreting a treaty is the ordinary meaning of the words of the treaty.

12. In the AD Agreement, the drafters cross-referenced particular provisions to make them applicable in the context of Article 11 reviews. If the Members had actually agreed that various provisions of Article 5 should apply in sunset reviews carried out under Article 11, the text would reflect that agreement, just as it does with respect to the application of Article 6 in Article 11 reviews. The Article 5.6 evidentiary prerequisite simply does not apply to Article 11.3 sunset reviews, and neither does the Article 5.8 *de minimis* standard. For this reason, Japan's claims concerning self-initiation and *de minimis* must fail.

13. With respect to the likelihood standard in Article 11.3, Japan has raised a number of issues about the manner in which the United States determines whether dumping is likely to continue or recur. In this regard, Japan claims that Commerce's regulations do not provide for a determination consistent with the obligations of Article 11.3, and effectively create a "not likely" standard for sunset reviews. Japan is wrong. The applicable US law, on its face, requires that Commerce determine whether there is a likelihood that dumping will continue or recur in sunset reviews. In this case, Commerce affirmatively found that dumping was likely to continue, were the duty to be revoked, based on the undisputed fact that the Japanese producers continued to dump even with the duty in place.

14. With respect to Commerce's treatment of antidumping margins in the sunset review, the likelihood analysis required by Article 11.3 of the AD Agreement is a qualitative analysis, not a quantitative analysis. Article 11.3 requires an administering authority to determine likelihood of continuation or recurrence of dumping. Article 11.3 does not require the calculation of dumping margins.

15. Moreover, the United States determines likelihood of dumping on an order-wide basis, which is consistent with Article 11.3. Article 11.3 provides for the review of the "definitive" duty. The definitive duty is imposed on a product-wide (that is, order-wide) basis, not on a company-specific basis. This is made clear by the reference in Article 9.2 to "any product." In addition, there is no basis in Article 11.3 for distinguishing between the required specificity of the likelihood of injury determination and the required specificity of the likelihood of dumping determination. Thus, because likelihood of injury is determined, by necessity, on an order-wide basis, it follows that likelihood of dumping should be determined on the same basis. The fact that Article 11.4, makes the evidentiary and procedural provisions of Article 6 applicable to sunset reviews under Article 11.3 does not create a substantive obligation to determine likelihood on a company-specific basis.

16. Finally, with regard to the injury determination made in this sunset review, consideration of the text of Articles 11.3, 3.3 and 5.8 of the AD Agreement, as well as the structure of the AD Agreement as a whole, shows that the AD Agreement does not require any quantitative negligibility analysis in a sunset review. Like the AD Agreement, US law does not require the application of a quantitative negligibility test in sunset reviews.

17. By its plain language, Article 11.3 does not contain a negligibility test nor does it incorporate negligibility concepts from Article 5.8 and Article 3.3. On its face, Article 3.3 of the AD Agreement applies to investigations. Moreover, Article 3.3 refers to present events, whereas Article 11 refers to future or likely events. Article 3.3 does not refer in any manner to Article 11.3 reviews. Similarly, the plain language of Article 5.8 indicates that it applies only to investigations.

18. Japan's reliance on footnote 9 to Article 3 to show that Article 3 requirements are somehow applicable to sunset reviews does not advance Japan's argument. That footnote simply provides that any reference in the AD Agreement to the term "injury" incorporates the definition of injury in Article 3. The fact that "injury" should be interpreted in accordance with Article 3 does not automatically mean that all provisions of Article 3 are applicable to Article 11. Furthermore, the text of the AD Agreement provides no support for the view that the provision to terminate an investigation when imports are negligible was based on the notion that negligible imports are non-injurious.

19. The negligibility requirements of Article 5.8 do not apply in sunset reviews for good reason: the focus of a review under Article 11.3 is decidedly different from that of an original investigation under Article 3. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports, and must examine whether the volume, price effects, and impact of such imports are indicative of present injury or threat to the domestic industry. In contrast, in a sunset review, in deciding whether to remove the order, the investigating authorities examine the likely volume of imports in the future, after these imports have been restrained for five years by an antidumping duty order, and their likely impact in the future on a domestic industry that has been operating with the order in place. Accordingly, Japan has failed to show that the United States International Trade Commission ("USITC") acted in a manner inconsistent with the AD Agreement when it decided to cumulate imports from various countries in this sunset review.

20. Another way of looking at the arguments raised by Japan and the third parties in this dispute is in terms of four general theories that run through their arguments. The first theory is that Article 11.3 of the AD Agreement creates a presumption of termination of antidumping duties after

five years and that any extension is an exception to the agreement. This theory finds no support in the applicable provisions of the AD Agreement properly interpreted in accordance with customary rules of treaty interpretation.

21. As mentioned earlier, there is no temporal limitation on the remedial relief from unfairly trade imports afforded by the antidumping duty provisions of the AD Agreement. Rather, under Article 11.3, there is a conditional limitation on the application of antidumping measures, and Article 11.3 plainly gives authorities the option of either automatically terminating the definitive antidumping duty, or taking stock of the situation by conducting a review to determine whether continuation or recurrence of dumping and injury is likely. Nothing in Article 11.3 or elsewhere in the AD Agreement suggests a presumption as to how long antidumping duties may continue to be necessary or as to the final outcome of a sunset review.

22. Moreover, characterizing a sunset review or extension of an antidumping duty order beyond five years as some sort of "exception" does not alter the analysis of the AD Agreement provision at issue here. On its face, Article 11.3 establishes that sunset reviews are part of the overall balance of rights and obligations negotiated during the Uruguay Round.

23. The second theory advanced by Japan's arguments is essentially that any provision of the AD Agreement is potentially applicable mutatis mutandis to any other provision of the AD Agreement. This is a teleological approach to treaty interpretation which suffers from several fatal flaws. First, it violates the principle of effectiveness by rendering the various cross-references and scope language of the AD Agreement redundant. Second, this approach to treaty interpretation turns a customary rule of treaty interpretation, found in Article 31(1) of the Vienna Convention, on its head. As noted earlier, where the Members wished to have obligations set forth in one provision of the AD Agreement apply in another context, they did so expressly. If accepted, Japan's approach would nullify the Members' expectations as explicitly expressed in the AD Agreement.

24. The third theory is that the concept of *de minimis* or negligible import volumes is equivalent to "non-injurious". This is simply wrong. Dumping and injury are separate concepts defined by the Agreement. In particular, whether in fact dumped imports are causing injury must be ascertained in light of the applicable provisions on determination of injury set forth in Article 3 of the AD Agreement.

25. The fourth and final theory is that Japan and the third parties' flawed approach to treaty interpretation does not just nullify Members' expectations, it confounds those expectations. The fact is the United States amended its antidumping duty statute in 1995 to include - for the first time - provisions for the conduct of sunset reviews of antidumping duty measures; the United States agreed to these new provisions subject to the conditions that were clear from the text that the new *de minimis* standard would be limited to investigations and that sunset reviews could be automatically self-initiated by authorities. Japan and the third parties are trying to undo this deal seven years after the fact.

26. Finally, despite Japan's claims during its oral presentation to the contrary, the United States has in fact revoked 139 antidumping orders of the sunset reviews conducted to date, nearly one-half of the AD orders subject to the sunset reviews.

27. For the reasons discussed in our oral presentation at the first substantive meeting of the Panel and in our first written submission, we ask that the Panel reject each of Japan's claims in this dispute.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF BRAZIL

I. INTRODUCTION

1. I would like to thank the Panel for the opportunity to present Brazil's views as a third party in these proceedings. This morning, I would like to highlight certain aspects of the issues discussed in detail in our written submission dated 14 October 2002.

2. Brazil concurs with the arguments raised by Japan and share its concerns that the US law and practice involving sunset reviews is in violation of the obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement") and Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement").

3. Brazil is particularly concerned that the US practice, as it pertains to the administrative reviews underlying Japan's sunset review claims, reaches far more than just the US government's sunset reviews. Indeed, it impacts adversely virtually all antidumping duty proceedings conducted by the United States, thus negatively affecting all of US trading partners within the WTO. Specifically, the *de minimis* margin standard of 0.5 per cent and the use of the "zeroing" methodology by the United States affect not only US sunset reviews but also reviews in which the revocation of the order by the United States is under consideration, as part of an annual review, for example. Brazil considers that, in maintaining a *de minimis* margin of 0.5 per cent and applying a zeroing methodology to the dumping calculations, the United States violates Articles 2.4, 2.4.2, 5.8, 11 and 18.3 of the Anti-Dumping Agreement.

II. THE *DE MINIMIS* STANDARD

4. In both revocation review and sunset review proceedings, the United States applies a *de minimis* threshold of 0.5 per cent, despite Article 5.8 of the Anti-Dumping Agreement that explicitly defines the *de minimis* margin as less than two percent. The fact that the provisions that relate to administrative review and sunset review proceedings are contained in a different section of the Agreement does not affect this definition.

5. All provisions of the Agreement are threaded by the basic principles and obligations concerning all aspects of an antidumping measure. This means that one provision of the Antidumping Agreement cannot be read in a vacuum.

6. As we mentioned, Article 5.8 states that "[t]he margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price." Read in its plain language, the definition is not confined to any situation or to *investigations*. There is no other definition of "*de minimis*" contained anywhere else in the Anti-Dumping Agreement. Because this sentence is clear in its ordinary meaning, it does not require a contextual analysis and is not subject to various interpretations.

7. The Panel should consider that the argument presented in this case is different from the dispute in *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors*

(DRAMS) of One Megabit or Above From Korea ("DRAMS").[1] In DRAMS, the Panel rejected Korea's claim that the United States violated Article 5.8 by applying a 0.5 per cent *de minimis* standard in the context of Article 9.3 duty assessment procedures.

8. The Panel in the DRAMS case focused its analysis to interpreting the obligation imposed by the second sentence of Article 5.8, *vis-à-vis* Article 9.3, rather than on the Anti-Dumping Agreement's definition of "*de minimis*." The DRAMS Panel found the application of the *de minimis* provision to Article 9.3 duty assessment reviews would conflict with note 22 of the Agreement, to the extent that note 22 provides that a finding of no duty in the Article 9.3 duty assessment procedures "shall not" require a termination of the duty.[2] Based on this context, the Panel concluded that "Article 5.8, *second sentence,* [requiring termination of the "case"] does not apply in the context of Article 9.3 duty assessment procedures."[3]

9. The Panel's reasoning shows that its decision was narrow and limited. It only decided that the termination of the case required by the second sentence of Article 5.8 would not apply to Article 9.3 duty assessment proceedings. The parties in DRAMS did not argue, and the Panel did not consider, the applicability of the definition of the term "*de minimis*", contained in the third sentence of Article 5.8, to contexts other than investigations and duty assessment proceedings. As discussed earlier, the plain meaning of Article 5.8 does not limit the definition of *de minimis* to any particular context. However, even if it did, DRAMS would only veto its applicability to duty assessment proceedings, that are different from sunset reviews or revocation reviews, which result in the termination of the order.

10. The Antidumping Agreement does contemplate other proceedings that are distinct and separate from the Article 9.3 duty assessment procedure, considered in DRAMS. In this regard, the types of reviews provided in Article 11 have for purpose to determine the continued necessity of the duty. The antidumping duty order can be removed, in whole or in part, following an Article 11 review, while an Article 9.3 assessment would not lead to the same result. Moreover, the continued imposition of duties under Article 11 requires "dumping which is causing injury," while a single Article 9 duty assessment does not, by itself, address the injury issue. In this regard, an Article 11 review bears a close connection to Article 5 in that both Articles are concerned with whether an order should apply at all and both Articles require tests for dumping ***and*** injury.

11. To apply the principle of Article 11.1 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," one must first determine the meaning of the term "dumping which is causing injury." Although Article 11 does not refer to Article 5.8 specifically, the terms "dumping which is causing injury" are only addressed and defined in that Article. Accordingly, Article 11 must be read in conjunction with Article 5 to be given its full meaning, because the terms "dumping which is causing injury" in Article 11 cannot have a different meaning than they do in Article 5. The fact that Article 11 does not explicitly reference Article 5.8 cannot mean that that Article 11 is independent from the principles of the Antidumping Agreement. As we mentioned earlier, the provisions of the Antidumping Agreement cannot be read in a vacuum. For example, the parties must turn to Article 2 for the definition of "dumping," despite the fact that Article 11 does not explicitly reference Article 2 for such definitions. The parties cannot have intended that each Article was to entail a different definition of the terms commonly used.

12. Article 5.8 requires an "immediate termination" of cases where the dumping margin is less than 2 per cent. Thus, by definition, a *de minimis* margin of less than 2 per cent cannot cause injury.

---

[1] WT/DS99/R (19 January 1999).
[2] *Id.*
[3] *Id*. (emphasis added).

A dumping margin that does not cause injury cannot justify the imposition of antidumping measures and also does not support the continued imposition of such measures.

13. An interpretation to the contrary leads to illogical results. It makes no sense to mandate termination of an investigation where the margin of dumping is less than 2 per cent, but simultaneously allow duties to continue on the basis of an even lesser amount. To illustrate, consider an example of two exporters: Exporter A earns a margin of 1.9 per cent during the investigation while Exporter B receives a margin of 2.2 per cent during the investigation. By operation of the US law, Exporter A is excluded from the dumping order while Exporter B becomes subject to continued dumping duties. In the ensuing reviews, Exporter B receives a dumping margin of 1.0 per cent, is assessed duties in the same amount and cannot become eligible for the termination of the duty. During the same time, Exporter A remains free to sell its products to the US market at a dumping margin of 1.9 per cent. The current US practice essentially allows Exporter A to continue selling its products at even *lower prices* than those exporters that are subject to the dumping order. This result could not possibly have been intended by the parties, and contradicts the ordinary meaning interpretation of the terms.

14. Pursuant to section 351.106(c) of the US regulations and by practice, the United States equates no dumping as less than 0.5 per cent margin of dumping, the threshold that it applies to all "reviews" of the antidumping duty order, irrespective of the purpose of the review. Thus, the United States equates "dumping which is causing injury" as less than 0.5 per cent margin when determining the continued necessity of the antidumping measures and maintains antidumping duties even when there is no dumping which is causing injury. Accordingly, Section 351.106 of the US regulations, on its face and as applied to sunset reviews and other types of reviews, such as the revocation reviews mentioned earlier, violates Article 5.8 and Article 11 of the Anti-Dumping Agreement.

15. We note that the Panel in the *United States – Countervailing Duties on Corrosion-Resistant Steel from Germany*[4] had to deal with the same issue as in this case in the context of the analogous provisions of the Subsidies Agreement, namely, whether the *de minimis* definition contained in Article 11.9 of that Agreement (the counterpart to Article 5.8 of the Antidumping Agreement) applied to sunset reviews of Article 21.3 (the counterpart to Article 11.3 of the Antidumping Agreement). The Panel agreed that the *de minimis* standard contained in Article 11.9 was implied in Article 21.3, based on the object and purpose of Article 11.9, even though no specific reference was made in Article 21.3 to the *de minimis* definition of Article 11.9 (para. 8.61). The Antidumping Agreement must be interpreted likewise, and all the more so in light of the fact that, whereas Article 11.9 of the Subsidies Agreement defines a *de minimis* percentage "*[f]or the purpose of this paragraph*", there is no such condition in Article 5.8 of the AD Agreement. The otherwise closely matching wording of the two provisions leads to the conclusion that the omission of the phrase in the AD Agreement is a further demonstration that the third sentence of Article 5.8 is a general definition, not restricted to investigations.

16. Further support for Brazil's position is provided by Article 18.3 of the Antidumping Agreement. Article 18.3 states:

> Subject to sub-paragraphs 1 and 2, the provisions of this Agreement shall apply to *investigations, and reviews of existing measures,* initiated pursuant to applications which have been made on or after the date of entry into force for a Member of WTO Agreement.

17. The plain language of this paragraph does not distinguish which "provisions" are applicable to reviews or investigations. The lack of differentiation indicates the Agreement was not intended to

[4] WT/DS213/R (3 July 2002).

set up different rules for reviews and investigations. Therefore, Article 18.3 further supports the conclusion that the *de minimis* standard defined in Article 5.8 is applicable to all segments of an antidumping proceeding.

III. ZEROING

18. Turning now to the issue of the zeroing methodology, the United States continues to maintain the methodology of zeroing negative margins in all its proceedings, despite the decision of the Panel and the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India* ("Bed Linen") which found such practice to violate Article 2.4.2 of the Anti-Dumping Agreement.[5]

19. In Bed Linen, the Appellate Body concluded that by disregarding the margin comparisons that yield a negative margin, the European Communities failed to determine dumping on the basis of a comparison of the normal value with "all comparable export transactions," as required under Article 2.4.2. It also found that the zeroing practice, by failing to take fully into account the prices of all comparable export transactions, violates Article 2.4 which require a "fair comparison" between export price and normal value.[6]

20. The United States employs the identical practice of "zeroing" when determining the margin of dumping in both investigations and reviews, and has asserted that "zeroing" is required by the US law. Like the European Communities, the United States, in an investigation, compares the weighted-average export price of each "model" of the product under investigation with the weighted-average normal value for similar model, and then disregarding those comparisons that does not yield in a positive margin.

21. In an administrative review, the comparison methodology is similar, with a slight difference. Instead of comparing the weighted average normal value with the weighted average export price, the margin of dumping in a review, in general, is determined by comparing the price of individual export transactions with weighted-average normal value. This difference in the comparison methodology, however, does not exempt the United States from the obligations imposed by Article 2.

22. To the extent that the US law requires zeroing of negative margins, the statute leads to an overall dumping margin that is not based on "all comparable transactions" as required by Article 2.4.2 of the Anti-Dumping Agreement, nor based on a "fair comparison" between export price and normal value, as required by Article 2.4. Thus, the US law, on its face and as applied to all antidumping proceedings, violates Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement, as determined by the Appellate Body.

23. Brazil submits that the principles affirmed in the *Bed Linen* decision apply equally to investigation and reviews, such as sunset, revocation or administrative reviews, notwithstanding the slight difference in the comparison methodology used by the United States. The principle of "fair comparison" established under Article 2.4 does not distinguish whether the comparison is made on an average of all transactions or on a transaction-to-transaction basis. Therefore, this principle applies equally to a review as well as to an investigation, no matter what comparison methodology is used.

24. In a review, the US government compares individual export transactions with normal value and aggregates the results of these multiple comparisons to determine the weighted-average dumping margin. In doing so, the US government disregards those export transactions that yield a negative margin. In effect, the US government assigns to those transactions a value equal to normal value

[5] WT/DS141/AB/R (1st March 2001).
[6] *Id.*

despite the fact that, in reality, such transactions have a value higher than normal value. This methodology is identical to that used by the European Communities which the Appellate Body found to violate Article 2.4 in the Bed Linen decision. Accordingly, the US methodology of "zeroing," whether it involves an average of all transactions or transaction-to-transaction comparison basis in the context of an administrative review, violates Article 2.4 of the Agreement. If the application of zeroing during the investigative phase impermissibly inflates the dumping margin, it is also impermissible to inflate the dumping margin in such a manner during the subsequent review phases.

IV. CONCLUSION

25. The effects of WTO-inconsistent methodologies maintained by the United States adversely affects all antidumping cases brought by the United States against all of its trading partners, including Brazil. Brazil respectfully requests the Panel to find the United States in violation of its obligations under the WTO Agreement and the Anti-Dumping Agreement. Thank you very much.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF CHILE

1. Let me begin by thanking you and the members of the Panel for giving us this opportunity to express our views in this important dispute. We already presented a written submission with some elements that we think the Panel should take into consideration when resolving this matter. In this opportunity we do not want to repeat those arguments but make some general comments on the US submission.

2. Article 17.6 of the Antidumping Agreement ("ADA") establishes the standard of review for Panels when examining Antidumping disputes. While we do not contest the scope and significance of that provision we would like to highlight the obligation of the investigating authorities to evaluate the facts before it on an unbiased and objective way. Unfortunately the US authorities do not act in such an unbiased and objective way during sunset reviews as Japan has shown in this particular case and as the history of the USDOC/USITC determinations prove.

3. The US disagrees with Japan – and by extension with Chile – that sunset reviews are analogous to the original investigation and asserts that it is a procedure that stands on its own. We do not find basis for such a proposition since the effects of both administrative acts could be the same, meaning the application of an anti-dumping measure. Even if we were to agree with that approach, it is not an excuse to adopt legislation and regulations or act in ways that are not provided for by the ADA – the US recognises that Article 11.3 contains minimal guidance – and inconsistent with the spirit and fundamentals of such Agreement.

4. We are struck by the length of the US arguments regarding the way Japan used the principles of treaty interpretation to show that Article 11.3 of the ADA should not be read in isolation from the rest of the provisions of the ADA. Indeed, some of those provisions as well as the requirements throughout the ADA do apply to sunset reviews. If the US did not like that rationale it should have provided the Panel with an interpretation of Article 11.3 that justifies the regulations and conduct for sunset reviews in the US. The US not only did not do that but it considers that it has the right to apply disciplines that are different – and in most cases inconsistent - to the ones provided in the ADA for investigations and other reviews.

5. US laws, regulations and practice are based on the understanding that paragraph 3 of Article 11 gives authorities an option between terminating the AD measure or not doing so in some specific cases. There is no option in Article 11 but to terminate the measure within five years. It expressly provides that an AD duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury (paragraph 1) and if it is no longer necessary it shall be terminated on a date not later than five years from its imposition (paragraph 3). If the authority determines that dumping and injury will continue or recur it may decide not to terminate the measure.

6. If paragraph 1 prevails ("notwithstanding the provisions of paragraph 1 and 2") then what is the reason to provide for an exception in paragraph 3 if the AD duty shall remain in force as long as it is necessary to counteract dumping? Clearly what paragraph 3 stipulates is that even though dumping may still exist, the measure shall be terminated not later than 5 years unless the authority determines that the expiration of the duty will lead to continuation of dumping (it goes back to the general rule of paragraph 1).

7. On the other hand, if there is no more dumping and injury and the measure should have been terminated by application of paragraph 1 and certainly by paragraph 3, then why can the measure be maintained after a sunset review? Because the authority may decide that considering the evidence, dumping and injury may recur.

8. What does these all mean? That the authority cannot exclusively rely on the facts, evidence and conclusions of the original investigation as the USDOC/USITC does. The provisions of the ADA are clear regarding the conditions under which an AD measure shall terminate. As the US states in its submission, a sunset review deals with likely future behaviour[1], and we agree. That is why we do not agree with the conclusion that the authority can use historical evidence of dumping, especially when that evidence or the investigation may be flawed with WTO inconsistencies or is at least 5 years old. Commerce's determination of future behaviour based on remote past behaviour has no basis in the ADA nor in logic.

9. Let me give you some examples.

10. The USDOC relies on the original margins based on the fact that they better represent the behaviour of the exporter without a discipline. It may be true for past behaviour but certainly a presumption for future behaviour since the USDOC assumes that absent the AD duty the exporter will recur to dumping. An irrefutable presumption even though the same USDOC may have calculated a different margin in a subsequent administrative review. The presumption may only be rebutted if the decline of dumping margins is accompanied by stable or growing imports. While we could agree with the US that historical dumping with a discipline can be highly probative of the behaviour of exporters without the discipline[2], there is no possibility, as the history has shown us, for the exporter to demonstrate the contrary.

11. The USDOC may report a lower, more recently calculated margin if dumping margins declined or dumping was eliminated after the issuance of the order and import volumes remained steady or increased. This provision of the Sunset Policy Bulletin would never pass a test of impartiality or lack of bias since that is exactly the only case when the USDOC has to determine that there is no likelihood that dumping will recur, and the measure has to be terminated. So then, why should the USDOC transmit those margins to the USITC? Is that a recognition that even though a measure should be terminated, it will never be done because there will always be grounds to come to a determination of likelihood?

12. Use of "other factors". As shown in our written submission, the US authorities only accept considering "other factors" in order to avoid the termination of an AD order that otherwise would have terminated when applying the US regulations. The *Sugar and Syrups from Canada* case is the best example. Although the USDOC originally concluded that there was no dumping, it examined other factors to conclude that dumping had not been eliminated and therefore the AD measure should be maintained; despite the fact that in its first submission the US argues that "current reality of the market" is not the issue in a sunset review.

13. This attitude of the US authorities is perfectly clear in paragraph 53 of the US submission. Even if the USDOC would have considered NSC "other factors" – something that it did not – its final sunset determination would not have changed in light of the existing dumping margins. Plainly, while there are dumping margins, the USDOC will not consider "other factors". Is that an unbiased and impartial authority? We admit that we are not familiar with the Canadian sugar case, but the result of the USDOC determination was the perpetuation of the AD order despite the absence of dumping.

[1] US First written submission, Footnote 124
[2] US First written submission, Par. 119

This was based on some analysis that indicated that the producers could not export sugar profitably even though we assume they were doing so since no dumping existed.

14. If you allow me Mr. chairman, I would like to ask the US through you the following question. If the USDOC in the absence of dumping determines that there is likelihood of recurrence of dumping if the measure is revoked – for example because imports have fallen – it will nevertheless transmit to the USITC the original margins? A concrete example, in the Canadian Sugar case where no dumping was found, what margins did the USDOC transmit to the USITC?

15. Finally, a word on Article 18.3 of the ADA. The US correctly states that the methodologies used and margins resulted from investigations conducted prior to the entry into force of the ADA cannot be challenged. But reviews initiated on or after that date of entry can certainly be subject to challenge. If the authorities have decided – wrongly or not - to use in a review margins based on pre-WTO rules that may be WTO inconsistent, then those margins and methodologies as well as the review may be subject to consistency challenge. Otherwise, it would render the review immune to WTO rules.

16. Mr. Chairman, in concluding, Article 11.3 of the ADA clearly establishes that AD measures must expire not later than five years from their imposition. Investigating authorities may conclude that that termination may likely conduce to a continuation of dumping and injury (while there is dumping and injury a measure shall be in effect) or its recurrence. Such determination is not a simple task but it is not a futurology exercise either. It implies a future behaviour analysis that can not be based solely on historical evidence and determinations, especially when those maybe WTO inconsistent.

17. Japan and the third parties have clearly made their case that the provisions of the ADA do apply when conducting sunset reviews. Article 11.3 of the ADA cannot be read in isolation but in the context provided by other Articles of the Agreement and especially those that require the authorities to be objective and impartial. The US has claimed that nothing in Article 11.3 and by extension in the ADA requires its authorities to conduct sunset reviews in a certain manner. And consequently it has constructed a system to maintain perpetually AD orders despite the fact that Article 11.3 mandates that those orders should have been terminated not later than five years from their imposition.

18. The figures provided by Japan in its first submission show that the way the US has decided to conduct those reviews have in all cases concluded in the extension of the AD order. There has been no single case in which the USDOC has determined that there was no likelihood of recurrence or continuation of dumping and injury. The replacement of absent specific rules that only lead to a single result make the provision of paragraph 3 of Article 11 moot. And in doing so it has substantially modified the balance of rights and obligations that resulted from the Uruguay Round.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. The EC has decided to intervene as third party in this case because of its systemic interest in the correct interpretation of the AD Agreement.

2. The EC shares the view of Japan and of the other third parties that US law and practice with regard to sunset reviews are not in accordance with the AD Agreement. There is widespread concern among WTO members that US law and practice regarding sunset reviews have rendered the provisions of the WTO Agreements limiting the duration of defensive trade measures largely ineffective. This concern is illustrated not only by this case, but also by a number of similar cases which have been brought against the US both by the EC and by other parties.

3. In its written submission, the EC has commented on certain of the claims of Japan which are of a particular interest to the EC. These claims are the following:

(a) The evidentiary standards required by Article 5.6 for self-initiation of original investigations apply also to sunset reviews;

(b) The AD Agreement requires a "likely" and not an "unlikely" determination of continuation and recurrence of dumping and injury;

(c) The sunset review determination has to be based on a "prospective" analysis;

(d) The *de minimis* requirement of Article 5.8 also applies in the context of a sunset review;

(e) The requirements of Article 3.3 and 5.8 for the cumulation of exports in an injury determination also apply within the context of a sunset review.

4. The EC will briefly set out its views on each of these issues. For a more detailed reasoning, the EC refers the Panel to its written submission.

A. THE EVIDENTIARY STANDARDS REQUIRED BY ARTICLE 5.6 FOR SELF-INITIATION OF SUNSET REVIEWS APPLY ALSO TO SUNSET REVIEWS (JAPAN'S CLAIM 1)

5. With its first claim, Japan has submitted to the Panel that US law and regulations are inconsistent with the AD Agreement because they mandate that USDOC automatically initiate sunset reviews without any evidence. In this respect, the EC agrees with Japan that the automatic initiation by the US of sunset reviews without any evidence constitutes a violation of Article 11.3 of the AD Agreement. This follows from an interpretation of Article 11.3 in accordance with the customary rules of treaty interpretation, taking into account the text, context, and object and purpose of the provision.

6. It should be recalled that Article 11.3 lays down a fundamental principle, namely that anti-dumping duties are not infinite in duration, but shall be terminated on a date not later than five years

from their imposition. According to the unambiguous wording of Article 11.3, an anti-dumping duty may be continued beyond this date only if the authorities determine, on their own initiative or upon a duly substantiated request on behalf of the domestic industry, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Accordingly, termination of the duty is the rule, whereas its continuation is the exception.

7. In the view of the EC, the fact that the authorities may initiate a review also on their own initiative does not mean that they may automatically initiate a review in every single case. The EC agrees with Japan that the evidentiary requirements set out in Article 5.6 of the AD Agreement must also apply to the initiation of sunset reviews. The EC considers that, although Article 11.3 does not contain any explicit reference to evidentiary requirements for the initiation of sunset reviews, it mandates domestic authorities to engage in a review to "determine" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury. The verb "to determine" is commonly understood to mean to find out, to ascertain, to establish, or, in more articulated terms, to carry out all those activities necessary to reach a decision, i.e. to investigate and decide. Thus, the very text of Article 11.3 already indicates that the decision to initiate a sunset review is by no means "automatic", but requires a certain evidentiary standard to be met.

8. The EC would like to add that it would also be hard to understand why the AD Agreement would require requests from the domestic industry to be "duly substantiated" for the initiation both of an original investigation and of a sunset review, whereas in the case of self-initiation it would distinguish the two hypotheses: in case of an original investigation, domestic authorities can self-initiate only "in special circumstances" and "if they have sufficient evidence of dumping, injury and causal link"; whilst in case of a sunset review they could exercise a completely arbitrary discretion. Since from the point of view of the exporter, it is irrelevant whether an investigation is initiated at the initiative of the domestic industry or of the authorities, similar evidentiary standards should apply to both cases.

9. A further contextual element that reinforces the comprehensive interpretation put forward by Japan with regard to the evidentiary requirements for self-initiation of sunset review can be found in Article 12 of the AD Agreement. Paragraph 1 of Article 12 requires domestic authorities to notify interested parties and issue a public notice "when there is sufficient evidence to justify the initiation of an anti-dumping investigation". Paragraph 3 of the same Article specifies that this provision "shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11".

10. Finally, Japan rightly points out that sunset reviews and new investigations have the same *effect*, i.e. they result in the imposition of anti-dumping duties for a period of five years. It should also be noted that both new proceedings and sunset reviews involve a large amount of investigation by the domestic authorities with a view to determining whether anti-dumping duties should be put into effect. The automatic termination of anti-dumping orders foreseen in Article 11.3 is meant to protect the exporter from investigations which are not justified on the basis of sufficient evidence. By automatically self-initiating sunset reviews in every case, the US does away with the procedural guarantees established by the AD Agreement.

11. In conclusion, a proper analysis of the text, context, and object and purpose of Article 11.3 reveals that the evidentiary standard of Article 5.6 is applicable to the initiation of sunset reviews. Accordingly, such reviews should not be initiated automatically, but only where there is sufficient evidence to justify them.

B. THE AD AGREEMENT REQUIRES A "LIKELY" AND NOT AN "UNLIKELY" DETERMINATION OF CONTINUATION AND RECURRENCE OF DUMPING AND INJURY (JAPAN'S CLAIM 2)

12. With its second claim, Japan has submitted to the Panel that the Sunset Regulations, and in particular Section 351.222(i)(1)(ii), are not in conformity with Article 11.3 AD Agreement. In particular, Japan has argued that whereas Article 11.3 AD Agreement requires that anti-dumping duties be terminated "unless the authorities determine [...] that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury", the Sunset Regulations require USDOC to revoke an order or terminate a suspended investigation where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of a countervailable subsidy or dumping.

13. The US has attempted to explain this provision by characterising it in its written submission as only "ministerial in nature". However, this is not in accordance with the plain wording of the Sunset Regulation, which purport to lay down a standard to be applied in sunset reviews. As the EC has explained in its written submission, the provision was in fact explicitly intended to clarify the circumstances under which the Department will revoke an order or terminate a suspended investigation.

14. The EC agrees with the view of Japan that the standard laid down by the Sunset Regulations is incompatible with Article 11.3 of the AD Agreement. In the view of the EC, these differences between the "likely" and the "not likely" standards are by no means semantic only. Rather, the Sunset Regulations require USDOC to apply a standard which is patently more demanding than the one prescribed by Article 11.3 AD Agreement. The requirement that continuation or recurrence of dumping or injury must be "likely" for the duty to be terminated implies a higher degree of probability than the requirement that the duty be terminated only "where it is not likely" that this would lead to continuation or recurrence of dumping. In the first case, a higher degree of certainty is required than in the second, where it is necessary only for the continuation or recurrence of dumping not to be "unlikely".

15. That a "likely" standard implies a higher degree of certainty than a "not likely" standard has also been confirmed by the Panel in *US – DRAMs*, as quoted in paragraph 96 of the first written submission of Japan. The EC submits that this reasoning, which the Panel applied in interpreting Article 11.2 AD Agreement, is perfectly transposable to Articles 11.3.

16. For these reasons, the EC considers that a "not likely" standard is incompatible with Article 11.3.

C. THE SUNSET REVIEW DETERMINATION HAS TO BE BASED ON A "PROSPECTIVE" ANALYSIS (JAPAN'S CLAIM 3)

17. With its third claim, Japan has submitted that USDOC in its sunset review practice fails to "determine" whether dumping is "likely" to occur. In particular, Japan has argued that USDOC determinations are not based on a prospective analysis of positive evidence ascertaining that continuation or recurrence will be probable.

18. The EC agrees with Japan's argument that Article 11.3 requires that the "likelihood" of the continuation or recurrence of dumping must be established on a prospective basis. By definition, an assessment of the "likelihood" of continuation or recurrence of dumping requires the authorities to make a judgement about events in the future. The need for a prospective, rather than a retrospective, analysis has been confirmed by the Panel in *US-DRAMs*.

19. The EC also agrees with Japan that a "determination" of the likelihood of continuation or recurrence of dumping and injury must be based on positive evidence. An authority would fail to meet this standard if, in a determination in a sunset review, it based itself purely on the fact that dumping had occurred in the past, without addressing the question of whether dumping is likely to also recur or continue in the future.

20. The EC is of the view that US law and practice, as reflected in the Sunset Policy Bulletin, with respect to likelihood determinations in sunset reviews of anti-dumping orders, falls short of the requirements of Article 11.3 AD Agreement. However, the EC would like to point out that a prospective analysis is already precluded by Section 752 (c) (1) and (2) of the Act, which mandates the US authorities to consider only past dumping margins and import volumes, and allows consideration of other factors only if "good cause" is shown. Therefore, the US Sunset Policy Bulletin, which essentially limits revocation of the order to the unlikely scenario "where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased", is a faithful reflection of the applicable US law.

21. The EC agrees with Japan that US law and practice as reflected in the Sunset Policy Bulletin fall foul of the standard for likelihood determinations in Article 11.3 AD Agreement. The criteria which US DOC applies in likelihood determinations clearly are not adequate to establish such likelihood. The fact that imports of the subject merchandise ceased after issuance of the order or the suspension agreement as such is in no way indicative of whether the producers of the product concerned will again begin dumping after the duty is terminated. Similarly, it is not clear why the fact that dumping was eliminated after the issuance of the order, and import volumes for the subject merchandise declined significantly, as such should indicate that the producers will again start dumping after the duty is removed.

22. This inadequacy of the standard applied by USDOC becomes even more obvious in the positive formulation of the same standard. The requirement that "dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased", defies all economic theory. It is clear that if an anti-dumping duty is imposed, this will necessarily have an anti-competitive effect for the products concerned. If, notwithstanding the imposition of an anti-dumping order, imports remain stable or increase and dumping ceases, then this must be due to factors unrelated to dumping.

23. By conditioning the determination concerning the likelihood of continuation or recurrence of dumping on what Japan has rightly referred to as "a commercially impractical scenario", producers are faced with a nearly impossible task for obtaining the lifting of an anti-dumping duty. Accordingly, US law and practice does not appear compatible with the requirements of Article 11.3.

D. THE *DE MINIMIS* REQUIREMENT OF ARTICLE 5.8 ALSO APPLIES IN THE CONTEXT OF A SUNSET REVIEW (JAPAN'S CLAIM 7)

24. With regard to the de minimis obligation, Japan has claimed that the US requirement to treat as de minimis in sunset reviews only those margins that are less than 0.5 per cent is inconsistent with the 2 per cent rule contained in Articles 5.8 and 11.3 AD Agreement.

25. The EC agrees with Japan, as well as all the other third parties which submitted written submissions, that the application of a de minimis standard lower than 2 per cent in sunset reviews is incompatible with the AD Agreement. It would, in fact, be illogical to read Article 11.3 of the AD Agreement in isolation. As other third parties have already pointed out, the text of Article 11.3 refers to the "continuation or recurrence of dumping". This is not "dumping" in the abstract. The notion of "continuation or recurrence of dumping" has a historical context and refers back to an earlier finding,

i.e. to the original investigation. On this textual basis, the de minimis threshold of 2 per cent in Article 5.8, below which "immediate termination" is required, applies equally to a sunset review.

26. The US argument in favour of a 0.5 per cent *de minimis* threshold in a sunset review amounts to saying that dumping which is not injurious in a new investigation suddenly becomes injurious in a sunset review. As the Panel in *US – Corrosion-resistant carbon steel from Germany* found with regard to the parallel provisions concerning sunset reviews for countervailing duties (Para.8.67), "We fail to see why the threshold for injurious subsidization …would become inapplicable simply by virtue of the age of the CVD". Terms such as "dumping" and "injury" mean the same throughout the AD Agreement. When the US looks at "injury" in a sunset review, it is required to determine whether "material injury" would continue or recur, i.e. the same level required in a new investigation. Why, therefore, should it be able to find that dumping at a quarter the level required for a new investigation is sufficient to cause injury in a sunset review?

E. THE REQUIREMENTS OF ARTICLE 3.3 AND 5.8 FOR THE CUMULATION OF EXPORTS IN AN INJURY DETERMINATION ALSO APPLY WITHIN THE CONTEXT OF A SUNSET REVIEW (JAPAN'S CLAIM 10)

27. Finally, in its last claim, Japan has submitted to the Panel that the USITC's decision to cumulate imports from various countries in this sunset review is inconsistent with Article 3.3, 5.8 and 11.3 AD Agreement.

28. The EC agrees with the view expressed by Japan that the requirements of Articles 3.3 and 5.8 for the cumulation of exports in an injury determination also apply within the context of a sunset review under Article 11.3 AD Agreement.

29. Article 11.3 mandates that antidumping duties shall be terminated unless the authorities determine that this would be likely to lead to continuation or recurrence of dumping and injury. The continuation or recurrence of injury is therefore part of the preconditions for the continuation of an antidumping duty.

30. As Japan has submitted, the term injury is defined, for the purposes of the entire Agreement, in Article 3 AD Agreement. Paragraph 3 of Article 3 sets out the conditions under which the effects from imports from more than one country may be cumulatively assessed, and requires, among others, that the volume of imports from each country must not be negligible. The only place where a definition of when the volume of dumped imports shall be considered "negligible" is Article 5.8.

31. Therefore, the Community is of the opinion that in a sunset review, negligible imports must not be included into a cumulative assessment of injury unless the authorities have determined that these imports are likely to become non-negligible upon revocation of the duty.

II. CONCLUSION

32. By way of conclusion, the EC would like to remark that in its various aspects, the present case is an illustration of the general tendency of US law and practice with respect to sunset reviews, which is to perpetuate anti-dumping orders, rather than to terminate them. The statistics quoted by Japan and others regarding the practice of the US authorities in sunset reviews speak for themselves. By perpetuating anti-dumping orders without exception wherever there is an interest expressed by the domestic industry, US authorities are turning the sunset provision of Article 11.3 into the opposite of what it was intended to be. As in the Empire of Charles V, on which the sun never set, the sun never seems to set on antidumping order issued by the US authorities. The EC respectfully submits that this is not in conformity with US obligations under the WTO Agreements.

33. Mr Chairman, Members of the Panel, Thank you for your attention. The EC is ready to answer any questions the Panel might wish to ask.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF KOREA

I. INTRODUCTION

1. The issue Korea wishes to highlight in this case is whether the US sunset rules are consistent with the AD Agreement. The USDOC has initiated 305 sunset reviews so far. Out of these 305 cases, the USDOC revoked the measure in 73 cases on the ground that the domestic industry did not respond to USDOC's notice of initiation. For all of the remaining 232 cases, the USDOC found that the termination of the measure would be likely to lead to continuation or recurrence of dumping. In other words, the USDOC ruled against revocation of the measure in every single case that was contested by the domestic industry.

2. In Korea's view, this record of the USDOC in these reviews establishes clearly that the US sunset rules are inconsistent with the AD Agreement.

A. AUTOMATIC INITIATION OF SUNSET REVIEW WITHOUT SUFFICIENT EVIDENCE

3. Section 751(c)(1) of the Tariff Act of 1930, as amended, mandates that the US authorities "shall" conduct a sunset review in every instance without requiring any evidentiary finding that the review is justified or necessary. This provision for automatic initiation reverses the presumption contained in Article 11 that anti-dumping measures normally expire after 5 years. Moreover, the practical effects of automatic initiation further undermines this presumption in two ways. First, automatic initiation removes, at least in part, the burden on parties favouring continuation of the measure to show that termination would result in continued dumping and injury by removing the threshold step of showing evidence supporting such a likelihood. Second, automatic initiation increases the burden on parties seeking termination of a measure by forcing them to participate in reviews that might not otherwise be initiated.

4. The text of Article 11.3 provides two different means through which a sunset review can be initiated; first, "on the authorities' own initiative"; second, "upon a duly substantiated request made by or on behalf of the domestic industry." With respect to a review initiated at the authorities' own initiative, Article 11.3 is silent about the threshold of evidence that should be met before a review is initiated. The United States has interpreted this silence to mean that there is no threshold at all.

5. Article 11.3 does not provide that there must be a review in every case. To the contrary, the primary clause of the first sentence of Article 11.3 provides that measures "shall be terminated" after five years "unless" the appropriate finding is made. The correct interpretation of this sentence is that measures will normally terminate, except when an alternative determination is made. Thus, Article 11.3 contemplates that measures may terminate without any review being conducted. By providing for automatic initiation of reviews in every case, US law makes the conduct of a review a sine qua non of termination and precludes the possibility of a measure terminating under the normal operation of the Article 11.3.

6. Moreover, nothing in the text of Article 11.3 supports the US position that a review may be initiated automatically in every case. Contrary to the arbitrary interpretation of the US, the text does not provide that "the authorities shall conduct a review every five years."

7. Article 12.1 of the AD Agreement, through the intermediary of Article 12.3, provides the context for the interpretation of Article 11.3. Article 12.3 stipulates that "the provisions of the Article shall apply *mutatis mutandis* to the initiation of reviews pursuant to Article 11".

8. With respect to the disciplines governing the initiation of reviews, Article 12.1 provides that "when the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members shall be notified and a public notice shall be given." It should be noted here that Article 12.1 does not attempt to differentiate in any way between reviews initiated at the authorities' own initiative or by or on behalf of the domestic industry. Thus, the obligation to have "sufficient evidence" before initiating a review must be construed to apply in either case.

9. The US law on the sunset review is not consistent with Article 12.1 in this respect. Under section 751(c)(1) of the US law it is mandatory for the USDOC to publish in the Federal Register a notice of initiation of a sunset review not later than 30 days before the fifth anniversary of a dumping order. This requirement to publish a notice of initiation without any supporting evidence is clearly inconsistent with Article 12.1, which provides that public notice may only be given, "when the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5."

10. Furthermore, since Article 12.1 applies to the initiation of reviews under Article 11, the absence of a reference to "sufficient evidence" in Article 11.3 itself cannot be interpreted to mean that authorities may automatically initiate the review process without any evidence. Thus, the US law is inconsistent with Article 11.3 as well as Article 12.1.

11. In particular, Article 12.1.1 provides that "a public notice of the initiation of an investigation shall contain adequate information on, inter alia, 'the basis on which dumping is alleged in the application' (Art. 12.1.1(iii)) and 'a summary of the factors on which the allegation of injury is based'" (Art. 12.1.1(iv)). If the authorities were permitted to initiate a sunset review automatically without a prior determination of the sufficiency of the evidence, there would be no reason for the requirement that the authority provide in the public notice adequate information on the basis of the alleged dumping and injury. Again, since Article 12.1.1 applies to the initiation of reviews under Article 11, the absence of a reference to "sufficient evidence" in Article 11.3 cannot be interpreted to mean that authorities can automatically initiate the review process without any evidence.

B. THE 'NOT LIKELY' STANDARD OF THE USDOC

12. The USDOC's regulation 19 C.F.R. 351.222(i)(1)(ii) sets forth a WTO-inconsistent "not likely" standard for sunset reviews. Article 11.3 of the AD Agreement stipulates that except when the authorities determine that the expiry of the duty would be likely to lead to continuation of recurrence of dumping and injury, the AD duty shall be terminated after 5 years. By switching this likely standard in Art. 11.3 to a "not likely" standard, the United States in effect flips the burden of proof on its head and requires the respondent to prove that termination of the measure will not result in continued dumping. The USDOC's use of a not likely standard is biased in favour of the continuation of the dumping order, and accordingly, is inconsistent with the WTO obligations. This unjustified shift of burden is then coupled with the arbitrarily pre-established test provided in the Sunset Policy Bulletin, which imposes an impossibly high threshold.

C. THE USDOC PRESUMES "LIKELIHOOD" THROUGH THE APPLICATION OF ARBITRARILY PRE-DETERMINED SCENARIOS

13. The Sunset Policy Bulletin directs the USDOC to examine whether the facts of the particular sunset review fall into one of four factual scenarios. If facts fall under one of the following three factual scenarios, dumping is "likely" to continue or recur:

- there has been continued dumping at any level above de minimis (i.e., 0.5%) after the imposition of the anti-dumping duty order;
- imports ceased after the imposition of the anti-dumping duty order; or
- dumping ceased thereafter, but import volumes declined significantly from pre-order level.

14. As Japan has correctly argued, the commercial reality is that in practice these three scenarios cover every case. The only scenario, under which dumping is presumed to be unlikely, is commercially impractical where dumping was completely eliminated and import volumes remained steady or even increased in terms of relative market share since the imposition of the order. Thus, the Sunset Policy Bulletin invariably leads to an unjustified and effectively irrefutable presumption of the likelihood of dumping.

15. Article 11.3 stipulates that the dumping order shall be terminated, unless the authorities determine that the expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury. This obligation to make this determination lies with the investigating authorities. The authorities cannot fulfil this obligation properly or fairly where they pre-judge the outcome by restricting the circumstances that will be deemed to justify an affirmative determination to arbitrary, pre-determined and commercially implausible scenarios, and by limiting their determination to a narrow analysis of circumscribed facts (i.e., the margin of dumping and the trends in import volumes.)

D. THE "GOOD CAUSE" BARRIER REINFORCES USDOC'S IRREFUTABLE PRESUMPTION

16. More importantly, the USDOC places an arbitrarily high "good cause" barrier upon respondents, making it practically impossible for the respondents to cross the barrier to rebut the presumption.

17. Section II.C of the Sunset Policy Bulletin states that "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."

18. Here, the other factors means factors other than the changes in the margin of dumping and the import volume. Given its obligation under Article 11.3 to determine the likelihood of dumping, there is no reason why the USDOC should not consider other relevant factors in its analysis from the beginning. There is no basis in the AD Agreement for the USDOC to limit arbitrarily the scope of its initial consideration of facts. This error is compounded by the fact that the USDOC does not simply accept evidence regarding other factors later in the proceeding, but imposes an additional burden that respondents must make a showing of "good cause" before evidence on these factors will be considered. This additional burden on the respondents is not supported by the text of Art. 11.3.

E. THE DISCIPLINES APPLYING TO AN INITIAL INVESTIGATION AND A SUNSET REVIEW

19. Finally, Korea would like to provide its views on the objective and purpose of the AD Agreement and, in this connection, why the disciplines applying to the initial investigation apply *mutatis mutandis* to the sunset review as well.

20. The AD Agreement contains detailed and complex provisions on the rules applying to various phases of anti-dumping proceedings. The imposition of an anti-dumping measure depends on the proper establishment, and unbiased and objective evaluation, of detailed facts and arguments presented by petitioners and respondents. Given that these facts are highly technical in nature, and are normally presented in an adversarial manner, they must be assessed pursuant to detailed procedural and substantive rules governing the imposition of anti-dumping measures.

21. If these detailed rules are biased in one way or the other, or lack sufficient clarity, it will be difficult to expect the outcome of anti-dumping investigations, whether initial investigations or subsequent reviews, to be fair and consistent. Therefore, it was necessary for the drafters of the AD Agreement to agree on the detailed provisions to prevent and cure any biases in the national rules and to establish multilateral control over the anti-dumping measures.

22. Article 11.3, per se, does not contain detailed substantive provisions governing the conduct of a sunset review. To enable the investigating authorities to assess detailed facts and arguments presented in a sunset review, therefore, either the detailed provisions provided elsewhere in the AD Agreement should be applied to the sunset review, or the investigating authorities of each Member are free to develop their own detailed rules for these reviews. The second option would, of course, lead to a proliferation of different rules governing the sunset review, resulting in a complete loss of multilateral control over these reviews.

23. Korea does not believe that the drafters of the AD Agreement intended the latter scenario. In Korea's view, the detailed substantive provisions provided elsewhere in the AD Agreement should apply to the sunset review under Article 11.3 in the same manner as they do to the initial anti-dumping investigation.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF NORWAY

I. INTRODUCTION

1. First of all, I would like to thank you for this opportunity to present the Norwegian views in the present case, based on our written third-party submission dated 14 October 2002. My name is Ms. Anniken Enersen. I am a legal adviser at the Ministry of Foreign Affairs, and will be representing the Government of Norway in this case.

2. Norway has addressed three issues of legal interpretation that we find to be the most critical ones in our third-party submission:

- The United States' standard of initiation of sunset reviews;
- The United States' standard of investigation of sunset reviews; and
- The *de minimis* standard applicable to sunset reviews in anti-dumping cases.

3. These issues are all very important to the functioning of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (which I will refer to as the Anti-Dumping Agreement). They are equally important to cases on countervailing duties and safeguards. The series of similar cases brought against the United States shows the great concern of WTO Members in respect of the relevant US laws, regulations and administrative practice on sunset reviews of anti-dumping and countervailing duties, and testifies to the common view, that the way they have been applied violates several provisions of the WTO Agreements. As I am sure all present here today know, the same issues arise in case DS/213 regarding the SCM Agreement which is before the Appellate Body in these days.

4. Mr. Chairman, it is our understanding that Article 11.3 of the Anti-Dumping Agreement concerning reviews of anti-dumping duties, including sunset reviews, must be interpreted in accordance with recognized principles of public international law, as codified in the Vienna Convention on the Law of Treaties.

5. Article 31 of the Vienna Convention requires that treaty provisions should be interpreted *"in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose"*.

6. The United States interprets each provision of the Anti-Dumping Agreement in isolation from the other provisions as long as there is no explicit reference to one of the other provisions of the Agreement. This is not in accordance with the said principle of the Vienna Convention, according to which all the provisions must be read in their textual context, that is to say that explicit cross references are not required.

7. Article 11.3 of the Anti-Dumping Agreement does not set out detailed substantive or procedural rules. For those obligations one must look elsewhere in the Agreement. A proper analysis of the context and purpose of Article 11.3 reveals that no provision of the Anti-Dumping Agreement can be read in isolation. In fact, all the provisions of the Agreement are applicable *mutatis mutandis* to Article 11.3 to the extent that they are relevant to sunset reviews. The Government of Norway believes that this is the case for the "sufficient evidence" standard set forth in Article 5.6 and the "*de minimis"* standard set forth in Article 5.8.

A. THE EVIDENTIARY STANDARDS REQUIRED BY ARTICLE 5.6 FOR SELF-INITIATION OF ORIGINAL INVESTIGATIONS ALSO APPLY TO SUNSET REVIEWS

8. The United States bases its position on the absence of a direct reference to an evidentiary standard in Article 11 itself. The absence of such a reference does not mean that there is no standard to be applied.

1. Object and Purpose of Article 11.3

9. The object and purpose of an anti-dumping duty are set out in Article 11.1: the duty should be maintained only as long as and to the extent necessary to counteract dumping which is causing injury.

10. It follows from Article 11.3 that, as a rule, anti-dumping duties shall be terminated no later than five years from their imposition, the presumption being that dumping is counteracted after such a period. A review is meant to take place only in exceptional cases where there is a clear indication, based on the existing situation at the time of review, that the expiry of the duty would be likely to lead to the continuation or recurrence of both dumping and injury.

11. As I have said, "initiating" a sunset review is an exceptional occurrence. It is thus not simply a matter of analysing whether continuation of the order is necessary, but also of determining whether "initiation" itself is necessary.

12. The presumption that the imposition of an anti-dumping duty will terminate after a period of five years contemplates that some duties will terminate without any review. Therefore, the object and purpose of Article 11.3 require that the administering authority first make a threshold decision as to whether to begin a sunset review at all. Initiation is not an empty or automatic decision.

2. The Context of Article 11.3

13. Furthermore, the textual context of the provision in Article 11.3 clearly mandates what the evidentiary standard is. There is an abundance of textual context that confirms that the "sufficient evidence" standard required by Article 5.6 for self-initiation in original investigations also applies to sunset reviews.

14. There are in particular three textual links that the Government of Norway would like to mention. Firstly, the textual link in Article 12.3 of the mutatis mutandis application of Article 12 to Article 11, secondly the reference to Article 5 in Article 12.1 and thirdly footnote 1 to the Anti-Dumping Agreement. I here refer to our written submission for further elaboration on this matter.

15. In Article 5.6, the authorities do not have a carte blanche to automatically initiate investigations without first having "sufficient evidence". It is illogical to presume that the Anti-Dumping Agreement only limits the administering authorities' ability to self-initiate in some instances but not in others.

16. For these reasons, the proper interpretation of Article 11.3 in accordance with its context, object and purpose requires that a sunset review initiated by the authorities should be based on "sufficient evidence".

17. Therefore, the United States statute and regulations mandating the automatic initiation of sunset reviews without any evidence are inconsistent with the Anti-Dumping Agreement both on their face and as applied in this case.

B. THE ANTI-DUMPING AGREEMENT REQUIRES A LIKELY, NOT AN UNLIKELY DETERMINATION OF CONTINUATION OR RECURRENCE OF DUMPING AND INJURY, AND THE DETERMINATION MUST BE BASED ON A "PROSPECTIVE" ANALYSIS

18. I will now turn to the "likely" standard in Article 11.3. This represents a positive obligation on the domestic authorities to "determine" the "likelihood" of the continuation or recurrence of dumping. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence that there is a probability, not some remote possibility, that dumping will continue or recur in the future.

1. The United States' Regulations

19. A textual comparison of the United States' Sunset regulations with Article 11.3 of the Anti-Dumping Agreement shows that the standard for revocation of an anti-dumping duty is not in conformity with its WTO obligations. An anti-dumping order should be revoked unless it is likely that this would lead to the recurrence or continuation of dumping and injury. By contrast, under United States' regulations, the anti-dumping duty will only be revoked where it is not likely that this would lead to the continuation or recurrence of dumping.

20. This difference is by no means only a semantic one. The "likely" standard implies a higher degree of certainty than the requirement that the duty be revoked "where it is not likely". This is also stated by an earlier Panel in the US-DRAMs-case. The reasoning that the Panel applied in interpreting Article 11.2 is perfectly transposable to Article 11.3. It is not conceivable that a stricter standard for the revocation of duties would apply under a review during the normal lifetime of a duty than in the context of a sunset review under Article 11.3, which unlike Article 11.2, establishes the expiry of the duty as a main rule.

2. The Sunset Policy Bulletin

21. The United States' WTO inconsistency on this issue does not stop at the provisions of the regulations. The Sunset Policy Bulletin impermissibly restricts any genuine factual investigation to determine prospectively whether dumping is likely to continue or recur. The term "likely" in Article 11.3 requires that the authorities undertake a prospective analysis of positive evidence to establish whether dumping is likely to continue or recur. By examining only historical dumping margins and import volumes, the USDOC, as a general practice, looks backwards rather than forward. The Sunset Policy Bulletin thus impermissibly restricts the USDOC's analysis to a retrospective one. This approach creates an irrefutable presumption that dumping will continue or recur.

22. For these reasons, the Government of Norway considers that the USDOC does not take the proper prospective approach to determine whether dumping is likely to continue in a sunset review. Therefore, we consider the United States' regulations and practice to be inconsistent with Article 11.3 both as a general practice and as applied in this case.

3. The *De Minimis* Requirement of Article 5.8 Also Applies in the Context of a Sunset Review

23. As I have already stated, public international law as codified in the Vienna Convention require that treaty provisions be interpreted in accordance with their context, object and purpose. The immediate context of Article 11.3 is Article 11.1, which spells out the object and purpose of an anti-dumping duty. Article 11.1 requires that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." The concept of "dumping which is causing injury" is central to all provisions of the Anti-Dumping Agreement. Where dumping does not cause such injury, the Agreement does not permit the imposition of anti-dumping duties.

24. Further, Article 5.8 requires that anti-dumping duties shall be terminated immediately in cases where the margin of dumping is *de minimis*, which is further defined as a margin of less than 2 per cent. It is thus prohibited to impose anti-dumping duties when the dumping margin is below this threshold.

25. There is no reason why the same *de minimis* standard should not apply to sunset reviews. Sunset reviews and the original investigation share the same object and purpose, and all impositions of anti-dumping duties must fulfil the same requirements. Allowing a lower *de minimis* percentage when conducting sunset reviews would be to disregard the very substance of the Anti-Dumping Agreement.

26. As I stated before regarding the question of automatic self-initiation, the silence of Article 11.3 is not in itself conclusive. It simply confirms that one must look elsewhere. It is clear from the overall architecture of the Agreement that the basic concepts are not repeated once they have been defined. Thus, neither "dumping" nor "injury" is defined or cross-referenced in Article 11, as their standards are self-evident from the other articles of the Agreement. This is also the case for the *de minimis* rule, which is defined once, in Article 5.8.

27. The panel report in the *US – German Steel CVD Sunset* case supports this interpretation. The panel found that the same *de minimis* standard under Article 11.9 of the SCM Agreement should apply both to original investigations and to sunset reviews of countervailing duty orders under Article 21.3 of the SCM Agreement. The ruling in the *US-DRAMs* case also supports the application of a *de minimis* standard of 2 per cent to sunset reviews.

28. For these reasons, Norway believes that the 0.5 per cent *de minimis* standard used by the United States in sunset reviews constitutes a clear violation of Article 11.3 read in conjunction with Article 5.8 of the Anti-Dumping Agreement, both as a general practice and as applied in this case.

29. Finally, I would like to underscore the importance of the decision in the present case, which is not only of significance for this specific case, but also for the legislation of the United States as such. As we all know, a number of sunset reviews are being undertaken by the United States in accordance with the same model. This applies not only to sunset reviews on anti-dumping duties, but also to such reviews on countervailing duties and safeguards.

30. Mr. Chairman, when considering the US laws, I would ask you to always bear in mind that the use of these measures is exceptional, and that their use should therefore only be prolonged in extraordinary cases.

31. Thank you for your attention.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF JAPAN – SECOND MEETING

I. INTRODUCTION

1. It is necessary to first address the proper scope of review under WTO jurisprudence as it relates to Japan's general practice claims. Effectively the United States is arguing that administrative procedures that on their face appear discretionary are exempt from scrutiny. This interpretation makes the obligations contained in Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement meaningless. Measures that appear discretionary on their face but in reality are treated as, and function like, mandatory obligations by the administering authorities are actionable. These *de facto* mandatory administrative procedures are just as WTO-inconsistent as the *de jure* mandatory obligations cited by the United States. The mere appearance of executive discretion alone is insufficient to find the Sunset Policy Bulletin WTO-consistent. The question for this Panel is whether the Sunset Policy Bulletin has a functional life of its own and provides concrete pre-established rules for conducting sunset reviews inconsistent with the AD and WTO Agreements. The answer to this question is yes.

2. Japan has demonstrated that the Sunset Policy Bulletin was published two months before USDOC began conducting sunset reviews. USDOC has followed the precepts of the Bulletin in all 227 sunset reviews, and in all of those reviews USDOC found that dumping was likely to continue. Therefore, Japan has established a "consistent practice" on the part of USDOC in conducting its likelihood analysis.

3. In its answers to the Panel's questions, the United States admits that, "Japan's alleged 'practice' simply consists of specific determinations in specific sunset proceedings." This is precisely what a "general practice" is. In *Mechanical Transfer Presses from Japan*, USDOC requested that parties submit information regarding the overall volume of imports after the 30-day deadline. The only deviation that case represents is from the 30-day substantive response deadline, not from the Sunset Policy Bulletin.

4. The United States went on to note that to satisfy the obligation the "determine" standard in Article 11.3 imposes the determination must merely be supported by sufficient evidence. The sufficient evidence standard, however, is the US judicial standard of review. This is a much lower standard than the standard of review under the AD Agreement and the WTO Agreement.

II. SUBSTANTIVE CLAIMS

5. As the Appellate Body in *US – CVD Sunset* recognized, "{t}ermination of a countervailing duty is the rule and its continuation is the exception. This basic premise should influence how all determinations within a sunset review under Article 11.3 of the AD Agreement are conducted.

A. AUTOMATIC SELF-INITIATION OF SUNSET REVIEWS WITHOUT SUFFICIENT EVIDENCE

6. The basic language of Article 11.3, read in light of the other provisions of the AD Agreement, reveals that there is an evidentiary standard with respect to initiation within the Article. The evidentiary standards in Article 5 are explicitly mentioned in both Article 12 and in footnote 1 of the Agreement. Article 12.1 through the use of the *mutatis mutandis* language in Article 12.3 reflects the

existence of that evidentiary standard in Article 11.3. With respect to footnote 1, it specifically requires an administering authority to follow the evidentiary standards in Article 5 when initiating a proceeding under the Agreement.

7. The Appellate Body's decision in *US – CVD Sunset* is not controlling in this case. The Appellate Body did not have an opportunity to review the explicit cross-reference in footnote 37 to Article 11 and to Article 21.3 of the SCM Agreement, corollary to footnote 1 to Articles 5 and 11.3 of the AD Agreement.

8. In its second submission, the United States appears to agree that footnote 1 defines the term "initiated," but the United States ignored the footnote's broader meaning. The footnote defines the term "initiated" to mean the procedures a Member is required to employ when a Member commences an investigation pursuant to Article 5. More importantly, the footnote provides that the definition of "initiated" applies to the entire AD Agreement. Article 11.3 provides that sunset reviews are "initiated" – the only definition for which appears in footnote 1. Therefore, the evidentiary procedures in Article 5 also apply to the initiation of sunset reviews.

9. In the Uruguay Round, footnote 1 was amended to incorporate the evidentiary standards of Article 5. At the same time Article 11.3 was added. By doing so, the Members ensured that investigations and sunset reviews would be "initiated" according to Article 5.

10. While the Appellate Body was correct in finding that Articles 22.1 and 22.7 of the SCM Agreement provide for public notice, it failed to recognize that the *mutatis mutandis* language of Articles 22.1 and 22.7 of the SCM Agreement (respective corollaries to Article 12.1 and 12.3 of the AD Agreement) reflects the incorporation of the evidentiary standards in Article 11 to Article 21.3 through footnote 37 of the SCM Agreement (corollary to Article 5 to Article11.3 through footnote 1 of the AD Agreement). Otherwise the *mutatis mutandis* language in Article 12 of AD Agreement makes no sense.

B. USDOC'S LIKELIHOOD STANDARD AND DETERMINATION IS WTO-INCONSISTENT

11. The United States attempts to justify its use of WTO-inconsistent language in section 351.222(i)(1)(ii) of its regulations. The United States misconstrues the Appellate Body's determination in *US – CVD Sunset*. In fact, the Appellate Body supports Japan's position. It stated that the conduct of a single sunset review does not evidence USDOC practice. In no way is this an endorsement of USDOC's general practice with respect to its likelihood determination.

12. The Appellate Body went on to state "in the absence of information as to the number of sunset reviews that have been conducted, the methodology employed by USDOC in other reviews, and the overall results of such reviews," it is difficult to find a general practice by the authorities. Japan has established that in all 227 affirmative sunset review determinations, USDOC examined and found that respondents fit into one of the three "likely" to continue dumping scenarios in section II.A.3 of the Bulletin. Consequently, unless the Sunset Policy Bulletin is amended USDOC will continue its blind adherence to those guidelines without exception.

13. In section 351.222(i)(1)(ii), which sets forth the "not likely" standard, the United States could have simply included the identical language it used in the statute in this section of its regulations. Its choice not to do so illustrates the US intent to apply a much more restrictive and WTO-inconsistent "not likely" standard to its sunset reviews.

14. The United States puts the cart before the horse in its likelihood determinations. In its second submission, the United States asserts that if there is evidence that dumping has continued at all over

the past five years, USDOC will conclude that upon revocation of the order dumping is likely to continue. The US position is contrary to the obligations in Article 11.3.

15. A sunset review is a proceeding to "determine" if dumping is likely to "continue." The use of the term "continue" and the phrase "notwithstanding the paragraphs 1 and 2" in Article 11.3 means that the likelihood of dumping must be "determined" in a sunset review even if dumping remains at the time of initiation of the sunset review. The Appellate Body in *US – CVD Sunset* confirmed this interpretation, finding that continuation of CVDs must be based on a properly conducted review and a positive determination. The panel in that same case found that the authorities have an affirmative obligation to collect positive evidence, which may consist of evidence from the original investigation, intervening reviews, and the sunset review itself. The Appellate Body confirmed this notion when it found that Article 21 reviews must be "meaningful" and "rigorous." Nonetheless, the United States claims that any "continuation" of dumping since imposition of the order will result in an affirmative determination. In case after case, USDOC never bases its determination on any type of positive prospective evidence. This type of review is neither meaningful nor rigorous.

16. The United States uses the "good cause" standard to further restrict USDOC ability to make a prospective determination and solidifies the irrebuttable presumption. The United States cited two sunset review cases in its rebuttal. USDOC's final determinations in both cases were, however, based only on past margins and import volumes as required by the Sunset Policy Bulletin sections II.A.3 and 4.

17. If USDOC were to conduct a proper likelihood determination, there would be no "good cause" standard at all. USDOC would simply accept and evaluate all evidence submitted. The Sunset Policy Bulletin section II.C., however, shifts the burden to respondents to rebut the presumption, and restricts USDOC's ability to incorporate other information into its determination.

18. In this case, the United States applied the same result-oriented logic as it does in every case. The United States argues that there was no evidence to support the inference that Japanese producers/exporters would no longer dump upon termination. Yet, in fact, there was such evidence on the record in this case. The United States simply rejected the evidence, and its logical implication.

19. The United States assertion that the likelihood determination is qualitative is false. Article 2 requires that all dumping determinations be based on a quantitative analysis. In fact, the US approach is neither qualitative nor quantitative. It simply relies on the presumption that any amount of dumping over the past five-years is sufficient to continue the imposition of the anti-dumping order.

20. The United States reads the Appellate Body's decision out of context. Contrary to the US assertion, the Appellate Body in *US – CVD Sunset* supports Japan's position, finding that the amount of subsidization is relevant to the injury determination.

21. The panel in *US – CVD Sunset* supports Japan's argument, stating "in our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization." The recent panel in *EC – Bed Linens* also indicates that quantification is a must. Indeed, without an assessment of the magnitude of the probable margin of dumping, one cannot determine the likelihood of "dumping." A "dumping" determination cannot be made in the abstract.

22. Finally, USDOC's rejection of a respondent's submission based on its 30-day submission rule was inconsistent with Articles 6.1, 6.2, and 6.6. The 30-day requirement of Article 6.1.1 is not the end of the analysis, but is an absolute minimum for initial responses, as the Appellate Body in *US – Hot Rolled Steel* stated. A proper interpretation requires examination of the broader obligations contained throughout Article 6. Article 6.1 sets forth the basic rule that parties should be given

"sufficient opportunity" to present all evidence and argumentation within the time constraints imposed by Article 11.4. As demonstrated in *Mechanical Transfer Presses from Japan*, USDOC is able to provide respondents an opportunity to submit evidence with the case brief in a sunset review. Article 6.1 requires USDOC to do so at the time of the case brief in other sunset reviews. Article 6.2 requires the authorities to provide respondents a full opportunity to defend their interests. In this context, Article 6.9 requires the authorities to disclose the essential facts under consideration to allow the parties to defend their interests. The case brief submitted by NSC was its only opportunity to defend its interests after learning what essential facts were under consideration. Therefore, the US refusal to accept NSC's defense in this case is contrary to its Article 6.2 obligations. Under Article 6.6, the authorities are obliged to consider all information in the proceeding. As the Appellate Body in *Bismuth II* stated, the authorities are not free to ignore parties' submitted information. In sum, USDOC's rejection of NSC's submission was inconsistent with Articles 6.1, 6.2, and 6.6.

C. THE MAGNITUDE OF THE DUMPING MARGIN LIKELY TO PREVAIL, ZEROING PRACTICE, AND *DE MINIMIS* STANDARD

23. Japan has argued that reporting WTO-inconsistent dumping margins to the USITC for purposes of its injury analysis is inconsistent with the United States' obligations under Article 11.3. Contrary to the US argument that "there is no provision of the Agreement that requires or precludes the USITC from considering the magnitude of the margin," the obligations of Articles 3.4 and 3.5 are incorporated within Article 11.3 through the definition of injury provided in footnote 9.

24. The Sunset Policy Bulletin, unless a case falls within the limited exceptions as stated in section II.B.1 through II.B.3, irrefutably presumes that the original dumping margins will resume. In this particular case, USDOC also mechanically applied section II.B.1 of the Sunset Policy Bulletin to report the dumping margin in the original investigation to the USITC, ignoring all other facts presented by a respondent. This practice is exactly what the Appellate Body in *US – CVD Sunset* condemned.

25. USDOC's application of dumping margins with "zeroed-out" negative margins to a sunset review is inconsistent with US WTO obligations. Article 2 defines how "dumping" is determined throughout the AD Agreement, including sunset reviews. Article 2.4 sets forth the rules for calculating a dumping margin and is the basis for the dumping determination. Article 2.1 requires that the "fair comparison" in Article 2.4 be made for the whole of the product under consideration, not a subset of the product. A zeroing methodology excludes margins for certain subsets of the product when calculating a dumping margin. Therefore, a dumping determination using a zeroing methodology is not consistent with the obligations of Article 2. Because USDOC uses dumping margins that "zero-out" negative margins when determining whether "dumping" will occur in the future and then reporting the magnitude of that dumping, the United States acts inconsistently with its obligations under Article 11.3.

26. The *de minimis* standard contained in Article 5.8 to sunset reviews applies in Article 11.3. Given the textual difference, particularly the lack of the phrase "for the purpose of this paragraph" in Article 5.8 of AD Agreement, and in light of its negotiating history, the *de minimis* standards in the SCM Agreement and the AD Agreement are not identical, and therefore, the reasoning of the Appellate Body in *US – CVD Sunset* does not apply in this case.

D. THE LIKELIHOOD DETERMINATION MUST BE COMPANY SPECIFIC

27. In response to question 25(c), the United States incorrectly asserted that all the provisions of Article 6 contain some form of evidentiary and procedural components, yet the substantive components of those provisions are not incorporated into Article 11.3. In fact, the negotiating history shows that all the provisions of Article 6 are procedural or evidentiary in nature. As such, they are all

expressly incorporated into Article 11. The fact that some of those procedures may have substantive implications does not foreclose their procedural effect.

28. Article 6.10, which sets forth the rule of a company-specific dumping determination, does not contain any substantive rules on how to determine "dumping" on a company-specific basis. Such substantive rules are set forth in Article 2. The obligations contained in Article 6.10 are procedural in nature and therefore incorporated within Article 11.

E. THE USITC'S DECISION TO CUMULATE IMPORT WITHOUT ASSESSING NEGLIGIBILITY IS INCONSISTENT UNDER ARTICLE 11.3

29. In response to question 22, the United States asserts that use of the term "investigation" in Article 3.3 limits the applicability of the negligibility standard only to original investigations. Contrary to the US assertion, Article 3.3, which refers to "assessing the effects of such imports" for determining injury, is inseparable from Articles 3.1, 3.4 and 3.5, and, in accordance with footnote 9, must be evaluated in conjunction with one another, whether in an original investigation or a sunset review.

30. There were conflicting views among the Members on the permissibility of cumulative assessment in the Tokyo Round AD Code. The newly added Article 3.3 in the Uruguay Round AD Agreement and the term "may" in Article 3.3 resolved this issue. Under the current AD Agreement, the cumulative assessment is permissible only when certain conditions set forth in Article 3.3 are met.

31. Japan claims in the terms of reference that Article 3.3 must be observed when making a cumulative assessment in sunset reviews. To rebut the US argument that Article 3.3 does not apply to Article 11.3, Japan argues that no cumulative assessment would be permitted if Article 3.3 were not to apply to sunset reviews. Japan's argument is thus within the terms of reference.

32. Contrary to the US argument, the Appellate Body in *US – CVD Sunset* supports Japan's claim. The Appellate Body noted that footnote 45 (the corollary to footnote 9 of the AD Agreement) indicates that the term "injury" "shall be interpreted in accordance with the provisions of {Article 15}." Because Article 11.3 requires the USITC to determine the likelihood of future "injury," the USITC must follow the obligations set forth in Article 3.

33. The United States argued that the USITC had addressed the volume of subject imports in the USITC's report. To the contrary, neither one of these sections, nor any other section in the USITC's report addressed the 3 per cent / 7 per cent negligibility standard when deciding to cumulate imports from Japan. By not considering whether imports from Japan were negligible, the USITC acted inconsistently with its WTO-obligations.

F. ARTICLE X:3(A) OF GATT 1994 REQUIRES THE UNITED STATES TO ADMINISTER ITS LAWS IN A UNIFORM, IMPARTIAL, AND REASONABLE MANNER

34. As this issue has been thoroughly briefed, we will not repeat our arguments here. We do note, however, that the US assertion that Japan has not presented any evidence to support its claims with respect to this issue is simply false.

III. CONCLUSION

35. For these reasons, Japan respectfully requests that the Panel: (1) find that the above-mentioned US laws, regulations, administrative procedures and its determinations are inconsistent with its WTO obligations and (2) recommend that the United States take appropriate actions to conform to its obligations.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES – SECOND MEETING

1. The claims raised by Japan in its submissions related to self-initiation standards, an alleged *de minimis* requirement, the evidentiary and procedural requirements applicable to sunset reviews, and an alleged strict quantitative negligibility requirement for sunset reviews, fail because they rely on obligations not found in Article 11.3 of the AD Agreement. On this basis, the Panel should reject Japan's claims and refuse to impute into Article 11.3 of the AD Agreement "words that are not there."

2. Consistent with DSU Article 3.2 and accepted WTO jurisprudence, the United States has argued that the Panel should interpret the text of the AD Agreement, and in particular Articles 11.3 and 11.4, in accordance with the ordinary meaning of the terms of the AD Agreement in their context and in light of the Agreement's object and purpose. This should be a straightforward exercise because the terms themselves are straightforward.

3. Simply put, Article 11.3 provides that a definitive antidumping duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of dumping and injury – is made. This likelihood finding is made in the context of a sunset review that, according to the explicit terms of Article 11.3, may be initiated on one of two bases – on an authority's "own initiative" *or* upon a "duly substantiated request" by or on behalf of the domestic industry. There is no textual or contextual qualification of the right to initiate on the authority's "own initiative." There is also no requirement in Article 11.3 or elsewhere in the AD Agreement to consider the magnitude of current dumping in determining the likelihood that, absent the antidumping duty, dumping would be likely to continue or recur or even to quantify the dumping margins likely to prevail in the event of revocation. Further, there is no requirement in Article 11.3 or elsewhere in the AD Agreement to make likelihood of dumping determinations on a company-specific basis. Neither is there a requirement in Article 11.3 or elsewhere in the AD Agreement that the negligibility standards of Article 5.8 apply to the likelihood of injury determination in sunset reviews. Finally, under the terms of Article 11.4, a sunset review must be conducted in accordance with the evidentiary and procedural requirements of Article 6. Commerce's sunset determination in corrosion-resistant steel from Japan comports with all of the obligations required by the terms of the AD Agreement.

4. In contrast to the United States' text-based analysis, Japan makes various assumptions regarding the "purposes" of various provisions of the AD Agreement and then attempts to derive from these alleged purposes obligations not found in the text. This approach, of course, is the very antithesis of the basic principle of treaty interpretation reflected in Article 31 of the Vienna Convention.

5. In the recent case of *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*,[1] the Appellate Body rejected the interpretive approach advocated by Japan. First, the Appellate Body rejected a claim by the EC that the *de minimis* standard for countervailing duty investigations is also applicable to countervailing duty sunset reviews by virtue of Article 21.3 of the SCM Agreement. Second, the Appellate Body affirmed the panel's rejection of a claim by the EC that the provisions of US law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the SCM Agreement. Although *Corrosion-Resistant Steel from Germany* addressed Article 21.3 and other provisions of the SCM

[1] WT/DS213/AB/R, Report of the Appellate Body, adopted 19 December 2002.

Agreement, the relevant provisions of the AD Agreement are essentially identical to those of the SCM Agreement and the Appellate Body's reasoning is equally persuasive in this proceeding.

6. Four examples of that reasoning are very illuminating with respect to the claims Japan makes before this Panel. First, the Appellate Body began its analysis both on the self-initiation issue and the *de minimis* issue with the text of Article 21.3, the substantive sunset review provision, in an effort to determine whether that text includes the same alleged obligations as those claimed by Japan in the instant dispute. In this regard, the Appellate Body recognized that (1) "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning,'"[2] and (2) "when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may take place."[3] Second, the Appellate Body noted that Article 21.3 of the SCM Agreement contains no explicit cross-reference to evidentiary rules relating to initiation and went on to state that, "[w]e believe the absence of any such cross-reference to be of some consequence given that, as we have seen . . . the drafters of the SCM Agreement have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings."[4] Third, the Appellate Body accorded meaning to the fact that there is an express reference in Article 21.4 of the SCM Agreement to Article 12 (regarding evidence), but not to Article 11 (regarding initiation). The lack of a cross-reference was interpreted by the Appellate Body as an indication that "the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3."[5] Finally, the Appellate Body made findings regarding the object and purpose of the SCM Agreement, concluding that, "[t]aken as a whole, the main object and purpose of the SCM Agreement is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures."[6]

7. In addition to the general legal issues just discussed, Japan has also made case-specific claims regarding Commerce's sunset determination involving corrosion-resistant carbon steel flat products from Japan. Commerce's determination – that the expiry of the antidumping duty order would be likely to lead to the continuation or recurrence of dumping – is based on *continued dumping* over the life of the order. After providing all interested parties with ample opportunity to submit for the record their views as well as any information they deemed to be relevant, Commerce reasonably concluded that, in the event of revocation, dumping is likely to continue or recur.

8. As the United States has detailed in it submissions, the AD Agreement does not require the USITC to engage in a negligibility assessment in deciding whether to cumulate imports in sunset reviews. Specifically, the United States has emphasized that neither the text of the Agreement nor its object and purpose supports Japan's assertion. Indeed, the Appellate Body in *Corrosion-Resistant Steel From Germany* recently rejected the panel's conclusions that were premised on arguments similar to those made by Japan here and found that the *de miminis* standard in Article 11.9 of the SCM Agreement did not apply to Article 21.3 sunset reviews. Applying the same reasoning underlying the Appellate Body's report with respect to Article 11.9 of the SCM Agreement compels the conclusion in this matter that the negligibility standards of Article 5.8 of the AD Agreement pertaining to original investigations do not apply to Article 11.3 sunset reviews.

9. Notwithstanding the Appellate Body's report in *Corrosion-Resistant Steel From Germany*, Japan continues to argue that the negligibility standards of Article 5.8 are incorporated into Article 11.3 reviews via footnote 9 to Article 3. However, the Appellate Body found that the text of

[2] *Id.*, para. 65.
[3] *Id.*, para. 104.
[4] *Id.*, para. 105 (emphasis in original).
[5] *Id.*, para. 72.
[6] *Id.*, para. 73.

Article 15 of the SCM Agreement, including its footnote 45, which is identical to footnote 9, does not support the conclusion that a *de minimis* subsidy is non-injurious.[7] The Appellate Body also rejected the conclusion that an interpretation that the same *de minimis* rate be considered injurious in the original stage but not at the sunset stage would lead to irrational results, and observed that original investigations and sunset reviews are distinct processes with different purposes, which may explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.[8]

10. Quite simply, in applying the Appellate Body's reasoning from its report in *Corrosion-Resistant Steel From Germany* to this matter, it is evident that the negligibility standard in Article 5.8 is an agreed rule that if imports are found to be negligible in an *original investigation*, authorities are obliged to terminate their investigation, with the result that no antidumping order be imposed. Thus, Japan's contentions should be rejected.

[7] *Id.*, para. 79.
[8] *Id.*, paras. 84-89.

ANNEX E

Questions and Answers

Content		Page
Annex E-1	Replies of Japan to Questions of the Panel – First meeting	E-2
Annex E-2	Reply of Japan to Question 27 of the Panel – Appendix I	E -46
Annex E-3	Replies of the United States to Questions of the Panel – First meeting	E -53
Annex E-4	Comments by Japan on US Replies to Panel Questions – First meeting	E -85
Annex E-5	Comments by the United States on Japan's Replies to Panel Questions – First meeting	E -94
Annex E-6	Third party replies by Brazil to Questions of the Panel	E -100
Annex E-7	Third party replies by the European Communities to Questions of the Panel	E -103
Annex E-8	Third Party replies by Norway to Questions of the Panel	E -114
Annex E-9	Replies of Japan to Questions of the Panel – Second meeting	E -117
Annex E-10	Replies of the United States to Questions of the Panel – Second meeting	E -133
Annex E-11	Comments by Japan on US Replies to Panel Questions – Second meeting	E -151
Annex E-12	Comments by the United States on Japan's Replies to Panel Questions – Second meeting	E -160

ANNEX E-1

REPLIES OF JAPAN TO QUESTIONS OF THE PANEL – FIRST MEETING

I. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS

BOTH PARTIES

1. The United States argues that certain US legal instruments cited by Japan are discretionary rather than mandatory and therefore cannot be challenged as such under the WTO Agreement.[1] Please provide the Panel with detailed information regarding the legal status and interrelationships, if any, of the following instruments under US law, and in particular whether they are mandatory or discretionary. In particular, in light of the relevant WTO dispute settlement reports, the Panel would like to know whether each of these instruments have an operational life of their own under US law, and whether the DOC is required to follow their provisions in sunset reviews.

(i) Tariff Act of 1930 (as amended by the URAA).

(ii) Statement of Administrative Action,

(iii) Sunset Regulations, and

(iv) Sunset Review Policy Bulletin.

Reply

1. The above question correctly lists the hierarchy of the US legal system. Whether these instruments have a "functional life" of their own,[2] however, depends on the underlying facts and circumstances of the specific provision of the instrument. For instance, with respect to automatic initiation, the Tariff Act of 1930 (the "Act"), both on its own and in conjunction with section 351.218(a) and (c) of USDOC's Sunset Regulations, mandates automatic initiation of all sunset reviews.

2. The SAA also expressly provides that USDOC should automatically initiate sunset reviews. The SAA generally provides an authoritative interpretation of the Act.[3] As the panel in *US – Section 301* has stated, the SAA is "an important interpretative element in the construction of the statutory

[1] *See*, for example, First Written Submission of the United States paras. 35 and 126.

[2] The panel in *US – Export Restraints* explained that an instrument is subject to review when the instrument has a "functional life of its own." The panel stated "{I}n considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with **a functional life** of its own, it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations." (emphasis added). *United States – Measures Treating Export Restraints As Subsidies*, WT/DS194/R at para. 8.85 (29 June 2001) (herein "*US – Export Restraints*").

[3] *See* SAA, at 656 (**Ex. JPN-2 at 4040**) ("As is the case with earlier Statements of Administrative action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements.").

language."[4] Japan does not assert that the SAA has an operational life or status independent of the statute, regulations, or the Sunset Policy Bulletin. None of Japan's claims rest on the SAA alone. Rather, Japan asserts that the SAA strongly influences how these various instruments are applied by USDOC and the USITC.

3. USDOC's Sunset Regulations are similar to the Act in that the nature of the claim and the circumstances surrounding these claims will affect whether a specific provision of the regulations have a "functional life" of their own. In this case, both the "not likely" standard in section 351.222(i)(1)(ii) and the *de minimis* standard in section 351.106(c)(1) are both mandatory requirements set forth in the regulations. Thus, with respect to these provisions, USDOC's Sunset Regulations do have an operational life or status independent of the statute giving rise to a WTO-inconsistency on their own.

4. Japan also believes that the Sunset Policy Bulletin has a functional life or status independent of the statute, SAA, and Sunset Regulations, on its own. The Sunset Policy Bulletin provides "guidance on methodological or analytical issues not explicitly addressed by the statute and regulations."[5] Section II.A.2 of the Sunset Policy Bulletin mandates that USDOC make determinations on an order-wide basis. Sections II.A.3 and 4 of the Sunset Policy Bulletin sets forth a concrete methodology that has been faithfully and consistently followed by USDOC in numerous cases. The best measure of the "functional life" of the Sunset Policy Bulletin is the history of USDOC sunset determinations. It is hard to imagine a more consistent set of decisions. Of the 228 sunset reviews in which the domestic industry participated, USDOC found that dumping was "likely" to continue in every single case.[6] The USG attempts to assert that the use of discretionary terms such as "normally" implies that the precepts of the Sunset Policy Bulletin are not legally binding. Yet because USDOC has faithfully followed the directives of the Sunset Policy Bulletin 228 times without exception the discretionary nature of "normally" is destroyed. Thus, the Sunset Policy Bulletin does have a "functional life" of its own and is a challengeable measure before this Panel.

2. Regarding US practice in sunset reviews, the Panel notes that previous panels have held that practice as such cannot be challenged under WTO law.[7] In light of the findings in previous WTO dispute settlement reports on this issue, please indicate what constitutes US practice in sunset reviews, where it can be found and whether it is challengeable under WTO law.

Reply

5. As Japan has demonstrated, the methodologies that the Sunset Policy Bulletin sets forth to determine the likelihood of dumping in sunset reviews are WTO-inconsistent. Also as Japan has shown, the history of USDOC practice shows that USDOC does not have effective discretion to deviate its practice from the provisions of the Sunset Policy Bulletin. The Sunset Policy Bulletin, therefore, establishes a de facto set of mandatory "administrative procedures" in violation of the AD Agreement and the WTO Agreement.

---

[4] *Panel Report, US – Section 301 Trade Act*, (WT/DS152/R) (22 December 1999) at para.7.133, as quoted in the *Panel Report, US – Countervailing Measures*, (WT/DS212/R) (31 July 2002), at footnote 398.

[5] *Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin* 63 Fed. Reg. 18871, 18872 (16 April 1998) (hereinafter "Sunset Policy Bulletin") (**Ex. JPN-6**).

[6] *See* Ex. JPN-31.

[7] *See*, for example, Panel Report, *United States – Measures Treating Exports Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R and Corr.2, adopted 23 August 2001, para. 8.126. Also see, Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate"*), WT/DS206/R and Corr.1, adopted 29 July 2002, para. 7.20. The parties are requested to discuss ***all*** relevant dispute settlement reports.

6. Further, there is an important distinction between the cases mentioned by the Panel and this case. In this case, the Sunset Policy Bulletin is an actual written codification of USDOC's concrete practice. In neither of the two cases cited by the Panel, US–Export Restraints or US Steel Plate, were the alleged US practices codified in a formal policy bulletin.

7. In fact, as the panel in *US – Steel Plate* indicated, general practices that set forth pre-established rules for the conduct of anti-dumping proceedings are actionable as "administrative procedures."[8] In that case, the panel rejected India's claim that USDOC's "facts available" practice had a functional life of its own and was therefore an actionable measure.[9] In this case, however, the Sunset Policy Bulletin represents a pre-established codification of USDOC's "general practice" addressing how it will conduct every sunset review. The panel in *US – Countervailing Measures*[10] has stated "we are of the view that the existence of some form of executive discretion alone is not enough for a law to be prima facie WTO-consistent, what is important is whether the government has an effective discretion to interpret and apply its legislation in a WTO-inconsistent manner." Moreover, the panel in *US – Section 301 Trade Act*,[11] also stated that "[i]t simply does not follow from this test, as sometimes has been argued, that legislation with discretion could never violate the WTO." Consequently, the mandatory nature of the Sunset Policy Bulletin gives it an operational life independent from the Act, the SAA, or the Sunset Regulations and provides an actionable WTO-inconsistent measure.

JAPAN

3. What are the mandatory provisions of US legal instruments challenged by Japan in this dispute?

Reply

8. Japan challenges the following mandatory provisions of the US statute, Sunset Regulations, and the *de facto* mandatory provisions of the Sunset Policy Bulletin:

(b) Section 751(c)(1) of the Act, which provides that "the administering authorities and the Commission shall conduct a review" in connection with USDOC's automatic initiation of sunset reviews;

(c) Section 351.222(i)(1)(ii) of the Sunset Regulations, which establishes USDOC's "not likely" standard to determine whether to revoke anti-dumping duty orders in sunset reviews;

(d) Section 351.106(c) of USDOC antidumping and countervailing duty regulations, which sets forth the 0.5% *de minimis* standard for sunset reviews;

(e) *de facto* mandatory administrative procedures of the Sunset Policy Bulletin in:

(i) Section II.A.3 and 4 in connection with the likelihood of dumping determination;

(ii) Section II.A.1 in connection with the use of pre-WTO dumping margins and "zeroed-out" dumping margins as the basis of the dumping determination;

[8] *See US – Steel Plate*, WT/DS206/R at 7.22.
[9] *See id*. at 7.23.
[10] *United States-Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, at para. 7.123 (31 July 2002).
[11] WT/DS152/R, at para.7.54 (22 December 1999).

(iii) Section II.B in connection with the determination of the magnitude of dumping likely to prevail and reported to USITC for its injury analysis; and

(iv) Section II.A.2 in connection with the likelihood determination on an order-wide basis.

4. Can Japan explain what it means by the term "de facto mandatory" or "de facto binding", and whether Japan can find any specific reference to such de facto measures in the Anti-dumping Agreement? Even if so, are such de facto measures susceptible to challenge? Please discuss with reference to any relevant WTO dispute settlement reports.

Reply

9. Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement explicitly require that each Member conform its statutes, regulations, and "administrative procedures" to its WTO obligations. Both of these provisions use the term "administrative procedures," therefore, the WTO Agreement and the AD Agreement contemplate general practice claims regarding a Member's WTO-inconsistent administrative procedures. The text of Article 18.4 does not restrict itself to "administrative procedures" that only explicitly mandate the authorities to take certain actions. Rather, Article 18.4 also contemplates "administrative procedures" that are implicitly mandatory in nature and thereby actionable under the WTO and AD Agreements. Thus, an assertion that an instrument is discretionary is rebuttable.

10. The USG attempts to assert that the "administrative procedures" contained in its Sunset Policy Bulletin are discretionary and therefore not actionable under the AD Agreement. The USG claims that the Sunset Policy Bulletin*'s* adoption of the word "normally" in Section II.A.3 and 4 makes USDOC's likelihood/unlikelihood dumping determination in the Sunset Policy Bulletin discretionary.[12] Previous panels, however, have found that even discretionary instruments would be actionable depending on the nature of the obligations contained in those provisions.[13] The panel in *US – Countervailing Measures* found that the mere appearance of executive discretion alone is insufficient to find a law WTO-consistent.[14] The panel in that case held that, "what is important is whether the government has an effective discretion to interpret and apply its legislation in a WTO-consistent manner."[15] Consequently, the issue is whether the Sunset Policy Bulletin provides USDOC with effective discretion or whether the Sunset Policy Bulletin sets forth *de facto* mandatory obligations within USDOC's "administrative procedures." WTO precedent recognizes that substance matters more than form in determining the true operation of the measure at issue.

11. Japan believes that USDOC's continued adherence to the Sunset Policy Bulletin and its four factor test, without considering "other factors" establishes a complete lack of any "effective discretion" on the part of USDOC. The Sunset Policy Bulletin, therefore, is a *de facto* mandatory obligation preventing USDOC from interpreting its legislation in a WTO-consistent manner.

12. Japan uses the term "*de facto*" to mean a situation where the domestic "administrative procedures," as those codified in the Sunset Policy Bulletin, appear to be discretionary, but in reality

---

[12] We note, as argued in our first and second submissions, that sections II.A.1 and 2 even do not contain any words suggesting discretion, such as "normally."

[13] *See United States – Sections 301-310 of the Trade Act of 1974* ("*Section 301*"), WT/DS152/R at para. 7.27 (22 Dec. 1999):

> even though the statutory language granting specific powers to a government agency may be *prima facie* consistent with WTO rules, the agency responsible, within the discretion given to it, may adopt internal criteria or administrative procedures inconsistent with WTO obligations which would, as a result, render the overall law in violation. *Id*.

[14] WT/DS212/R, at para. 7.123 (31 July 2002) (Report of the Panel).

[15] *Id*. (citing the panel report in, *US – Section 301*, WT/DS152/R, at paras. 7.53-7.54).

the administering authority consistently follows the directives of the Sunset Policy Bulletin as if they were mandatory.[16] In the present case, USDOC has followed the directives of the Sunset Policy Bulletin in every single sunset review – 228 times. It is hard to imagine a better example of a measure that functions as a mandatory rule, regardless of the label applied.

5. Does Japan agree that the Sunset Policy Bulletin is not a mandatory instrument under US law, but that the DOC in implementing that Bulletin has applied a standard which is inconsistent with the Agreement? In other words, is Japan challenging:

- **the Bulletin as mandatory as such;**
- **the Bulletin, although not mandatory, is nevertheless being applied by the DOC in a WTO-inconsistent manner and the DOC never deviates from that manner (that is, is Japan saying that the Bulletin gives the DOC the discretion to act in a WTO-compliant manner but that the manner in which the DOC applies the Bulletin is always WTO-inconsistent); or**
- **the application of the Bulletin by the DOC in this specific case?**

Reply

13. Japan challenges:

(f) The Sunset Policy Bulletin as a *de facto* mandatory instrument requires USDOC to follow dumping determination methodologies that are WTO-inconsistent. When USDOC applies these methodologies, it always results in WTO-inconsistent determinations. Although the Sunset Policy Bulletin in theory appears to provide USDOC some discretion not to follow these methodologies, USDOC has in fact never deviated from these methodologies. In fact, as discussed in question 4, the Sunset Policy Bulletin*'s* discretionary language is meaningless and constitutes a *de facto* mandatory WTO-inconsistent "administrative procedure."

(g) In addition, the application of the Sunset Policy Bulletin by USDOC in this specific case is also inconsistent with the USG's obligations under the AD Agreement.

6. Does Japan contend that the SAA and/or the Sunset Policy Bulletin is an "administrative procedure" within the meaning of Article 18.4 of the Anti-dumping Agreement? If so, why does Japan so contend and how is such contention to be understood in the light of Japan's answers to questions 3-5 supra?

Reply

14. As discussed in response to question 4, Japan believes that the Sunset Policy Bulletin is an "administrative procedure" within the meaning of Article 18.4. The plain and ordinary meaning of "administrative procedure" are those methods and processes before an administrative agency. The Sunset Policy Bulletin explicitly states that it sets forth "guidance on methodologies and analysis not explicitly addressed by the statute and regulations." Thus, by its very definition the Sunset Policy Bulletin is an "administrative procedure" under Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement. The Sunset Policy Bulletin is therefore subject to the scrutiny of this Panel.

15. We note that Japan is not challenging the WTO-consistency of the SAA itself.

[16] *See The New Shorter Oxford English Dictionary*, vol. I at 615 (1993) (defining de facto as: "in fact, in reality; in actual existence, force, or possession, whether by right or not.").

8. With respect to the US Sunset Regulation:

JAPAN

(a) How does Japan respond to the US' argument that the DOC has discretion regarding the application of the "likely vs. not likely standard" and that the provision in the Sunset Regulations pointing to the "not likely standard" is ministerial and merely a shorthand for a negative sunset determination rather than setting out a standard to be followed by the DOC?

Reply

16. The USG's argument is inconsistent with its own statement in its Sunset Regulations.[17] First, in the preamble of the regulations, USDOC states explicitly regarding section 351.222(i)(1) that "{t}hese revisions are intended to clarify the circumstances under which the Department will revoke an order."[18] USDOC then states:

> Circumstances under which the Secretary will revoke an order or terminate a suspended investigation. ... Paragraph (i)(1)(ii) provides for revocation or termination within 240 days (or 330 days where a full sunset review is fully extended) after initiation of the sunset review where the Department determines that revocation or termination is not likely to lead to continuation or recurrence of a countervailable subsidy or dumping, as applicable.

17. The USG explained in *US – Export Restraint* that the preamble to USDOC's regulations evidences "an agency's contemporaneous understanding of its proposed rules," which "may be consulted to determine the proper interpretation of an agency's regulations."[19] As its own statement, the preamble of Section 351.222(i)(1)(ii) shows that USDOC will revoke an anti-dumping duty order when it finds the continuation or recurrence of dumping is "not likely."

18. This intention was incorporated into the text of the regulations. The introductory paragraph in section 351.222(a) of USDOC's Sunset Regulations, notes that:

> Generally, a revocation or termination may occur only after the Department or the Commission have conducted one or more reviews under section 751 of the Act. This section contains rules regarding requirements for a revocation or termination; and procedures that the Department will follow in determining whether to revoke an order or terminate a suspended investigation.[20]

19. US sunset reviews are part of the procedures addressed in section 751 of the Act for revoking or terminating anti-dumping duty orders. Therefore, the provisions in section 351.222 of USDOC's regulations contain substantive procedures for revocation in a sunset review under the statute.

20. Section 351.222(i) then addresses the conditions necessary for USDOC to terminate an anti-dumping duty order under the statute:

> (i) Circumstances under which the Secretary will revoke an order or terminate a suspended investigation. (1) In the case of a sunset review under §351.218, the

---

[17] *See Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 63 Fed. Reg. 13516, 13519 (20 March 1998) (**Ex. JPN-5**).

[18] *Id*.

[19] *US – Export Restraint*, para. 8.111.

[20] 19 C.F.R. § 351.222(a) (**Ex. JPN-3 at 230**).

> Secretary will revoke an order or terminate a suspended investigation: ... (ii) under section 751(d)(2) of the Act where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of a countervailing duty or dumping ... .[21]

21. The preamble and the text of the regulations demonstrate that USDOC will only revoke an anti-dumping duty order where it determines that dumping is "not likely." No other provisions of the Sunset Regulations provide for any other situations in which USDOC will revoke an anti-dumping duty order. USDOC confirmed this in *Brass Sheet and Strip from the Netherlands*,[22] stating "the Department is required to revoke the order if, based on the record of the proceeding, the Department determines that dumping is not likely to recur."[23]

22. This "not likely" standard is imbedded in the Sunset Policy Bulletin. The Sunset Policy Bulletin in section II.A.4, sets forth a single scenario in which USDOC will determine that dumping is "not likely," while section II.A.3 sets forth three other scenarios in which USDOC will determine that dumping is "likely." No other scenarios are provided for in the Sunset Policy Bulletin. These scenarios show that USDOC distinguishes the "not likely" standard from the "likely" standard. Consistent with the regulations, the "not likely" scenario is the only scenario in which satisfaction of it will result in revocation.

23. Furthermore, it makes no sense to argue that only the language in section 351.222(i), titled "*Revocation or termination based on sunset review*," which applies to Article 11.3 reviews, is ministerial as opposed to section 351.222(b), titled "*Revocation or termination based on absence of dumping*," which applies to Article 11.2 reviews. These two sub-sections are parallel provisions and provide substantive rules applicable to these two reviews. The underlying statute for Article 11.2 revocation reviews – section 751(b) of the Act[24] – also uses the term "likely." Yet the panel in *US – DRAMs* still found that USDOC's regulations to be WTO-inconsistent.[25] Upon the panel report in *US – DRAMs*, USDOC amended the section 351.222(b)(1)(ii) as follows:

> (ii) If the Secretary determines, based on ..., that the antidumping duty order or suspension of the antidumping duty investigation is no longer warranted, the Secretary will revoke the order or terminate the investigation."[26]

24. Section 351.222(b), before the amendment in 1999 due to the panel's determination in *US – DRAMs*,[27] provided:

> (1) The Secretary may revoke an antidumping order or terminate a suspended antidumping investigation if the Secretary concludes that:
>
> (i) ....

---

[21] 19 C.F.R. § 351.222(i) (**Ex. JPN-3 at 234**).

[22] *Final Results of Full Sunset Review: Brass Sheet and Strip From the Netherlands*, 65 Fed. Reg. 735 (6 January 2000) (**Ex.JPN-25l**).

[23] *Id*., 65 Fed.Reg. at 740.

[24] *See* 19 USC. § 1675(b)(2) ("In conducting a review under this subsection, the Commission shall – (A) in the case of a countervailing duty order or antidumping duty order or finding, determine whether revocation of the order of finding is **likely** to lease to continuation or recurrence of material injury.") (emphasis added).

[25] *See US – DRAMs*, WT/DS99/R, at para. 6.46.

[26] *See Amended Regulations Concerning the Revocation of Antidumping and Countervailing Duty Orders: Final Rule*, 64 Fed. Reg. 51236 (22 Sep. 1999) (**Ex. JPN-7**).

[27] *See id*. (citing the panel's decision in *US – DRAMs*, WT/DS99/R). *See also US – DRAMs*, at para. 2.8 (discussing section 353.25(a)(2) of USDOC's previous regulations establishing USDOC's revocation procedures in an Article 11.2 review prior to its revision in 1997).

(ii) It is not likely that those persons will in the future sell the subject merchandise as less than normal value.

USDOC amended its regulations because it accepted the panel's determination that "requiring the Secretary to conclude that 'it is not likely' that the persons requesting revocation will dump merchandise subject to an antidumping duty order in the future did not implement properly Article 11.2 of the Antidumping Agreement."[28] In this case, however, the USG conveniently ignores prior WTO precedent distinguishing between the use of the term "likely" and "not likely," the former of which requires a greater degree of certainty."

25. In this case, the fact that the underlying statute for Article 11.3 revocations – section 751(c) of the Act[29] – uses the term "likely" does not insulate USDOC's regulation from WTO challenge. The USG conveniently ignores its own history with respect to Article 11.2 reviews and section 351.222(b), and now argues that section 351.222(i) is only ministerial. This argument contradicts its prior statements in the preamble of section 351.222, in the Sunset Policy Bulletin, in the final determination in this sunset review, and in previous dispute settlement cases before the WTO. All of these statements demonstrate that section 351.222(i) provides substantive rules that USDOC will revoke anti-dumping duty orders in sunset reviews only when USDOC finds that dumping is "not likely."

BOTH PARTIES

(b) In respect of DOC Regulations 19 CFR 351.222(i) (Exhibit JPN-5), both parties are requested to indicate whether this regulation is mandatory or discretionary and why. Japan is invited to respond to the US contention that this regulation is not substantive in nature and deals with time periods, and in respect of sub-regulation (iii), is unenforceable.

Reply

26. As demonstrated in the answer to question 8(a), this provision is mandatory. The provision explicitly states that "the Secretary **will** revoke an order" (emphasis added). As shown in our first written submission,[30] "will" in USDOC's regulations is the mandatory equivalent of "shall." Further, the "not likely" standard encompasses all possible situations in which USDOC may revoke an order. In fact, except for lack of interest on the part of the domestic industry, no other provisions permits USDOC to revoke an order than that specified in 19 CFR 351.222(i).

(c) If there is a disagreement between the United States and Japan as to the proper interpretation of the Regulation or the legal status of the regulation in US law, how should the Panel resolve that interpretative issue? If the Panel is in doubt, does that simply mean that Japan failed to prove its case?

Reply

27. As shown in our first and second written submissions and answers to questions 8(a) and (b) above, section 351.222(i)(1)(ii) mandates that USDOC will only terminate an antidumping duty in situations in which USDOC finds that revocation or termination is not likely to lead to a continuation or recurrence of dumping in a sunset review. Logically, therefore, the legal status of the provision is

[28] *Id*., at 51236-27.

[29] *See* 19 USC. § 1675(c) ("the administering authority and the Commission shall conduct a review to determine, …, whether revocation of the countervailing or antidumping duty order or termination of the investigation suspended under section 1671c or 1673c of this title would be **likely** to lead to continuation or recurrence of dumping or a countervailable subsidy.") (emphasis added).

[30] *See* Japan First Written Submission, at para. 104, n. 144.

without question. The provision provides substantive obligations and is well within the purview of the Panel.

28. As Japan established its prima facie case on this issue, the burden to rebut Japan's argument is now shifted to the USG. If the USG fails to rebut successfully, then the Panel is requested to decide this case for Japan.

II. EVIDENTIARY STANDARDS FOR SELF-INITIATION OF SUNSET REVIEWS

BOTH PARTIES

10. Assume arguendo that Article 11.3 creates a presumption that an anti-dumping duty should be terminated after five years and that the initiation of a sunset review is an exception to that general presumption. Do you consider that automaticity of self-initiation under US law has the effect of undermining or reversing this presumption? Is there any situation in which the United States would allow the application of the general rule contained in Article 11.3 (i.e. permitting the duty to expire instead of self-initiating a sunset review)? More generally, is self-initiation mandatory under US law or does the DOC have the discretion not to self-initiate a sunset review?

Reply

29. The automatic self-initiation of sunset reviews is mandatory under US law, and thus reverses the presumption of termination after five years in Article 11.3. Automatic initiation extends the five-year effective period of the determination in the original investigation. After five years, the original finding has lost its factual and legal relevance requiring the order be terminated. Automatic initiation, based solely on the fact that the anti-dumping duty is still in place, permits a Member to extend the five-year termination. Automatic initiation of the sunset review in every case essentially results in the continued imposition of an anti-dumping duty for at least another year until the conclusion of the sunset review, based on nothing more than the decision in the original investigation.

30. Section 751(c) of the Tariff Act explicitly mandates that USDOC "shall" conduct a sunset review. The statute does not provide any room for USDOC not to self-initiate a sunset review. The SAA, which is the authoritative interpretation of the Act, explains that the "{n}ew section 751(c)(1) provides for automatic initiation of five-year reviews by Commerce."[31] Moreover, USDOC automatically initiates every single sunset review. In fact, the USG admits in its submission that USDOC is directed by the statute to automatically initiate sunset reviews without any evidence of future dumping. "{U}nder the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of an antidumping duty order."[32] Consequently, even the USG admits that automatic self-initiation is mandatory under US law.

11. Assume *arguendo* that the US domestic producers in a given sunset review informed the DOC before the initiation of the sunset review that they were not interested in proceeding with the review. Would that constitute sufficient grounds for the DOC not to self-initiate that particular sunset review or would it simply afford a basis not to proceed with a review?

[31] *See* SAA at 879 (**Ex. JPN-2 at 4205**) (emphasis added).

[32] *See* First Submission of the United States Government, in *United States – Sunset Review of Anti-dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (DS244) at para. 13. (7 Oct. 2002) (hereinafter "USG First Submission") (emphasis added).

Reply

31. US law requires self-initiation regardless of any expressions of intent. USDOC might use the expression of intent as a reason not to proceed. But US law does not allow USDOC not to initiate the review.

32. Japan does not believe that automatic self-initiation is ever WTO-consistent. Therefore, there can be no grounds under which it would be acceptable for USDOC to self-initiate a particular sunset review without sufficient evidence. Whether the domestic industry intends to participate in a particular sunset review, or not, should not by itself constitute sufficient evidence to initiate. Although Japan believes it would certainly make more sense for USDOC to solicit whether the domestic industry intends to participate before initiation, the domestic industry's intent does not absolve USDOC from the obligation to collect and examine prospective evidence before deciding to initiate.[33] The intent of the domestic industry to participate or not is insufficient. Article 11.3 obliges the authorities to collect prospective evidence that shows a probability that dumping *might* be likely to continue. The finding that dumping *is* likely to continue is left for the final sunset review. The intent of the domestic industry has little to do with whether dumping *might* be likely to occur in the future.

33. Further, the Panel need not address what evidence would be sufficient. Since the USG did not explicitly rely on any evidence, the USG's decision can be found WTO-inconsistent on that basis alone. In addition, historical information alone is never sufficient. The authorities must consider, to some degree, evidence of what is likely to happen in the future. The degree of evidence may be modest; but at least some of that evidence must be perspective. Authorities should examine similar types of evidence as that required to initiate an original investigation. The original investigation's finding of dumping would never be enough by itself to satisfy the sufficient evidence standard. Things like current dumping margins and economic factors showing changes in circumstances are relevant to satisfy the "sufficient evidence" standard.

34. Japan also notes that in Article 11.2 reviews USDOC pays greater attention to the present state of the market to predict the future. In sunset reviews under Article 11.3, however, the USG has asserted that the current state of the market is irrelevant. Instead USDOC bases its decision on five-year-old dumping margins. We believe that the most recent information available is more indicative of future events and therefore a much more appropriate basis to find sufficient evidence to initiate a sunset review.

12. Article 11.3 refers to the reviews "initiated" by investigating authorities "on their own initiative".

(a) In the ordinary sense, does the word "initiate" or the phrase "to take an initiative", require that there be at least some reason to either choose to do or not to do something? Is this what the term "initiate" means in the context of Article 11.3 (i.e. not a standard of sufficient evidence but at least some sort of

[33] The panel in *Guatemala – Cement* found that an administering authority must take positive action to determine that there is sufficient evidence. *See Guatemala – Definitive Antidumping Measures on Grey Portland Cement from Mexico*, WT/DS60/R at para. 7.53 (24 Oct. 2000). In that case, Guatemala attempted to argue that its initiation of an investigation was reasonable because it had based its decision on the information submitted by the domestic industry. The domestic industry's petition was adequate because it contained all the information reasonably available to the industry. The panel, however, found that while the administering authority may have satisfied the requests under Article 5.2 that does not necessarily mean that the "sufficient evidence" standard under Article 5.3 was satisfied. *See id.* Therefore, the authorities are under an obligation to take positive action to determine whether sufficient evidence exists to initiate an antidumping procedure. While this case involves an original investigation, the panel's rationale is applicable to this case because both proceedings are subject to Article 5 as discussed in our first and second submissions.

rationality standard by which you choose whether or not to initiate a sunset review)? If so, does US law comply with that proposition?

Reply

35. Japan believes that the "sufficient evidence" standard articulates the requirements necessary to justify initiation of sunset reviews. In other words, the "reason" to initiate is the "sufficient evidence" standard. In fact, footnote 1 of the AD Agreement recognizes this fact by explicitly cross-referencing the obligations of Article 5, which includes the "sufficient evidence" standard.

36. The United States does not comply with the requirements to initiate a sunset review. The term "initiated" or "initiative" should be interpreted in the context of the entire AD Agreement. As discussed in our first submission paragraphs 63 through 69, Article 12.1 reflects the requirement that the authorities have "sufficient evidence" to initiate a sunset review. The term "initiated" or "initiative" must be construed in this context. Further, as discussed in our second submission,[34] footnote 1 of the AD Agreement defines the term "initiated" to mean the procedures a Member employs pursuant to various provisions in the AD Agreement to commence an action. Article 11.3 then provides that a sunset review is "a review initiated." Consequently, the use of the term "initiated" in Article 11.3 demonstrates that the AD Agreement contemplates that a sunset review must be initiated in accordance with the procedural requirements under Article 5, including the "sufficient evidence" requirement in Article 5.6.

(b) Is your reading of the word "initiation" in Article 11.3 purely a procedural one? Does "initiation" not have to have any substantive reason or requirement (no matter how thin)? If you believe that it is purely procedural, please explain why the drafters used the phrase "on their own initiative" in Article 11.3? Is this phrase also purely procedural? If so, why was it necessary to put in those words? Does this phrase require the investigating authority to have a reason in order to initiate a review on its own initiative?

Reply

37. The phrase "on its own initiative" at least indicates that the authorities take an affirmative step or some kind of positive action to commence a sunset review. To take positive action to commence a sunset review, the authorities must have a purpose for doing so. Initiation, therefore, is not purely procedural. To take an action to commence a sunset review, the authorities must comply with both the procedural and substantive rules of Articles 12 and 5 respectively.

38. Procedurally, the authorities are required to provide public notice after having satisfied themselves that sufficient evidence exists under Article 5.6. From a substantive standpoint, in order for the authorities to publish the initiation notice they must first determine that sufficient evidence exists to properly initiate a sunset review. Significantly, footnote 1, which explicitly cross-references the obligations under Article 5, incorporates the "sufficient evidence" standard into Article 11.3. In particular, Article 5.6 provides the obligations necessary to fulfil those affirmative steps to self-initiate a sunset review.

39. The term "on their own initiative" in Article 11.3 must be understood in this context.

(c) Does the word "initiate", as used in Article 11.3, mean the same thing as in footnote 1 of the Agreement? Does initiating a review mean the same thing as initiating an investigation?

[34] *See* Japan Second Written Submission, at paras. 30, 37-39.

Reply

40. Yes, footnote 1 of the AD Agreement sets forth the requirements for the initiation of sunset reviews. Like the terms "dumping" and "injury," the term "initiated" is defined once and applied throughout the Agreement. Footnote 1 shows the drafters' intent that a case should be "initiated" only after it has complied with the obligations under Article 5. The footnote does not distinguish between cases that were self-initiated and those that were requested by the domestic industry. The footnote simply states that the authorities must comply with the requirements of Article 5. Therefore, in the context of self-initiation, the authorities must comply with the requirements of Article 5.6. Not unlike requests for initiation by the domestic industry, Article 5.6 requires the authorities satisfy themselves that "sufficient evidence" exists to justify initiation of the case.

13. In paragraph 23 of Japan's oral statement, Japan states that "Article 11.3 first requires that the administering authority make a threshold decision as to whether to begin a sunset review". Indicate any textual or contextual support in Article 11.3 or elsewhere in the Agreement for the view that an investigating authority has to make a decision as to whether or not to initiate a sunset review. In your response, please comment on: (i) paragraph 7 of the EC third party oral statement (that the word "determine" in Article 11.3 indicates that the decision to initiate a sunset review requires that an evidentiary standard must be met); and (ii) paragraph 11 of Norway's third party oral statement (that under Article 11.3, it is not simply a matter of analyzing whether continuation of the order is necessary, but also of determining whether "initiation" itself is necessary).

Reply

41. As discussed above, Articles 5.6, 12.1, and 12.3, and footnote 1 indicate that, to self-initiate an investigation, the authorities must first determine that sufficient evidence exists before publishing notice of that initiation. A contextual analysis of Articles 11.1 and 11.3 further supports this point. Sunset reviews should only be initiated if the authorities find "sufficient evidence" that it might be necessary to continue the AD order to counteract dumping. Thus, whether to initiate a sunset review at all is a threshold decision required by Articles 11.1 and 11.3. Article 11.3 sets forth two different means of initiation, either self-initiation by the administering authorities or upon request by the domestic industry. Both of these methods of initiation require the authorities to first satisfy the threshold determination that "sufficient evidence" exists before initiating the sunset review.

42. Contextually, Article 11.1 and the first sentence of Article 11.3 support this interpretation. The first sentence of Article 11.3 establishes the rule that a finding of injurious dumping in the original investigation is effective for only five years. After five years, the original finding has lost its factual and legal relevance, and the imposition of the anti-dumping duty must be terminated. Article 11.3, therefore, requires that the authorities make a decision – to "determine" – as to whether it should extend the imposition of the anti-dumping duty beyond the five-year expiration. Article 11.1 establishes the general rule that the imposition of an anti-dumping duty shall remain in force only as long as "necessary" to counteract injurious dumping. Article 11.3 permits that the anti-dumping duty may remain in force until the final determination of the sunset review, which would normally be concluded within 12 months. Thus, the authorities are required to make a decision as to whether the imposition of an anti-dumping duty beyond the first five-year period is necessary.

43. This contextual reading adds further credence to the "sufficient evidence" requirement. Because imposition of the anti-dumping duty is supposed to terminate automatically within five years the decision to extend the imposition by initiating a sunset review should require a threshold showing of "sufficient evidence" to extend the imposition of the anti-dumping duty.

44. The USG, however, automatically extends the five-year period only because it made an affirmative determination in the original investigation, although the effective period of the anti-

dumping duty expires. Such an interpretation allows a Member to completely disregard the five-year termination rule. Therefore, the only reasonable interpretation, which gives consistency between Articles 11.1 and 11.3, is that the authorities are obliged to make a decision with sufficient evidence on the initiation of a sunset review.

45. The arguments presented by the EC and Norway are completely consistent with this framework. We understand the EC's argument that the authorities should evaluate each stage of the sunset review process in light of the likelihood of dumping "determination" requirement under Article 11.3. The EC thus claimed that the authorities should be making conscious and informed decisions about the steps they are taking. Norway pointed out that we must be fully aware of the general rule of Article 11.3 that "initiating" a sunset review is an exception. The US arguments presuppose that the authorities can mechanically act without any basis for those decisions. Such a limiting interpretation of Article 11.3 is at odds with both the text of Articles 5.6, 11.3, 12, and footnote 1 as well as the overall context of these provisions.

JAPAN

14. Although the text of Article 11.3 requires a request for sunset review by or on behalf of the domestic industry to be "duly substantiated", it does not contain any such explicit qualification for the self-initiation of sunset reviews. Assume arguendo that the initiation of a sunset review is an exception to the presumption of termination provided for in the first clause of Article 11.3. Do you see any difference between these two substantive requirements for the initiation of sunset reviews? The provision regarding the request to be made by the domestic industry contains a standard. Do you consider that the "duly substantiated" requirement in Article 11.3 concerning requested reviews also applies to self-initiated reviews? Why do you think the drafters remained silent regarding the standard for the self-initiation of sunset reviews in Article 11.3? And if Article 11.3 is silent on the standard for a self-initiated review, why is Japan of the view that the applicable standard is one of "sufficient evidence" rather than a "duly substantiated" standard?

Reply

46. "On its own initiative" and "upon a duly substantiated request made by or on behalf of the domestic industry" are two different means for initiating sunset reviews. Both types of initiation, however, require the same threshold determination of "sufficient evidence" before initiation. Once the authorities are satisfied that the "sufficient evidence" threshold requirement has been meet, the authorities are then required to decided whether to initiate a sunset review, as discussed in our answer to the previous question. A "duly substantiated" request is a procedural requirement for domestic parties to fulfill upon a request to initiate a sunset review. A "duly substantiated" request simply means a request that has been adequately documented so that the authorities may determine from the request itself whether "sufficient evidence" exists to initiate the sunset review.

47. The text of Article 11.3 is silent with respect to whether the "duly substantiated" requirement applies to the self-initiation. Such silence, however, does not mean that the authorities may initiate a sunset review without any evidence to justify the initiation. As Japan has demonstrated throughout this case, the authorities are under an affirmative obligation to collect "sufficient evidence" to determine whether to self-initiate a sunset review.

III. DE MINIMIS STANDARD IN SUNSET REVIEWS

BOTH PARTIES

15. Article 11.9 of the SCM Agreement states that its *de minimis* standard applies "[f]or the purpose of this paragraph". This phrase is not, however, found in Article 5.8 of the Anti-

dumping Agreement. How and to what extent is this relevant to determining whether or not the *de minimis* standard in Article 5.8 applies in AD sunset reviews?

Reply

48. We believe this textual difference is an important reason that the SCM Agreement and AD Agreement provisions on *de minimis* must be interpreted differently – specifically that the *de minimis* standard under Article 5.8 applies throughout the AD Agreement, while the application of the standard under Article 11.9 is limited.

49. The absence of this limiting language is particularly important in light of the negotiating history of Article 5.8.[35] The first negotiating draft – the so called "Carlisle I" text – introduced the idea of *de minimis* margins with the phrase "for the purpose of this Code" – an explicit statement of broad applicability. The next draft – Carlisle II – deleted this phrase and instead introduced the narrower formulation "at any stage of the investigation." In the next draft – New Zealand I – this limiting phrase was deleted, but a footnote was added that included the "for the purpose of this paragraph" language. This limiting language was maintained in the New Zealand II and New Zealand III texts. But in the penultimate Dunkel Draft, this phrase "for purposes of this paragraph" was deleted. The final text of the AD Agreement, therefore, does not contain this limiting phrase.

50. As the Appellate Body has so often noted, differences in text must have some meaning. The fact that the SCM Agreement has this limiting phrase but the AD Agreement does not, and the fact that the limiting phrase was affirmatively removed from the AD Agreement, strongly suggests that the *de minimis* standard in Article 5.8 of the AD Agreement has broader applicability than under the SCM Agreement. That textual difference must be respected by this Panel.

16. How do you respond to Brazil's argument in paragraph 13 of its oral statement that the application of two different *de minimis* standards under US law would give rise to inconsistent results whereby an exporter with a greater dumping margin would be able to escape the imposition of the original duty while another exporter with a dumping margin below *de minimis* could be subjected to the duty perpetually. Does that show that there is an internal inconsistency in the policy of the DOC or is there any other explanation?

Reply

51. Yes, Brazil's example underscores the inconsistency of USDOC's practice of applying different *de minimis* standards to original investigations and sunset reviews. It is unreasonable that an exporter who was found to have a dumping margin of 1.9 per cent in the original investigation would not be subject to imposition of the anti-dumping order. But a similarly situated exporter who had a dumping margin of 2.1 per cent in the original investigation and a dumping margin of 0.6 per cent in a sunset review would continue to be subject to the same anti-dumping duty in perpetuity. Such an unreasonable interpretation is not permissible under Article 11.3.

52. A proper reading of Articles 5.8, 11.1, and 11.3 in light of the context, object and purpose requires that the same *de minimis* standard apply to both original investigations and sunset reviews. Article 5.8 provides that any "case" must be immediately terminated, and therefore no dumping duty imposed, when the authorities find a respondent's dumping margin to be 2 per cent or less. Further, because Article 5.8 applies to "cases," the obligations in Article 5.8 are applicable not just to investigations but to sunset reviews as well. Article 11.1 provides that the authorities can continue to impose anti-dumping duties only when continuation is necessary to counteract injurious dumping. Reading these two Articles together shows that it is not necessary to continue imposition of an anti-

[35] *See* James P. Durling & Matthew R. Nicely, *Understanding the WTO Anti-Dumping Agreement: Negotiating History and Subsequent Interpretation*, at pp. 294-298 (2002) (summarizing the various texts).

dumping order only when dumping is likely to continue at *de minimis* levels of less than 2.0 per cent. Please see our answer to question 21 for further discussion on this issue.

17. Would a reading of the Anti-dumping Agreement that imposed no *de minimis* standard in respect of sunset reviews lead to inconsistency that is repugnant to a coherent interpretation of the Anti-dumping Agreement? Why or why not?

Reply

53. Yes, the AD Agreement requires that the same *de minimis* standard be applied to both original investigations and sunset reviews. Please see our answers to questions 15, 16, 20, and 21, and our second submission at paragraphs 118-145 for further discussion on this issue.

JAPAN

18. How, in Japan's view, can a quantitative criterion – such as the *de minimis* standard – be properly applied in the context of sunset reviews given that sunset reviews deal with future - as opposed to past or present - likelihood of the continuation of recurrence of dumping (and injury)? And is this a reason for its omission from the text of Article 11?

Reply

54. It is true that the prospective nature of the "likelihood" determination in Article 11.3 makes it impossible to precisely predict future dumping margins. Nevertheless, that does not mean that the authorities have no obligation to approximate "likely" future dumping margins. Japan believes that it is inherent in Article 11.3 that the authorities must quantify what level of dumping they believe is likely to occur in the future. As the panel in *EC – Bed Linens*[36] explained, the provisions of Article 2 "govern the determination of dumping by establishing rules for calculation of dumping"[37] and "the calculation of a dumping margin pursuant to Article 2 constitute a determination of dumping."[38] The authorities would not be able to determine the likelihood of dumping without quantifying the dumping margin. For the USITC to conduct a proper injury analysis, USDOC must quantify the level of future dumping. How else can the USITC respect its obligation under Article 3.4 to consider the "margin of dumping" in determining injury? How can the USITC determine whether the "effects of future dumping" are likely to cause injury, as required by Article 3.5, if USDOC never quantifies the future level of dumping?

55. This raises the question how does one quantify a prospective dumping margin. Japan is of the view that the authorities can make reasonable estimates of likely future dumping margins, based on current dumping margins. The administering authorities should estimate the likely future dumping margin by: (1) calculating the most current dumping margin; (2) adjusting that margin to take into account import trends since the original investigation and the likely future implications of the current conditions of the market. The *de minimis* standard should then be applied to this estimated dumping margin. For example, if the current dumping margin rate is 1.5 per cent, and the authorities find that the current dumping margin will remain at present levels or will decline in the future, then the authorities should terminate the imposition of the anti-dumping duty because the likely future dumping margin is *de minimis*.

56. Although this is certainly not an exact science, by adjusting current dumping margins the authorities can develop a good approximation of likely future dumping margins. This approach at

[36] *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW (29 November 2002), at para

[37] *Id.*, at para. 6.128.

[38] *Id.*, at para. 6.130.

least involves collecting evidence and considering prospective trends. Japan believes that the most recently calculated dumping margin reflects the current reality of the market and a more accurate depiction of what degree of dumping may continue or recur in the future. Therefore, these margins are more predictive of future behaviour than the old dumping margins used by USDOC.

19. The Panel notes that Japan attaches particular importance to the use of the phrase "mutatis mutandis" in Article 12.3. What are the necessary changes that Japan believes must be made in order to apply the provisions of Article 12 in the context of sunset reviews under Article 11.3? In particular, what is the meaning of the term "necessary" in Article 12.3 in that context? For example, and with reference to paragraph 20 of Japan's oral statement, is it Japan's view that, in this context, mutatis mutandis means that the word "investigation" in Article 12.3 may or must be replaced with "review"? Are the words "mutatis mutandis" also to be interpreted according to the norm of interpretation in the Vienna Convention? If so, how does this assist in determining what changes are necessary?

Reply

57. Japan believes that the term "*mutatis mutandis*" must be given its ordinary meaning in the context of the AD Agreement, as the *Vienna Convention* dictates. The ordinary meaning of the term requires that a provision covering a particular situation be applied in a different setting by changing the "necessary" terms to fit the new situation. Black's Law Dictionary, Fifth Edition, explains that the term "*mutatis mutandis*" means that the "matters or things are generally the same, but to be altered, when necessary."[39]

58. Article 12 provides for certain rules with respect to the notice obligations in original investigations. Article 11.3 sets forth the obligations the authorities must satisfy when conducting sunset reviews. In applying the obligations of Article 12.1 *mutatis mutandis* to sunset reviews, the term "investigation" must be changed to "review." This is the most reasonable interpretation of the provision in light of the ordinary meaning of "*mutatis mutandis*" language and in accordance with the Vienna convention.

20. How is the fact that Article 5.8 explicitly refers to *de minimis* dumping margins and negligible import volumes and injury to be reconciled with the proposition that *de minimis* dumping margins are non-injurious? What is the basis for this view in the text of the Agreement?

Reply

59. As discussed in our answer to the question 16, Article 5.8 informs Article 11.1 that no anti-dumping duty may remain in force where the magnitude of dumping is so small that it is no longer necessary to continue the order to counteract injurious dumping, *i.e.*, less than two per cent.

60. Further, Article 3 incorporates the *de minimis* standard into the injury determination. Article 3.4 requires the authorities to consider "the magnitude of the margin of dumping" in examining whether the domestic industry is injured. Article 3.5 further requires the authorities to examine whether the "effects" of dumping are causing injury to the domestic industry. In conjunction with Article 3, Article 5.8, instructs the authorities to immediately terminate a "case" when the authorities find that dumping is below *de minimis* levels. Therefore, the authorities may not make an injury determination where the dumping margin is below *de minimis* levels.

21. In paragraph 67 of its oral statement, Japan places emphasis on the word "cases" in the second sentence of Article 5.8 and argues that this is an indication that this provision, and the *de*

[39] Black's Law Dictionary, 919 (5th ed. West Group 1979).

***minimis* concept it contains, is not limited to investigations, but also applies to sunset reviews. Elsewhere in its submissions, however, Japan seems to be arguing that not much significance should be attached to the variation in the language of "investigations" referred to in certain articles of the Agreement, particularly in Articles 5 and 12. How, in Japan's view, should the Panel treat specific references in the text of the Agreement to "investigations" where Japan would have the Panel not apply that specific language?**

61. With all due respect, Japan is not arguing that the term "investigation" in Article 12.1 does not have significance and does not apply only to investigations. Rather, Japan asserts that the "*mutatis mutandis*" language in Article 12.3 expressly requires a substitution of the term "investigation" with "review." Please see our answer to question 19 above. In Article 5.8, rather than using the "*mutatis mutandis*" language, the drafters used the more general term "case" to explicitly require application to multiple proceedings. It is our view that Article 5.8's use of the term "cases" instead of "investigation" means that Article 5.8 encompass not only original investigations but also other proceedings in which the existence, or continued existence, of an anti-dumping duty order is determined. For further discussion on this issue, please see our first meeting oral statement at paras. 62-68 and our second submission at paragraphs 127-132. We also note that the decision to remove limiting language "for the purpose of this paragraph" from Article 5.6 (as discussed above) reinforces this interpretation.

62. We further argue that the object and purpose of sunset reviews also requires us to apply the initiation standard under Article 5. As discussed in our first submission, the object and purpose of sunset reviews are analogous to those of the original investigation. For example, both sunset reviews and original investigations consider whether it is appropriate to impose anti-dumping duties for the next five years. According to Article 31 of the Vienna Convention, therefore, "initiation" of sunset reviews must be interpreted in the same manner as the initiation of original investigations. Accordingly, Article 5, which textually sets forth initiation rules for original investigations, must also apply *mutatis mutandis* to sunset reviews.

63. Moreover, footnote 1 supports this implicit *mutatis mutandis* application of Article 5 to Article 11.3. Footnote 1 defines the meaning of the term "initiated" as used in the AD Agreement and is therefore applicable whenever the word "initiated" is used in the Agreement.

IV. CUMULATION AND NEGLIGIBILITY IN SUNSET REVIEWS

BOTH PARTIES

22. What is the legal nature and role of the term "anti-dumping investigations" in the first sentence of Article 3.3 of the Agreement? Does it have the effect of limiting the scope of application of the provisions of Article 3.3 to investigations only? Please respond in detail, including, to the extent relevant, with reference to footnote 9 of Article 3 and the reference to "[a] determination of injury for the purposes of Article VI of GATT 1994" in Article 3.1. If Article 3.3 is only partially applicable to sunset reviews, then what are the specific elements of Article 3 (and Article 3.3) that apply?

Reply

64. The phrase "anti-dumping investigations" in the first sentence of Article 3.3 must be interpreted within the broader context of Article 3, particularly footnote 9 and Article 3.1. These provisions explicitly state that all provisions of Article 3 apply to injury determinations, including injury determinations in sunset reviews. The first sentence of Article 3.3 must be understood in this context.

65. The first sentence of Article 3.3 permits the authorities to assess the effects of imports from multiple countries where imports from these countries are "simultaneously subject to 'anti-dumping investigations.'" There are two possible interpretations of this sentence: (1) imports from more than one country may be cumulatively assessed in a sunset review when these imports were subject to simultaneous original investigations; or (2) these imports may be cumulatively assessed when they are subject to simultaneous sunset reviews. Either interpretation, however, results in the same conclusion in this case. The cumulatively assessed imports in this sunset review are the same as those imports that were cumulatively assessed in the original investigations.

66. We also note that, if Article 3.3 does not apply to sunset reviews, then the authorities cannot cumulatively assess whether imports from more than one country are collectively causing injury. GATT Article VI:1 provides that imports from one country are to be "condemned" if such imports cause material injury to the domestic industry of the importing country. Because Article 3.1 of the AD Agreement cites "Article VI of the GATT 1994," this basic concept is thereby incorporated within Article 3. Article 3.3 of the AD Agreement establishes the exception to this basic GATT concept. If this exception is not applicable to sunset reviews, then no cumulative assessment of imports from multiple countries may be permitted in a sunset review context.

23. Why and in what way would an historical negligible import volume be relevant to the "determination" required to be made under Article 11.3? Please respond, in detail, in conjunction with Japan's allegations concerning the application of the negligibility standard in sunset reviews.

Reply

67. As discussed, historic import volumes are relevant to estimate future import volumes, and accordingly, whether to cumulatively assess imports from Japan with imports from other countries in the "likelihood" of injury determination. The record shows that import volumes from Japan have been negligible under the Article 5.8 requirements. The history of such import volumes provide a good basis to consider "likely" future import volumes, and the likelihood of whether imports from Japan will remain negligible in the future.

68. We note that Japan argues in this dispute that the USITC acted inconsistently with Article 3.3 because the USITC never considered at all whether imports from Japan were negligible in this sunset review. The USITC did not consider negligibility in spite of record evidence that imports from Japan were negligible, which indicates that the import volume in the future is also likely to be negligible in the future. The Panel need not assess the USITC consideration of evidence; the USITC considered nothing.

JAPAN

24. Japan's request for establishment of the Panel in this dispute states:

> **The ITC does not consider whether imports were negligible as defined in Article 5.8 of the AD Agreement when determining whether to cumulate imports in a five-year "sunset" review. In addition, the ITC, in this case, never examined whether imports were negligible and therefore whether they should, or should not, be cumulated.**[40]

In para. 231 of its first written submission Japan challenges the application of US law in respect of the issue of cumulation. However, although in paras. 237-240 Japan seems to be presenting arguments attacking US law as such in this respect, nowhere in its first submission does Japan

[40]WT/DS244/4, p. 5.

state clearly that it is doing so. Is the Panel therefore to understand that Japan is not presenting a claim that challenges US law as such regarding cumulation in sunset reviews?

Reply

69. Japan claims that the USITC acted inconsistently in this case because the USITC never considered whether imports from Japan were likely to be negligible in the future. Japan does not claim, with respect to this issue, that US law as such is inconsistent with the UGS's obligations under the WTO Agreement.

V. BASIS FOR DETERMINATION OF DUMPING IN SUNSET REVIEWS (ORDER-WIDE OR COMPANY-SPECIFIC)

BOTH PARTIES

25. Article 11.4 of the Anti-dumping Agreement stipulates that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Article 11]."

(a) How do you interpret the language "regarding evidence and procedure" in Article 11.4? Does this language simply repeat the content of Article 6? Why, in your view, did the drafters in some other instances only refer to the number of the particular provision that is cross-referenced, while in Article 11.4 they appear to mention at least some of the content of Article 6 in the cross-reference?

Reply

70. All the provisions of Article 6 establish procedural and evidentiary obligations. As discussed in our answer to question 25(c) below, various provisions were added to Article 6, while the title of Article 6 did not change. The language in Article 11.4 indicates that only the procedural and evidentiary aspects of Article 6 should be incorporated within Article 11.3 sunset reviews. This does not mean, however, that the substantive implications of a procedural rule should not be applicable to Article 11.3. The mere fact that some of the procedural requirements of Article 6 when applied to other provisions have substantive implications does not foreclose their effect. Therefore, all of the provisions of Article 6 apply to Article 11.3.

71. The Appellate Body in *US – CVD Sunset* has confirmed that the provisions of Article 12 of the SCM Agreement – the corollary of which is Article 6 of the AD Agreement – generally apply to sunset reviews. It has stated "Article 12 sets out obligations, primarily of an evidentiary and procedural nature, that apply to the conduct of an *investigation*."[41] The Appellate Body has further stated that the drafters intended that the obligations in Article 12 "would apply to reviews carried out under Article 21.3."[42] Articles 12 and 21.3 of the SCM Agreement are corollaries to, respectively, Articles 6 and 11.3 of the AD Agreement. The same concept therefore applies to the AD Agreement.

(b) Do all provisions contained in Article 6 concern evidence and procedure? If not, which provisions of Article 6 do not fall within this category, and for what reason? What criteria may guide the Panel in distinguishing between evidentiary/procedural provisions and other provisions (if any) of Article 6?

[41] Report of the Appellate Body, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ("US – CVD Sunset")*, WT/DS213/AB/R at para. 72. (28 Nov. 2002).

[42] *Id*.

Reply

72. Japan is of the view that all provisions of Article 6 provide evidentiary and procedural obligations and thus apply to Article 11.3.

(c) What are the textual and contextual considerations that would support or undermine the proposition that all provisions of Article 6 concern evidence and procedure? In this respect, in particular, what is the legal nature and role of the Title of Article 6 ("Evidence"), and the role of the reference in Article 6.14 to "procedures"? Is there negotiating history that would suggest that all provisions of Article 6 concern evidence and procedure, or that would suggest that certain of those provisions may not be evidentiary or procedural?

Reply

73. Article 6.14 explicitly describes the requirements of Article 6 as "procedures." Article 6.14 explicitly states that:

> The *procedures* set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement. (emphasis added).

The Uruguay Round added several new provisions to the AD Agreement, including the current Article 6.10, while at the same time revising other provisions of Article 6.[43] Initially, the current provision in Article 6.14 were contained in Article 6.9. The current Article 6.14 changed the previous construction of the provision from "the provisions of this Article" to the current phrase "the procedures set out above" in *Carlisle I*, the earliest draft during the Uruguay Round negotiation.[44] No changes were made to this provision, while other provisions in Article 6 have been added and changed.[45] This represents the understanding that all the provisions in Article 6 are procedural.

74. The title of Article 6 "evidence," however, was not changed from the previous AD Agreement. While the title of the Article remains "evidence," the current Article contains more than purely evidentiary rules. The unchanged title of Article 6, while various provisions were added to

---

[43] The Uruguay Round added the following provisions to Article 6: 6.1.1 through 6.1.3, 6.3, 6.6., 6.9 through 6.13, and footnotes 15 and 16.

[44] The text from the Tokyo Round Code read:

> 6.9 The provisions of this Article are not intended to prevent the authorities of a Party from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final findings, whether affirmative or negative, or from applying provisional or final measures, in accordance with the relevant provisions of this Code.

Carlisle I, the earliest draft of the AD Agreement during the negotiation of the Uruguay Round, GATT Doc. No. MTN.GNG/NG8/W/83/Add.5 (23 July 1990), changed the language in the provision to read as follows:

> 6.13 The *procedures set out above* are not intended to prevent the authorities of a Party from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final *determinations*, whether affirmative or negative, or from applying provisional of final measures, in accordance with relevant provisions of this Code. (emphasis indicates the revisions from previous draft).

This text was not changed in the subsequent drafts of the AD Agreement and therefore became the current Article 6.14. *See* James P. Durling and Matthew R. Nicely, *Understanding The WTO Anti-dumping Agreement: Negotiating History and Subsequent Interpretation*, at 410-411 (2002).

[45] *See id*.

Article 6, illustrates that the obligations of this Article deal with the procedures for obtaining and presenting "evidence."

(d) Is there any interpretative guidance to be derived from the fact that Article 11 specifically refers to the provisions of Articles 6 and 8?

Reply

75. While these Articles are expressly cross-referenced by Article 11 and thereby incorporated within Article 11, that does not mean that no other obligations within the Agreement may be implicitly incorporated within Article 11. The obligations of Articles 6 and 8 are, however, not implicitly linked. Because the obligations of these Articles were not implicitly linked the drafters had to expressly link them to Article 11.3.

76. It is not intuitive that the procedural and evidentiary requirement of Article 6 should automatically apply to sunset reviews as well or that price undertakings should also be examined every five years.

77. Moreover, Article 8.1 provides that price undertakings may "suspend" the imposition of anti-dumping duties. The term "suspend" indicates that an anti-dumping investigation is pending while the price undertaking is effective. Some Members therefore might claim that a price undertaking is not subject to general rules of Article 11.1 or the five-year termination rule under Article 11.3 because suspension of an investigation does not begin the five-year period. The five-year period only begins to run once the suspension is terminated and the original proceeding is completed. Consequently, to avoid such confusion the drafters expressly included a cross-reference to Article 8 to ensure that price undertakings were also reviewed every five years.

VI. DUMPING MARGINS IN SUNSET REVIEWS

BOTH PARTIES

27. What methodology formed the basis for the calculation of the dumping margins in the original investigations and in the subsequent administrative reviews? Please indicate the relevant portions of the record to substantiate your response. What is the legal basis in the Agreement that permits or precludes the use of such methodology(y)(ies), or that governs certain aspects of these methodologies, in a sunset review?

Reply

78. In the original investigations and subsequent administrative reviews, both of which the USG conducted before the effective date of the WTO Agreement, the USG adopted the following methodologies to calculate dumping margins. Among these methodologies the United States continues to "zero-out" negative dumping margins in both original investigations and administrative reviews.[46] These methodologies, which were examined in detail in Japan's first submission,[47] are no longer consistent with the USG's obligations under the WTO Agreement.

(a) Zeroing

(i) US Practice Before and After the Effective Date of WTO Agreement

[46] It should be noted that Japan is not challenging the WTO-inconsistency of the USG's application of weighted average-to-transaction methodology in administrative reviews.

[47] *See* Japan's First Submission, at paras. 14, 172, and 181; *see also* (**Ex. JPN-1a, 12d, 12f.1-3, and 28a and b**).

79. USDOC zeroes all negative dumping margins when calculating a respondent's total dumping margin.[48] This practice continues up to the present in both original investigations and administrative reviews.

(ii) Record That Indicates This Practice

80. The following exhibits show the general application of USDOC's zeroing practice, and its specific application to *Corrosion-Resistant Flat Steel Products from Japan*:

General Application: Ex.JPN-10a through 10c, 27a through 27i, 28a, and 28b.

Specific Application to:

Original Investigation:	Ex.JPN-12f, and 12.f.5.
4th Administrative Review:	Ex.JPN-14c, 14d, 14.d.1, 14.d.2, 14.d.3, and 32.
5th Administrative Review:	Ex.JPN-15.c, 15.d, 15.d.1, 15.d.2, and 32.

81. We also provide a guide to the application of the programming language in Appendix I. We apologize if the material is a bit dense. But the difficulty in discerning what the USG is doing in dumping cases is in fact part of the burden of the law.

General Application

82. USDOC has consistently calculated dumping margins for investigations and administrative reviews using the zeroing methodology for more than 15 years. *Certain Welded Carbon Steel standard Pipe and Tube From India* is one of the oldest cases where a respondent took issue with USDOC's general practice of zeroing negative margins.[49] Later in *Certain Fresh Cut Flowers From Ecuador*, USDOC clearly expressed its general practice of zeroing by stating that, "given the Department's practice of treating non-dumped sales as having zero margins. …"[50] Moreover, USDOC's basic boilerplate SAS programme used to calculate the individual dumping margins has embedded within its programming language which excludes all negative margins and only includes positive margins when calculating the total dumping margin.[51]

---

[48] *See id*. at para. 181 and **Ex. JPN-27a-i and 28a and b**.

[49] *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 9089, respondent's cmt. 3. (17 March 1986) **(Ex. JPN-27a)**.

[50] *Certain Fresh Cut Flowers From Ecuador; Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. 2128, 2129 (20 January 1987) **(Ex. JPN-27b)**. *See also Potassium Chloride From Israel; Final Determination of Sales At Not Less Than Fair Value*, 50 Fed. Reg. 4560 (31 January 1985) **(Ex. JPN-27c)**; *Certain Iron Construction Castings From India; Final Determination of Sales at Less Than Fair Value*, 51 Fed. Reg. 9486 (19 March 1986) **(Ex. JPN-27d)**; *Standard Carnations From Chile Final; Determination of Sales at Less than Fair Value*, 52 Fed. Reg. 3152 (2 February 1987) (**Ex. JPN-27e**). USDOC has continued its general practice of zeroing negative dumping margins to the present day. *See Stainless Steel Wire Rod From India; Final Results of Antidumping Duty Administrative Review*, 67 Ref. Reg. 37391, Unpublished Decision Memorandum, at cmt. 5 (29 May 2002) (**Ex. JPN-27f**); *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain*, 67 Fed. Reg. 35482, Unpublished Decision Memorandum, at cmt. 15 (20 May 2002) (**Ex. JPN-27g**); *Notice of Final Determination of Sales at Less than Fair Value: Structural Steel Beams from Luxembourg*, 67 Fed. Reg. 35488, Unpublished Decision Memorandum, at cmt. 13 (20 May 2002) (**Ex. JPN-27h**); *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan: Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 2408, Unpublished Decision Memorandum, at cmt. 5 (17 January 2002) (**Ex. JPN-27i**).

[51] *See* USDOC's basic boilerplate SAS antidumping margin calculation for both investigations and administrative review program; the appropriate lines of programming are marked indicating the actual zeroing language. (**Ex. JPN-28a and b**). The company-specific margin is calculated by dividing total potential uncollected dumping duties ("PUDD") by the total net US sales value. The potential uncollected dumping duties is the aggregate margin on US sales, as measured by the unit margin (*i.e.*, the difference in unit prices)

Actual Application to this Sunset Review

83. USDOC's SAS programme code used in both the original investigation and subsequent administrative reviews illustrates the actual application of zeroing in this case.[52] USDOC's margin calculation memoranda also shows that the basis of dumping margins in the final determination are only positive dumping margins.[53] Because the programme language and calculations contain the proprietary information, we placed our explanation of the results of the operation of that programme language in a separate Appendix I. Appendix I is an integral part of our answers to the panel questions.

(iii) Legal Basis that Precludes the Use of Such Methodology

84. As the Appellate Body in *EC – Bed Linens* clarified, a determination of dumping based on a dumping margin calculated by using zeroing methodology is inconsistent with Article 2.4. Please see our answers to Questions 31 through 33 for further discussions on this issue.

(b) Average-to-Transaction Methodology

(i) US Practice before the Effective Date of WTO Agreement

85. USDOC calculated dumping margins by comparing the weighted-average of home market sales to individual sales in the United States in original investigations initiated before the effective date of WTO Agreement. After entry into force of the AD Agreement, Article 2 prohibited this practice in original investigations.[54]

(ii) Record That Indicates This Practice

86. The following exhibits show the general application of USDOC's average-to-transaction methodology, and its specific application to *Corrosion-Resistant Flat Steel Products from Japan*:

General Application: Ex.JPN-1a, and 2.

Specific Application to:

---

multiplied by the US sale's quantity. Zeroing occurs when USDOC includes positive PUDD (US price less than normal value) but excludes negative PUDD.

[52] The total of positive dumping margins (TOTPUDD) was the basis of the dumping margin rate as shown at 27 (see p. 26 "The Total of Positive Margins", Column TOTPUDD), while there were a number of sales producing negative dumping margins (see p. 23, showing some of these sales). In fact, the printouts on page 27 shows that over half of the transactions during the period by quantity and value had a negative dumping margin). **(Ex. JP-15d.2.)**.

See also the dumping margin calculation computer printout "*TOTAL OF POSITIVE MARGINS*," **(Ex. JPN-14d.1.)**, while the same printout shows that there were sales producing negative dumping margins (*see* the printout page, titled "MARGIN *BY SALETYPE AND IMPORTER*") (**Ex. JPN-14d.2.**).

[53] *See* Memorandum for the File from Doreen Chen through Rick Johnson regarding *Analysis for Nippon Steel Corporation ("NSC") for the Final Results of the Administrative Review of Certain Corrosion-Resistant Carbon Steel from Japan*, p.1 (14 February 2000) (**Ex. JPN-15c**) (showing that USDOC calculated NSC's dumping margin rate based only on positive dumping margins, as shown in **Ex-JPN.15.d.1 and 15.d.2**).

See also Memorandum for the File from Doreen Chen through Rick Johnson regarding *Analysis for Nippon Steel Corporation ("NSC") for the Final Results of the Administrative Review of Certain Corrosion-Resistant Carbon Steel from Japan*, p.1 (8 March 1999) (**Ex. JPN-14c**) (showing that the total dumping margin was in fact the total positive margins as shown in **Ex. JPN-14d.1 and Ex. JPN-14d.2**).

[54] Japan is not challenging the WTO-inconsistency of the USG's application in administrative reviews of the weighted average-to-transaction methodology, although the USG continues to use this methodology in its administrative reviews after the effective date of the WTO Agreement.

Original Investigation: Ex.JPN-12f, 12.f.2, and 12.f.3.

General Application

87. Prior to the passage of the Uruguay Round Agreements Act ("URAA"), USDOC used to calculated dumping margins based on a comparison of individual US transactions to weighted average home market prices. The SAA recognized this established practice, stating "Commerce's preferred practice has been to compare an average normal value to individual export prices in investigations and reviews."[55] This was a standard USDOC practice at the time, but was not expressly codified in its regulations.[56] Section 229 of the URAA thus added new section 777A(d) of the Act, which required USDOC to measure dumping margins on either an average-to-average or transaction-to-transaction price comparison, rather than an average-to-transaction comparison.[57] New Section 777A(d) allows USDOC to use an average-to-transaction method for measuring dumping only where targeted dumping is found.[58] The Section, however, states in paragraph (2) that USDOC must adopt the traditional methodology of individual US sales to weighted-average normal value in calculating antidumping duties in reviews.

Actual Application to this Sunset Review

88. The SAS programme code used in the original investigation shows the actual application of USDOC's comparison of weighted-average of home market sales to individual sales in the United States.[59] For a further explanation on the SAS program's application, please see Appendix I.

(iii) Legal Basis that Precludes the Use of Such Methodology

89. Article 2.4.2 of the current AD Agreement provides that dumping margins during the investigation phase shall be established using a weighted average-to-weighted average methodology or transaction-to-transaction methodology. Other methodologies are permitted under Article 2.4.2 only when the authorities fully explain why weighted average-to-weighted average or transaction-to-transaction comparison cannot be taken. Consequently, application of pre-WTO dumping margins from the original investigations to sunset reviews is inconsistent with the USG's WTO obligation.

(c) Sales Not in the Ordinary Course of Business

(i) US Practice before the Effective Date of WTO Agreement

90. Before entry into force of the AD Agreement, USDOC used all home market sales of the exporting country to determine normal value only when fewer than 10 per cent of all those sales were below the cost of production ("COP"). USDOC also previously rejected all home market sales and resorted to constructed value ("CV") where 90 per cent or more of all those sales were below COP. When more than 10 per cent and less than 90 per cent of all sales were below the COP, USDOC generally used only the home market sales above the COP to determine normal value. The URAA amended section 773(b), which now provides that USDOC may disregard below-cost sales only when 20 per cent of all those sales are below COP within an extended period of time. The section also repealed the previous 90 per cent test that permitted rejection of all sales when the 90 per cent

[55] *See SAA*, at 842 (Ex.JPN-2, at 4177).

[56] The SAS Computer Printout from the Original Investigation (9 September 1993), at pages 58-68 (SAS Programme Output) (home market) **(Ex. JPN-12f.2.**) and pages 106-140 (SAS Programme Output) (US market) confirms that USDOC in fact applied this standard practice in this particular case. (**Ex. JPN-12f.3.**).

[57] *See* URAA, sec. 229, 108 Stat. 4889-90 **(Ex. JPN-1a)**.

[58] *See id*. **(Ex. JPN-1a)**; *see also* SAA, at 842-43 **(Ex. JPN-2 at 4177-78)**.

[59] See the SAS Computer Printout from the Original Investigation (9 September 1993), at pages 58-68 (SAS Programme Output) (home market) (Ex. JPN-12f.2.) and pages 106-140 (SAS Programme Output) (US market) (Ex. JPN-12f.3.).

threshold cannot be met. Under the present law, USDOC bases normal value on the actual domestic market sales price of the exporting country if at least one sale survives the below-cost test.[60]

(ii) Record That Indicates This Practice

91. The following exhibits show the USDOC's general application of the 10/90 test, and its specific application to *Corrosion-Resistant Flat Steel Products from Japan*:

General Application: Ex.JPN-1a, and 12d.

Specific Application to:
Original Investigation: Ex.JPN-12d, 12.f, and 12.f.1.

General Application

92. USDOC's application of this requirement was codified in section 773(b) of the Tariff Act before it was amended by the URAA.[61] This practice was applied to original investigations and administrative reviews. In fact, USDOC applied the "10/90 test" to the original investigation in this case to determine when and to what extent sales should be disregarded as below cost.[62]

Actual Application to this Sunset Review

93. As discussed, USDOC stated that it applied the 10/90 test to this case.[63] The SAS programme code also shows USDOC's actual application of the 10/90 per cent test in this case.[64] For a more detailed explanation on the SAS program, please see Appendix I.

(iii) Legal Basis that Preclude the Use of Such Methodology

94. Article 2.2.1 and footnote 5 of the AD Agreement provide that below cost home market sales may be disregarded only when not less than 20 per cent of those sales are below the cost of production. Article 2.2 of the AD Agreement also provides that the dumping margin may be determined by using the constructed value only when "there are no sales of the like product in the ordinary course of trade." Thus, the authorities may not disregard any home market sales if such home market sales are above the COP. The dumping margins calculated in the original investigation were calculated based on the "10/90 test," rather than the new 20 per cent test provided in the AD Agreement. By basing its likelihood determinations in sunset reviews on these WTO-inconsistent dumping margins, which were calculated using the "10/90" test, USDOC acts inconsistently with the USG's obligations under the AD Agreement.

(d) Profits and SG&A Used for Constructed Value and Cost of Production Calculations

(i) US Practice before the Effective Date of WTO Agreement

95. Prior to the entry into force of the AD Agreement, when calculating constructed value ("CV"), the USG used an 8 per cent profit statutory minimum and a 10 per cent statutory minimum for selling, general, and administrative expenses ("SG&A") in both original investigations and

[60] 19 USC. § 1677b(b)(2)(c)(i).
[61] See Tariff Act, sec. 773(b) (before enactment of the URAA). (**Ex. JPN-1a**)
[62] *See Original Final Determination*, at 37155-56 (**Ex. JPN-12d**).
[63] *See id*.
[64] *See* SAS Computer Printout from the Original Investigations (9 September 1993), at lines 312-31 (SAS Programme Log) (**Ex. JPN-12f.1.**)

administrative reviews.[65] USDOC applied actual profit and SG&A only when respondents rates were above these statutory minimums. The URAA added new section 773(e)(2), which established that SG&A and profit for CV must be based on the actual data of the respondent's home market sales where such data are available, as required by Article 2.2.2 of the AD Agreement. Section 773(b)(3) also requires USDOC to use actual SG&A data of a respondent when calculating COP.

(ii) Record That Indicates This Practice

96. The following exhibits show the general application of USDOC's minimum 10 per cent GS&A and 8 per cent profit rules, and its specific application to *Corrosion-Resistant Flat Steel Products from Japan*:

General Application:	Ex.JPN-1a, and 12.d.
Specific Application to:	
Original Investigation	Ex.JPN-12.c, 12.d, 12.f, and 12.f.4.

General Application

97. These minimum SG&A and profit rules were statutory obligations and applied to all investigations and administrative reviews when necessary.[66] In the original investigation in this case, USDOC stated that it applied the statutory requirements "in accordance with section 773(e)(1)(B)(ii) of the Act."[67]

Actual Application to this Sunset Review

98. USDOC stated in its final determination in the original investigation that it applied the statutory minimum 8 per cent profit to this investigation.[68] The USDOC's *Concurrence Memorandum* then specifically stated that USDOC applied 8 per cent minimum of profit for NSC's constructed value calculation.[69] The SAS programme code evidences the actual application of the 8 per cent CV test and the 10 per cent SG&A test in this case.[70] For a more detailed explanation on the SAS program, please see Appendix I.

(iii) Legal Basis that Precludes the Use of Such Methodology

99. Article 2.2.2 of the AD Agreement provides that "the amount for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer." Article 2.2.2 thus prohibits application of a statutory minimum amount of SG&A and profit. The original dumping margins of this case, for example, were calculated using such minimum profit amounts. USDOC has based its likelihood determinations in sunset reviews on these now WTO-inconsistent dumping margins. Therefore, by using these dumping margins, the USG acts inconsistently with its WTO obligations.

[65] *See* Tariff Act, sec. 773(b) and 773(e)(1)(B)(ii) (before enactment of the URAA).
[66] *See* Tariff Act, sec. 773(b) and 773(e)(1)(B)(ii) (before enactment of the URAA).
[67] See *Original Final Determination*, at 37156 (**Ex. JPN-12d**).
[68] *See Original Final Determination*, at 37156 (**Ex. JPN-12d**).
[69] *See Concurrence Memorandum* (21 June 1993), at 26 (**Ex. JPN-12c**). Note that in this particular case, SG&A was based on the actual SG&A and not on the statutory minimum.
[70] *See* SAS Computer Printout from the Original Investigation (9 September 1993) at lines 358-60 (SAS Programme Log) (**Ex. JPN-12f.4.**).

28. Article 18.3 of the Agreement states, in part:

> **"...the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement. ...**
>
> > **18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph.**

JAPAN

(a) How does Japan respond to the United States' argument in paragraph 137 of its first written submission that by virtue of Article 18.3 of the Agreement the calculation of the original dumping margins cannot be challenged under the provisions of the present Agreement?

Reply

100. The USG's argument in paragraph 137 of its first submission is logically flawed. Essentially the USG asserts that, because the original investigation was initiated before the entry into force of the AD Agreement, the provisions of the AD Agreement do not apply to the application of dumping margins in this sunset review. Article 18.3 is more than just a timing provision. Article 18.3 dictates how and to what extent the obligations of the AD Agreement will be applicable to existing anti-dumping duty orders. Article 18.3.2 states that, "{f}or purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement." Article 18.3.2, together with the chapeau of Article 18.3, requires a Member to terminate the imposition of all previously existing antidumping duties in five years after the effective date of the WTO Agreement, unless the Member conducts sunset reviews upon the expiry of these measures in accordance with the AD Agreement. As such, while this provision does have aspects of a timing provision to transition from one regime to the next, it also carries substantive obligations. Sunset reviews of these old anti-dumping duty orders must now conform to the obligations of the WTO Agreement. Therefore, when USDOC employs a pre-WTO dumping margin for purposes of its likelihood determination, that margin must be adjusted to conform to current WTO dumping margin calculation disciplines. The USG's argument permits an authority to perpetuate the use of WTO-inconsistent dumping margins indefinitely despite the explicit language of Article 18.

101. Moreover, the United States has initiated all sunset reviews on or after 1998. Therefore, all sunset reviews are "reviews of existing measures" under Article 18.3. The USG's sunset review determination thus must be in accordance with the current Agreement. In order for the determination to be consistent with the current AD Agreement, the basis on which the determination stands must be WTO-consistent. A dumping margin, which was calculated in accordance with WTO-inconsistent methodologies, is not an appropriate basis for the sunset review determination. Use of such dumping margins as the basis of the determination in a sunset review is inconsistent with the USG's obligations under the AD Agreement.

102. It should be noted that Japan is not challenging, per se, the dumping margins found in the original investigation or its methodologies used to calculate the original dumping margins. Rather, Japan is challenging the employment of those margins in USDOC's likelihood determination in sunset reviews, as effectively mandated by the Sunset Policy Bulletin.

(b) How does Japan reconcile its argument that the provisions of the current Agreement apply to the pre-WTO dumping margins used by the DOC with the finding of the US-DRAMS panel that in an Article 9.3 administrative review of a pre-WTO measure under the new Agreement, the provisions of the Agreement apply to those aspects of the pre-WTO measure that are under review.[71]

Reply

103. As stated in our oral statement, the USG's interpretation of the panel report in US-DRAMs is misplaced.[72] The US-DRAMs panel findings in fact support Japan's position. The panel report specifically has stated "the AD Agreement applies to those parts of a pre-WTO measure that are included in the scope of a post-WTO review."[73] A sunset review determines, and therefore its scope is, the likelihood of "dumping" and "injury." Thus, the basis of "dumping" and "injury" in sunset reviews, in which USDOC relied on previously calculated dumping margins, must be WTO-consistent.

29. Japan states in paragraph 51 of its oral statement that "...the USDOC would not need to recalculate past dumping margins in every sunset review in exactly the same manner under Article 2 as in the original investigations". What obligations govern the dumping component of a sunset review? If not all of the obligations in Article 2 apply, which ones do and why? What criteria may guide this distinction?

Reply

104. We stated that "USDOC would not need to recalculate past dumping margins in every sunset review in exactly the same manner under Article 2 as those in the original investigation." (emphasis added). In other words, if USDOC is going to base its dumping determination on pre-WTO dumping margins, it is required to eliminate the effects of WTO-inconsistent methodologies from these margins. USDOC might not be required to completely recalculate every dumping margin from the outset to comply with requirements under Article 2. A dumping margin that was calculated pursuant to pre-WTO methodologies, however, may not be used as a basis of the likelihood determination in a sunset review without eliminating the effects of the WTO-inconsistent methodologies.

105. USDOC may also choose not to base its dumping determination on past dumping margins. In this case, USDOC must calculate a current dumping margin pursuant to the obligations of Article 2. In either scenario, however, to ensure the dumping margin is truly prospective, USDOC must then adjust the margin to reflect likely future developments in the market.

30. Does the determination of likelihood required by Article 11.3 require the calculation or recalculation of past dumping margins? What relevance could this have to the issue of whether or not the pre-WTO dumping margins in this case are subject to review by this Panel?

Reply

106. The likelihood determination under Article 11.3 must be prospective in nature. What is important is, therefore, that no matter which dumping margins USDOC uses those margins must reflect the prospective nature of the analysis.

---

[71] Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea ("US – DRAMS")*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521, para. 6.14.

[72] *See* USG First Submission, at para 138.

[73] *US–DRAMs*, para 6.14

107. The WTO-consistency of pre-WTO dumping margins is relevant to USDOC's sunset review determination because USDOC bases its determination on those margins. In the sunset review of *Corrosion-Resistant Steel Products from Japan*, and all other sunset reviews, USDOC based its determination on past dumping margins, which were calculated with WTO-inconsistent methodologies in accordance with the Sunset Policy Bulletin, sections II.A.1 and II.B. USDOC stated in its final determination of this case that USDOC based its dumping determination on past dumping margins. USDOC also determined that the dumping margins from the original investigation would prevail if the order were revoked. As discussed in our answer to question 43 below, past dumping margins are relevant to conduct a proper prospective determination. This information, however, is just part of the analysis. These determinations do not satisfy the prospective nature of the likelihood determination under Article 11.3.

31. How does Japan respond to the US argument, in footnote 193 of its first written submission, that Article 2.4.2 of the Agreement does not apply in sunset reviews? In this connection, what is the legal nature and role of the phrase "during the investigation phase" contained in Article 2.4.2 of the Agreement with respect to the issue of whether or not this obligations applies to sunset reviews?

Reply

108. The Appellate Body in *EC – Bed Linens* clarified the proper interpretation of Article 2.4 of the AD Agreement. The Appellate Body in that case found that dumping margins calculated using a zeroing methodology are WTO-inconsistent in proceedings that determine "dumping," and is not limited to original investigations. The term "during the investigation phase" in Article 2.4.2 instructs us that the authorities must use either a weighted average-to-weighted average or transaction-to-transaction methodology to determine the magnitude of dumping in an original investigation. Japan does not argue that the requirements of Article 2.4.2 apply directly to sunset reviews. Rather, Japan asserts that if USDOC is going to apply pre-WTO dumping margins from the original investigation in its likelihood determination, then those dumping margins must be WTO-consistent. Moreover, because the object and purpose of original investigations and sunset reviews are analogous, and both require a consideration of "dumping," then the obligations of Article 2.4.2 must apply as well.

109. The Appellate Body has found that zeroing is not only inconsistent with the obligations of Article 2.4.2, but also with the entire provision of Article 2.4 in a much broader sense, not just simply to original investigations. For further explanation of the WTO-inconsistency of "zeroing-out" dumping margins under Article 2.4, please see our second written submission, at paras. 103-113, and the answer to the following questions.

110. As discussed in answer to question 29, USDOC cannot apply dumping margins to sunset reviews that are WTO-inconsistent. Therefore, USDOC is under an obligation to either calculate the current dumping margin without "zeroing-out" negative margins or at the very least adjust the old margins to account for the "zeroed-out" negative margins.

32. What is the legal relationship of the obligation in Article 2.4.2 with the obligation in the chapeau of Article 2.4 to ensure a "fair comparison"? If Article 2.4.2 does not apply to sunset reviews, could "zeroing" be challenged on the basis of the Article 2.4 "fair comparison" obligation alone? Why or why not? In responding, please comment on paragraphs 21 through 24 of Brazil's third party oral statement concerning the issue of application in sunset reviews of the requirement of "fair comparison" in the chapeau of Article 2.4.

Reply

111. Japan submitted in its first submission that the use of dumping margins with "zeroed-out" negative margins as the basis of sunset review determinations is inconsistent with Article 2.4 and 11.3. The practice of "zeroing" selectively calculates margins only for those sales of products with positive margins and rejects sales with negative margins. This methodology thus creates an artificially high margin. The Appellate Body's findings in *EC – Bed Linens*[74] obliges authorities to make dumping determinations without "zeroing" negative dumping margins.[75] The Appellate Body determined that Article 2.4 requires the administering authorities to make a "fair comparison" between all comparable export transaction.[76] As discussed below, the existence of dumping margins, which is the basis of the "dumping" determination under the AD Agreement, must be established by making a "fair comparison" across all product types under consideration, not some of these types.

112. Article 2.4 sets forth how the comparison should be made between the export price and normal value to establish the dumping margin. It provides that the comparison must be fair, making due allowances for the differences affecting price comparability between the export price and normal value. The dumping margins in all proceedings, including sunset reviews, must be established in accordance with such fair comparison under Article 2.4.

113. The "fair comparison" requirements to establish the existence of the dumping margins under Article 2.4 must be understood in the context of "dumping" determinations under all the provisions of Article 2. In this context, Article 2.1 provides:

> 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)

114. The Appellate Body in *EC – Bed Linens* has stated "from the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*."[77] As shown above, Article 2.1 defines that a product is dumped if the export price is lower than its normal value. The difference is the margin of dumping. The existence of dumping therefore could not be determined unless the authorities properly establish, i.e., calculate, the dumping margin. The panel in *EC – Bed Lines* confirmed this, stating "{i}t appears to us that the calculation of a dumping margin pursuant to Article 2 constitute a determination of dumping."[78] Article 2.1 thus informs all the provisions of Article 2 that the determination of dumping must be based on the properly established dumping margin.

115. "A product" under Article 2.1[79] incorporates all types of the product that are subject to a particular anti-dumping duty. 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. In this case,

---

[74] *See EC – Bed Linens*, Appellate Body Report, at para. 55.

[75] *See* Japan First Submission, at para. 176.

[76] *See EC – Bed Linens*, at para. 55. ("{W}e are also of the view that a comparison between export price and normal value that does not take fully into account the price of all comparable export transactions – such as the practice of "zeroing" at issue in this dispute – is not a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.").

[77] *EC – Bed Linens*, at para. 51.

[78] *EC – Bed Linens, Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, at para. 6.128 (29 November 2002).

[79] "A product" is also described as "a product under consideration" under Articles 2.2 and 2.6, or a "product under investigation" under Article 6.

for example, the dumping determination must be made based on all the exports of corrosion-resistant steel products from a Japanese respondent, not on some or only part of the product. The Appellate Body in *EC – Bed Linens* clarified this point:

> We see nothing in Article 2.4.2 or in any other provision of the Anti-Dumping Agreement that provides for the establishment of "the existence of margins of dumping" for types or models of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the product that is subject of the investigation. (emphasis added)[80]

116. The Appellate body proceeded to clarify that Article 2.1 informs the interpretation of Article 2.4 and the "fair comparison" and "price comparability" requirements. Essentially these requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The Appellate Body in *EC – Bed Linens* stated that:

> The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.[81]

117. The practice of "zeroing-out" negative dumping margins when calculating margins of dumping is, therefore, inconsistent with Article 2.4 of the AD Agreement.

33. Is the reasoning of the Appellate Body concerning "zeroing" in *European Communities – Bed Linen* transposable to sunset reviews? Why or why not?

Reply

118. As discussed above, both anti-dumping investigations and sunset reviews must determine whether a product under consideration, as a whole, is or is likely to be dumped, based on the magnitude of dumping. Again, the omission in Article 11.3 of the definition of "dumping" does not mean that this term is undefined for sunset review purposes. The basic concept of "dumping" applies to both anti-dumping investigations and sunset reviews, irrespective of the dumping margin calculation methodologies. As the Appellate Body has stated, any "dumping" determination, including sunset reviews, must be made without zeroing.

119. The USG asserts that it is improper for Japan to rely on *EC – Bed Linens* to support its zeroing argument because that case did not involve a sunset review and only addressed zeroing on an average-to-average basis, not the average-to-transaction basis that was used in the investigation and administrative reviews considered in this sunset review.[82] Again, the USG misses the point. The fact that *EC – Bed Linens* did not involve a sunset review and involved average-to-average transactions is not dispositive. The key point is that the Appellate Body found that zeroing does not provide a "fair comparison" between the export price and the normal value when calculating the level of dumping. This has little relevance to whether the "fair comparison" is made on an average-to-average basis or an average-to-transaction basis. Zeroing in either of these types of comparisons is distortive and does not provide a fair comparison.

---

[80] *EC – Bed Linens*, WT/DS141/AB/R at para. 53.
[81] *Id*. at para. 60.
[82] *See* USG First Submission, at paras. 144-145.

120. Moreover, the USG never addressed Japan's argument regarding the fact that dumping is defined once in Article 2 and that definition then applies throughout the Agreement. Therefore, the relevant provisions that require USDOC to use dumping margins in its likelihood determination in a sunset review must reflect a "fair comparison" between the export price and the normal value. We also note that the USG does not address its long-standing zeroing practice.

34. Please specify the (allegedly) WTO-inconsistent practices that you argue were employed by the US investigating authority in the original investigation. Please cite the relevant portions of the record to substantiate your response. Is Japan arguing that the DOC's dumping calculation in this sunset review used these practices, or is Japan arguing that the original margins were based on these practices and the fact that the DOC used these margins in this sunset review renders the review determination inconsistent with Article 11.3?

Reply

121. Please see Japan's answer to question 27 and Appendix I for a detailed discussions of the WTO-inconsistent methodologies employed by USDOC in dumping margin calculations in original investigations and administrative reviews, and the relevant portion of our exhibits.

122. Japan argues that USDOC's use of these dumping margins renders its determinations in sunset reviews generally, and in this case, WTO-inconsistent.

VII. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

A. "LIKELY" AND "NOT LIKELY"

BOTH PARTIES

35. Pursuant to Article 11.3 of the Anti-dumping Agreement, any definitive anti-dumping duty shall be terminated not later than five years from its imposition unless the investigating authority determines that the expiry of the anti-dumping duty would be "likely" to lead to continuation or recurrence of dumping and injury in a review initiated before that date.

(a) Does the concept of "likely" or "likelihood", as it appears in Article 11.3, refer to a range of probability?

(b) On the basis of a probability scale from 0 to 100, do you agree with the proposition that "not likely" means between 0 and 50, whereas "likely" falls between 50 and 100?

(c) Does the word "likely" simply mean something that is more likely than not, and "unlikely", something that is less likely than not to occur?

(d) Can there be any future event whose probability of happening can be classified as being neither "likely" nor "unlikely"? Can there be a future event whose probability of happening is both "likely" and "unlikely"? Do you agree with the proposition that if a state of affairs is judged to be likely, it cannot simultaneously be judged to be unlikely?

Reply

123. The concept of "likely" or "likelihood" in Article 11.3 refers to a range of probability, or more precisely a spectrum of certainty. At one end of the spectrum is the Article 11.3 "likely"

standard and at the other the WTO-inconsistent "not likely" standard. Along this spectrum there are varying degrees of certainty.

124. It is impossible, however, to quantify precisely where "not likely" stops and "likely" begins along this spectrum. From a practical standpoint it is impossible to determine whether there is a 49, 50, or 51 per cent certainty that a respondent will dump in the future. Nevertheless, the difference between "not likely" and "likely" is not a 50/50 proposition. As the panel in *US – DRAMs* points out, "likely" implies a much greater degree of certainty - probability is not the same as possibility.

> We consider that this reflects common usage of the relevant terms. A finding that an event is "likely" implies a greater degree of certainty that the event will occur than a finding that the event is not "not likely". For example, in common parlance, a statement that it is "likely" to rain implies a greater likelihood of rain than a statement that rain is not unlikely, or not "not likely". Similarly, a statement that a horse is "likely" to win a race implies a greater likelihood of victory than a statement that the same horse is not unlikely to win, or not "not likely" to win. The difference between the concepts of "likely" and "not likely" is perhaps made clearer by interpreting the word "likely" in accordance with its normal meaning of "probable". The question then becomes whether not "not probable" is equivalent to "probable". In our view, the fact that an event is not "not probable" does not by itself render that event "probable".[83]

125. This indicates that "likely" occupies the far end of the certainty spectrum and possibility/ "not likely" the other. That an event is not "not probable" does not mean that an event is "probable." The difference between whether an event is probable or possible is not an "either or" proposition. Therefore, in order for the authorities to determine that a respondent is "likely" to dump in the future, the authorities must determine that the respondent falls on the "likely" end of the spectrum. If the authorities are uncertain where along the spectrum the respondent falls, the authorities may not find that there is likelihood of future dumping. To find that an event is probable requires an authority to ascertain definitively that there is a sufficient level of certainty that an event is "likely"/probable. In other words, the authorities must find that the event clearly falls on the "likely"/probable end of the spectrum. The general rule under Article 11.3 to terminate an anti-dumping duty,[84] therefore, requires that any uncertainty as to the likelihood of future dumping means that the authorities must find in favour of the respondents. As the *US – DRAMs* panel points out, if something is found to be "likely," it cannot simultaneously be "unlikely."

126. Thus, USDOC must find that there is a high degree of certainty that the respondent will dump in the future. Yet, USDOC's regulations and the Sunset Policy Bulletin create a "not likely" standard, which incorporates a much lower degree of certainty.

36. Pursuant to Article 11.3 of the Anti-dumping Agreement, any definitive anti-dumping duty shall be terminated not later than five years from its imposition unless the investigating authority determines that the expiry of the anti-dumping duty would be "likely" to lead to continuation or recurrence of dumping and injury in a review initiated before that date, whereas the US Sunset Regulations state that the Secretary will revoke an order only where the Secretary determines that revocation is not likely to lead to continuation or recurrence of dumping. Does the United States agree with this characterization? Does the use of the unlikely

---

[83] *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors ("DRAMs") of one Megabit or Above from Korea*, WT/DS99/R at para. 6.46 (19 March 1999).

[84] *See* Appellate Body report in *US – CVD Sunset*, which has stated in connection with CVD sunset reviews under Article 21.3 of the SCM Agreement (the corollary to Article 11.3 of the AD Agreement). ("the principle obligation in Article 21.3 is not, per se, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review.") (emphasis added), at para. 108.

standard to trigger revocation place a more onerous burden of proof upon exporters that is inconsistent with the requirements of Article 11.3?

Reply

127. The Panel has correctly pointed out that USDOC's Sunset Regulations create an impermissible "not likely" standard. The "unlikely" standard does create a more onerous burden of proof upon exporters and is inconsistent with the requirements of Article 11.3. In fact, section 351.222(i)(1)(ii) by using the "not likely" language incorporates the much lower degree of certainty. Indeed, the Sunset Policy Bulletin, in accordance with USDOC's Sunset Regulations section 351.222(i)(1)(ii), establishes standards for revocation that are practically impossible to rebut, thereby converting any "likely" standard in the statute into the WTO-inconsistent "not likely" standard in the Sunset Regulations. Please see our answers to Question 8 above for further explanation on this issue.

JAPAN

38. The Panel notes Japan's allegation in para. 105 of its first written submission that the DOC applied the "not likely" - as opposed to the "likely" - standard in the instant sunset review. The Panel also notes that Japan cited DOC's Final Sunset Decision Memo in this respect. The Panel observes that on page 6 of that memo, although the term "unlikely" is being used as part of the DOC's discussion of certain objections raised by NSC, the conclusion seems to explicitly refer to the "likely" standard. The Panel also notes that the notice of continuation of the anti-dumping order in the instant sunset review states on its face that the standard applied is the "likely standard".[85] On what basis is Japan arguing that the USDOC applied the "not likely" standard in this case? Please cite the relevant portions of the record. Is Japan challenging the adoption of the not likely standard as a mandatory requirement of US law or is Japan rather challenging the application of this standard, as a discretionary standard, in this case?

Reply

128. Japan challenges the mandatory "not likely" requirement in the Sunset Regulations, USDOC's general practice of applying a "not likely" standard to every sunset review, and USDOC's application of a "not likely" standard in this case. As discussed in answers to questions 8 and 36, USDOC's Sunset Regulations force it to apply a "not likely" standard. This alone is inconsistent with Article 11.3. At the same time, to implement the requirements of these regulations, USDOC adopted the Sunset Policy Bulletin. Therefore, the Sunset Policy Bulletin explains how USDOC's Sunset Regulations, specifically section 351.222(i)(1)(ii), applies to individual sunset reviews.

129. By following the precepts of USDOC's Sunset Regulations, the Sunset Policy Bulletin creates an irrebuttable presumption that dumping is "likely" to continue. The Sunset Policy Bulletin in sections II.A.3 and 4 directs USDOC to examine whether the facts of a particular sunset review fall into one of four factual scenarios. All of these factual scenarios, however, discourages examination of facts other than historical dumping margins and import trends. The Sunset Policy Bulletin groups these four factual scenarios into two categories: (1) historical events that indicate that dumping is "likely" to continue or recur; and (2) historical events that indicate that dumping is "not likely" to continue or recur. Three of the four factual scenarios in section II.A.3 are in the "likely" category and the fourth factual scenario in section II.A.4 is in the "not likely" category. These scenarios show that USDOC distinguishes the "not likely" standard from the "likely" standard. Consistent with the regulations, the "not likely" scenario is the only scenario in which satisfaction of it will result in revocation. If the facts of a particular case fall into the "likely" category, a presumption is established

[85] Notice of Continuation of Antidumping and Countervailing Duty Orders on Certain Steel Products from Japan, 65 FR 78469 (Exhibit US-5).

that the respondent will dump in the future. Respondents can only rebut this presumption by placing "other evidence" on he record. USDOC, however, uses the "good cause" standard to foreclose any examination of "other evidence" that may tend to rebut this presumption.

130. Therefore, because the Sunset Policy Bulletin creates an irrebuttable presumption and denies any meaningful prospective analysis, the Sunset Policy Bulletin effectively applies the "not likely" standard contained in USDOC's regulations. USDOC follows the guidelines of the Sunset Policy Bulletin in every case, thereby perpetuating USDOC's effective "not likely" standard as a general practice.

131. USDOC also applied this "not likely" standard in this sunset review as well. USDOC found that because "dumping had continued to occur throughout the life of the order and import volumes were significantly lower than per-order level," dumping was "likely" to continue in the future.[86] By strictly following the obligations set forth in the Sunset Policy Bulletin in this case USDOC effectively applied an analytical standard that is inconsistent with Article 11.3 of the AD Agreement. As discussed above, the Sunset Policy Bulletin solidified the application of the "not likely" standard to sunset reviews. The application of the Sunset Policy Bulletin to this case, therefore, is application of the "not likely" standard.

132. Further, USDOC's statement in its final determination demonstrated that USDOC in fact applied the "not likely" standard. It stated "the fact that NSC reduced its dumping margins during the same time that its port levels have remained stable does not lead us to conclude that dumping is *unlikely* to occur in the future."[87] It also stated that, even if USDOC had considered other factors presented by NSC, "the factors do not provide sufficient evidence that NSC is *not likely* to dump in the future."[88] Simply because USDOC's decisional memorandum used the magical incantation of the term "likely" does not mean USDOC in fact applied that standard in practice.

39. Japan has contended that the factual scenarios in the Bulletin give rise to presumptions that are contrary to the requirements of the Agreement.

(e) Does Japan contend that the adoption of any presumption is per se inimical to Article 11.3, and if so, why?

(f) Or does Japan contend that the particular scenarios applied by the United States are inimical to Article 11.3, and if so, why?

Reply

133. Japan claims that the presumption in the Sunset Policy Bulletin is inconsistent with the USG's WTO obligations. Japan does not claim that the adoption of any presumption is *per se* inconsistent with Article 11.3.

134. The presumption in the Sunset Policy Bulletin is inconsistent with the USG's obligations under Article 11.3. The factors used to establish the presumption in the Sunset Policy Bulletin only relate to historical dumping margins and import volumes. The Sunset Policy Bulletin does not incorporate any factors addressing recent changes in the economic conditions of the market. The Sunset Policy Bulletin's irrebuttable presumption prevents any sort of prospective consideration. The presumption prevents USDOC from considering any other relevant factors and therefore prevents any sort of prospective analysis of future dumping on a case-by-case basis. To be WTO-consistent, the

[86] *See Final Sunset Decision Memo*, at 5-6 (**Ex. JPN-8e**).
[87] *Id. See also* Japan First Submission, at para 140.
[88] *Final Sunset Decision Memo*, at 6 (Ex.JPN-8e) (emphasis added). *See also* Japan First Submission, at para 105.

Sunset Policy Bulletin must not set such rigid preconceived scenarios to determine whether dumping is "likely" to continue or recur.

B. NATURE OF OBLIGATION TO "DETERMINE" LIKELIHOOD OF CONTINUATION OR RECURRENCE

BOTH PARTIES

40. Article 11.3 requires that any definitive anti-dumping duty shall be terminated not later than five years from its imposition unless the investigating authority "determines" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury in a review initiated before that date. What is the meaning and content of the word "determine" in Article 11.3? Which, if any, obligations does it cast upon an investigating authority in a sunset review? More specifically, does it carry with it any obligations on the part of the investigating authority as to what steps it needs to take to inform itself in order to make a determination?

Reply

135. The term "determine" in Article 11.3 requires the authorities to base their likelihood findings on positive evidence, which directs the authorities take positive action to collect evidence. The ordinary meaning of "determine" is "to conclude from reasoning or investigation, to deduce, or ascertain definitely."[89] The plain meaning of "determine" thus requires the authorities take positive action to reach a conclusion.

136. The obligation to "determine" under Article 11.3 must also be read in the context of the "necessary" requirement under Article 11.1. When read in conjunction with the concept of "necessary," the obligation to "determine" reflects a serious burden. The authority must "determine" that revocation of the order will "likely" lead to continued dumping based on, in the words of the *US – DRAMs* Panel, the "positive evidence adduced," "as that appropriate to circumstances of practical reasoning intrinsic to a review process." The panel in *US – CVD Sunset* reached a similar conclusion as the panel in *US – DRAMs*, and found that the term "determine" in Article 21.3, the corollary to Article 11.3 of the AD Agreement, requires that "any determination made by investigating authorities under the SCM Agreement must be properly substantiated in order for that determination to be legally justified."[90] In addition, the Appellate Body in *US – Leaded Bars*, interpreted "determine," within Article 21.2 of the SCM Agreement, to require the investigating authority to base its "determination" on positive evidence that there is a continuing need for the imposition of the countervailing duty.[91]

137. Therefore, the text and context of Article 11.3 places the burden on the authorities to establish through positive evidence and on a prospective basis that the continuation or recurrence of dumping is probable. Moreover, the word "determine" and "likely" combine to compel the authorities to take affirmative steps to collect the necessary facts for prospective analysis and not just base their findings on assumptions from past evaluations.

138. Thus, USDOC's reliance on historical dumping margins and input volumes is inconsistent with Article 11.3, which requires the authorities to base their determinations on positive evidence that the authorities collect through their affirmative actions.

---

[89] *See* The New Shorter Oxford English Dictionary, at 651 (**Ex. JPN-23**).

[90] *See* Report of the Panel, *United States Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ("US –CVD Sunset")*, WT/DS213/R at para. 8.92 (3 July 2002).

[91] *See United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, at para. 54 (7 June 2000).

41. In paragraphs 34 and 35 of its oral submission, Japan argues that an investigating authority in a sunset review should consider certain additional positive evidence to carry out a prospective analysis. Which "other factors" should or must an investigating authority consider beyond historical facts? Where in the Agreement do you find the legal basis for your view?

Reply

139. As discussed above, while historical factors might be relevant to the authorities' prospective determination, they are not dispositive. When examining "other factors" the authorities should look to both the economic conditions of the market and the condition of individual respondents. Economic conditions would include such factors as: the strength or weaknesses of the relevant markets for the product under consideration; the state of the major input for the product under consideration; and any fluctuation in exchange rates. Information relating to the condition of the individual respondents should include their production process, capacity and utilization, sales performance, and financial condition. All of these "other factors" may be relevant to whether a respondent is likely to dump in the future.

140. The panel in *US–CVD Sunset* provides a good basis to consider relevant factors for a "likely" dumping analysis. The panel found that when assessing the likelihood of future subsidization historical import volumes and historical CVD rates are only part of the analysis. The panel found that it was appropriate to examine changes in the subsidy programs as well as socio-economic and political changes.[92] The panel found that economic factors showing changes from the time of the original investigation are relevant to the likelihood determination under Article 11.3. The Appellate Body in *US – CVD Sunset* has confirmed this, stating that "{t}he continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would 'be likely to lead to continuation or recurrence of subsidization and injury.'"[93] It has also stated "mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient."[94]

141. In a slightly different context, the panel in *US – DRAMs* confirmed that the prospective nature of reviews under Article 11 requires that "determinations" be based on positive evidence, stating:

> Accordingly, we must assess the essential character of the necessity involved in cases of continued imposition of an anti-dumping duty. We note that the necessity of the measure is a function of certain objective conditions being in place, i.e., whether circumstances require continued imposition of the anti-dumping duty. That being so, such continued imposition must, in our view, be essentially dependent on, and therefore assignable to, a foundation of positive evidence that circumstances demand it. In other words, the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced.[95]

142. Therefore, as discussed above, the prospective nature of Article 11.3 demands that the authorities base their "determination" on positive evidence.

JAPAN

42. Regarding the investigating authorities' obligation in Article 11.3 to determine the likelihood of continuation or recurrence of dumping in sunset reviews, how do you believe the

---

[92] *See id*.
[93] *Id*., at para. 88.
[94] *Id.*, at para. 88.
[95] *US – DRAMs*, at para. 6.42 (emphasis added).

DOC failed to adhere to the positive obligation that Japan describes regarding the nature of dumping determinations?

Reply

143. USDOC has never considered any of the factors enumerated in the answer to the previous question. USDOC has relied solely on historical dumping margins and import volumes. USDOC has not even considered the broader trends in such data. Further, USDOC failed to collect any information, which would facilitate a prospective analysis. To the contrary, USDOC has restricted the type of information that parties submit, including their "good cause" arguments, by requiring that all argumentation be submitted within the first 30 days after initiation. USDOC has never taken any affirmative action to collect other information. Instead, USDOC has applied the "good cause" requirement in its regulations to foreclose any possibility of making a prospective analysis. In this case, USDOC even refused to consider information that NSC submitted more than two months before the final determination.

43. Japan emphasizes the prospective nature of the determination to be made under Article 11.3. Does Japan also accept that the analysis of past data can also be part of the evidence that an investigating authority can consider in making a prospective determination although it may not be a sufficient basis for that determination? If the answer is in the affirmative, does Japan believe that while past behaviour is relevant, proceeding on the basis of factual presumptions of the kind in the US legislation is irrational or unduly restrictive of the inquiry? If so, why? And how is that inconsistent with the relevant provisions of the Anti-dumping Agreement?

Reply

144. Yes, Japan, believes that historic import volumes and dumping margins, which must be calculated pursuant to WTO-consistent methodologies, are relevant to a proper prospective determination. Such information, however, is just part of the analysis. USDOC's irrebuttable presumption methodology in the Sunset Policy Bulletin, however, examines only historic import volumes and dumping margins and as a result is unduly restrictive. USDOC does not even consider the trends that the data show.

145. Further, as discussed in our answer to question 18, the determination of dumping requires the authorities to base their findings of dumping on positive evidence. Under Article 11.3, therefore, the authorities' likelihood of dumping determination must be based on probable future dumping. USDOC, however, has never quantified probable dumping margins.

146. Article 2 sets forth the requirements for calculating dumping margins and defines how dumping should be determined. Article 2.1 provides that a product is considered dumped if the export price is lower than its normal value. The difference is the margin of dumping. The existence of dumping could not be determined unless the authorities quantify a dumping margin. The authorities, therefore, could not find dumping without quantifying the margins of dumping. The panel in *EC – Bed Linens* confirmed this, stating "{i}t appears to us that the calculation of a dumping margin pursuant to Article 2 constitutes a determination of dumping."[96]

147. The provisions of Article 2 apply to all "dumping" determinations under the AD Agreement. Article 2.1 of the AD Agreement defines dumping "for the purpose of this Agreement." The panel in *EC – Bed Linens* also explained that the provisions of Article 2 "govern the determination of dumping

[96] *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW at para. 6.128 (29 November 2002).

by establishing rules for calculation of dumping."[97] USDOC's methodology of determining the likelihood of dumping, by looking only to historical dumping margins and import volumes without quantifying future dumping margins, is, therefore, inconsistent with the likelihood of "dumping" determination under the Article 11.3, to which Article 2 applies.

148. Also, as discussed in our answer to question 41, the prospective analysis requirement of Article 11.3 requires the authorities to take an active role in collecting positive evidence. Such evidence includes the economic conditions of the market as well as the economic conditions of the individual respondents.

44. Regarding NSC's 11 May 2000 submission of information in its case brief, what was the nature and content of the information provided by NSC in that submission that Japan argues was not taken into consideration by USDOC? Did Japan present arguments advocating that the USDOC accept and consider that information on the basis of "good cause"?

Reply

149. NSC submitted the following information in its 11 May 2000 case brief:

- Prior to the original investigation, NSC had entered into a joint-venture with Inland Steel to establish I/N Kote, in the state of Indiana. The joint-venture involved hot-dip galvanizing and electro-galvanizing steel production. It had started its operation in the fall of 1991, and was still in the start-up phase during the period of the original investigation. NSC explained that it had reduced its exports to the United States as I/N Kote increased its production.

- NSC also explained that after taking into account the reduced export levels due to I/N Kote's production, NSC's exports have remained relatively constant, while at the same time its dumping margins have declined over the life of the AD order.

- NSC pointed out that it also had a stable customer base in the United States and as a result its export shipments remained stable over the period.

- NSC then argued that the above information, and the significant declining trends of its dumping margins does not lead to the conclusion that NSC is likely to dump in the future.[98]

150. All of this information tended to demonstrate why its volume of shipments to the US had not been dependant on the existence of dumping margins over the period.[99] Rather than accepting this forward looking information, USDOC refused to consider this information.

45. Taking into account the US argument that the additional information supplied by NSC in its 11 May 2000 case brief was known to NSC before the sunset review and that deadlines were known to the interested parties 15 months before the initiation of the sunset review, please explain why NSC waited until 11 May 2000 to submit this additional information to the DOC?

---

[97] *Id*., at para. 6.128.

[98] *See* Nippon Steel Corp.'s Case Brief in *Sunset Review of Antidumping Duty Order on Corrosion Resistant Carbon Steel Flat Producers From Japan*, Case No. A-588-826, at 14-19 (11 May 2000) (**Ex. JPN-19c**).

[99] *See id.*

Reply

151. As discussed in Japan's oral statement, USDOC's 30-day rule is unnecessarily restrictive. Under USDOC Sunset Regulations respondents have 30 days to file their substantive response after publication of the notice of intent. Yet respondents do not know whether the domestic industry will participate in the review for 15 days after publication of the notice of intent. If the domestic industry elects not to participate, USDOC will find that the domestic industry is no longer interested in the continuation of the AD order and will revoke the order. In this case, the domestic industry filed their notice of intent to participate 15 days after initiation.[100] Therefore, NSC had only 15 days – not 15 months – after they knew they were obligated to file a substantive response. Respondents should not have to go through the time and expense of preparing its substantive arguments, as well as its "good cause" argumentation when it is unclear whether the domestic industry will even participate.

152. Nowhere in USDOC's Sunset Regulations or in the notice of intent does USDOC explain the type of information necessary to establish "good cause." In USDOC's preliminary determination, it had not considered any of the information related to NSC's joint venture even though this was part of the record in previous proceedings. As a result, NSC's case brief was the last opportunity to present argumentation before USDOC final determination.

46. Taking into account the fact that a sunset review is a new action, do you consider it reasonable to assume that information placed on the record of the original investigation and the subsequent administrative reviews may or will be used by the investigating authority in a sunset review? Do you consider that there is some onus on the respondent specifically to bring such information to the investigating authority's attention in a sunset review?

Reply

153. Japan believes that the very nature of sunset reviews under Article 11.3 requires the administering authority to examine information and evidence from previous proceedings as part of its prospective determination. Article 11.3 demands that the authorities make an affirmative effort to collect positive evidence on which to base its prospective determination.

154. Further, Article 11.3 provides that the authorities must determine the likelihood of "continuation" or "recurrence" of dumping in a sunset review. These terms instruct the authorities to consider whether the past events of dumping are likely to continue or recur in the future. Previous proceedings, in which the past events of dumping were found, are thus all relevant to sunset reviews. USDOC however, examines only historical dumping margins and import volumes from previous investigations and administrative reviews. USDOC considered no other information recorded in these proceedings. We would also like to note that the authorities are in the best position to access this information, as it is already part of their records. In sum, the authorities are obliged to review records of previous proceedings in a sunset review.

155. In this context, we further note that USDOC may transfer certain information from the previous proceedings to a subsequent proceeding or even from a different proceeding. With respect to non-confidential information USDOC has discretion to make such transfers.[101]

---

[100] *See* **Ex. JPN-33** (submitted at the first Panel meeting).

[101] *See Antidumping Duties; Countervailing Duties; Notice of Proposed Rulemaking and Request for Comments*, 61 Fed. Reg. 7308, 7325, RIN 0625-AA45 (Feb. 27, 1996) (proposing amendments to 19 C.F.R. ports 351, 353, and 355 pursuant to the URAA and the SAA) ("While the Department may place public reports from prior segments of the proceeding on the record in an ongoing proceeding, it is not required to do so."); *See also Fresh Cut Flowers from Mexico; Preliminary Results and Partial Termination of Antidumping Duty Administrative Review, and Intent to Revoke Antidumping Duty Order in Part*, 61 Fed. Reg. 28166, 28167 (June 4, 1996) (stating that when applying "facts otherwise available" USDOC may resort to "information derived

156. As discussed, the initial burden is on the authorities to collect the necessary information. The authorities may ask for certain information from respondents. However, the authorities request must be specific. They cannot simply ask for "all relevant information,"[102] as USDOC effectively does by requiring respondents to submit their substantive response and "good cause" argumentation at the same time. Even without such specific information, NSC fulfilled its responsibility by submitting all the relevant information more than two months before USDOC's final determination.

47. The Final Sunset Determination in the instant sunset review indicates that the additional information submitted by NSC on 11 May 2000 would not change the DOC's ultimate conclusion regarding the likelihood of continuation. How are Articles 11.3 (or any other applicable provisions in the Agreement invoked by Japan) relevant to considering the consistency of the USDOC's "even if" statement in the determination with the obligations in the Anti-dumping Agreement?

Reply

157. USDOC's inclusion of the language "even if" in its final determination does not mean that USDOC actually examined the information NSC submitted regardless of whether it was on time or not. USDOC's determination states a conclusion, but does not provide a rationale for its conclusion:

> We agree with domestic interested parties that NSC has not shown good cause for the Department to consider other factors, including whether NSC's 50 per cent-owned galvanizing plant achieved full production or NSC has maintained a steady base of customers. As specified n 19 C.F.R. § 351.218(d)(3)(iv), if an interested party wants the Department to consider other factors during the course of a sunset review, the party must submit evidence of good cause in its substantive response. Because NSC did not submit the additional information in their substantive response we do not find good cause to examine other factors in this review. Further, as domestic interested parties point out, even if the Department were to consider these factors, they would be outweighed by the margin and import volume evidence on record. The factors do not provide sufficient evidence that NSC is not likely to dump in the future.[103]

There is virtually no discussion of why this evidence did not satisfy the "good cause" standard or why historic import volumes and dumping margins outweighed this evidence. The lack of evaluation of prospective evidence indicates that USDOC never seriously weighed this evidence to begin with in its final determination. Consequently, simply including the "even if" language does not cure this defect.

48. What legal basis in the Agreement, if any, does Japan find for its proposition that the DOC's reporting to the ITC of the likely dumping margin in sunset reviews is a separate obligation under the Agreement? Is Japan making a separate allegation of violation in this respect? If so, could Japan please clarify this allegation.

---

from the petition, the final determination, a previous administrative review, or other information placed on the record."), which is available at http://ia.ita.doc.gov/frn/frnjun96/a201601.html; *See also Notice of Final Determination of Sales Less Than Fair Value; Stainless Steel Sheet and Strip in Coils from Taiwan*, 64 Fed. Reg. 30592, 30599 (8 June 1999) ("*(see* . . .{a respondent's} verification report dated January 28, 1999 in SSPC from Taiwan, which has been placed on the record of this investigation.)"), which is available at http://ia.ita.doc.gov/frn/9906frn/99-608a.txt.

[102] *See* Japan Oral Statement, at para. 44-45 and Japan's Second Submission, at paras. 78 for further discussion on this issue.

[103] *See Corrosion-Resistant Carbon Steel Flat Products From Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 47380, Decisional Memorandum, at cmt. 1 (2 Aug. 2000) (**Ex. JPN-8e**) (emphasis added).

Reply

158. Japan is making a separate allegation that USDOC's determination of "the magnitude of dumping" is inconsistent with its WTO obligation under Article 11.3.

159. Only after USDOC determines that dumping is likely to continue or recur without quantifying the likely dumping margins will USDOC choose a dumping margin from the results of previous proceedings, usually the original investigation. USDOC reports this dumping margin to the USITC for purposes of its injury determination in accordance with the Sunset Policy Bulletin. This determination of the magnitude of dumping constitutes an independent actionable measure, which is inconsistent with the USG's WTO obligation to determine whether future injury is "likely" under Article 11.3 and is separate from USDOC's "not likely" dumping determination.

160. As discussed in answers to questions 18, 20, and 43, because Article 11.3 requires the authorities to evaluate whether "dumping" and "injury" are likely to continue or recur, USDOC must quantify the level of dumping for the USITC to conduct its injury analysis. There is no way for the USITC to determine whether the "effects" of dumping are likely to cause injury to the domestic industry without knowing the "likely" dumping margins. Therefore, USDOC's determination of the magnitude of dumping taints the USITC's injury determination, resulting in an injury determination that is inconsistent with Article 11.3.

VIII. OTHER

JAPAN

75. In what sense do Japan's allegations under Article X:3(a) of GATT 1994 regarding automatic self-initiation of a sunset review, the requirement for exporters to provide information and the difference in procedures concerning administrative and sunset reviews concern the administration of US law rather than its substantive content? Can a discretionary measure or practice be challenged under Article X:3? What is the legal basis for your view?

Reply

161. There are many situations where a particular measure triggers violation of different WTO provisions due to the particular aspects of the measure. GATT Article X:3(a) presents just such a situation. Whether a measure is inconsistent with more than one WTO provision in any particular case depends on the facts of that case.

162. In this case, automatic self-initiation, the 30-day rule, and Article 11.2 reviews versus Article 11.3 reviews have both substantive and administrative aspects. The substantive aspects of these measures are addressed by Japan's other claims. Yet these measures also have administrative implications and consequently also impinge upon Japan's benefits under GATT Article X:3(a).

163. The panel in *Argentina – Bovine Hides* clarifies that examination of administrative rules under Article X:3(a) are permissible provided the rules are administrative in nature.[104] Japan has demonstrated in its first submission that these three measures are also administrative in nature and their application results in a WTO-inconsistent administration of the USG's obligations under the AD Agreement.[105]

[104] *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R at para.11.71 (Panel Report adopted on 16 February 2001).

[105] *See* Japan First Submission, at paras. 244-277.

164. With respect to automatic initiation the SAA confirms that automatic self-initiation is administrative in nature. The SAA states that these rules are to "avoid placing an unnecessary burden on the domestic industry and promote efficiency of administration."[106] USDOC's rejection of NSC's information was based on the 30-day rule in its regulations.[107]

165. USDOC's 30-day rule governs the deadlines imposed on parties for submitting their argumentation in a sunset review. This rule is nothing but administrative in nature. That does not mean, however, that application of this rule does not have substantive consequences to the parties involved.

166. Finally, the non-uniform approach to Article 11.2 and 11.3 reviews is also administrative in nature. Japan is not arguing that these two proceedings must be identical or that the USG has violated a substantive obligation of Article 11.3 because these two proceedings are not identical. Rather, Japan asserts that because only one of these reviews applies the proper prospective analysis despite having similar "likely" standards the USG acts inconsistently with its WTO obligations. Article 11.3 reviews should have similar administrative procedures that elicit a similar prospective analysis. Yet, Article 11.3's administrative procedures are completely antithetical to any kind of prospective analysis.

167. Japan believes that general practice claims under Article X:3(a) are appropriate, provided administration of such a practice could only be exercised in a manner that is inconsistent with the WTO Agreement. As discussed in answers to questions 1, 2, and 4, Japan believes that the substantive aspect of "administrative procedures" under Article 18.4 are challengeable under the AD Agreement. The administrative nature of such "administrative procedures" by implication therefore must also be challengeable under GATT Article X:3(a). Article X:3(a) deals directly with the administration of administrative rules in good faith. Consequently, the administrative aspects of "administrative procedures" as a general practice are actionable under GATT Article X:3(a).

BOTH PARTIES

76. Taking into account the complexities of what is raised by the domestic industry in a sunset review, does providing five days for rebuttals meet the "reasonableness" standard referred to in Article X:3 of the GATT 1994?

---

[106] SAA, at 879 (emphasis added) **(Ex. JPN-2 at 4205)**.

[107] 19 C.F.R. § 351.218(d)(3)(iv) provides: "An interested party may submit information or evidence to show good cause for the Secretary to consider other factors under Section 752(b)(c) (CVD) or section 752(c)(2) (AD) of the Act and paragraph (e)(2)(ii) of this section. Such information or evidence must be submitted in the party's substantive response to the notice of initiation under paragraph (d)(3) of this section." With respect to the due date of the submission, Section 351.218(d)(3)(i) states that, "{a} complete substantive response to a notice of initiation, filed under this section, must be submitted to the Department not later than 30 days after the date of publication in the Federal Register of the notice of initiation." **(Ex. JPN-3 at 223-25)**.

Reply

168. While the five-day limit is relatively short, the reasonableness of the provision should be considered in light of the entire proceeding. In sunset review proceedings before USDOC, an interested party is able to present additional comments in its case brief to rebut other parties' substantive response to the notice of initiation. Japan thus is not challenging the reasonableness of the period for rebuttal.

ANNEX E-2

REPLY OF JAPAN TO QUESTION 27 OF THE PANEL – FIRST MEETING

Appendix I

ANSWER TO PANEL QUESTION 27
EXPLANATION OF ACTUAL CALCULATION IN SAS PROGRAMME

27. What methodology formed the basis for the calculation of the dumping margins in the original investigations and in the subsequent administrative reviews? Please indicate the relevant portions of the record to substantiate your response. What is the legal basis in the Agreement that permits or precludes the use of such methodology(y)(ies), or that governs certain aspects of these methodologies, in a sunset review?

(a) Zeroing

(i) Application of Zeroing Methodology in the Original Investigation

1. The USDOC's use of zeroing in the margin calculation in the original investigation for NSC is shown in the margin calculation at Exhibit **JPN-12(f)**. Exhibit **JPN-12(f)** is a reproduction of NSC's SAS programme log. Specifically, the programme shows explicitly that USDOC totals only the positive margins (excluding the negative margins) and divides the total by the total net US sales value for all sales.

2. As a first step, the total net US sales value is calculated at lines 987-989.

```
987     PROC MEANS NOPRINT DATA=MARGIN;
988     VAR VALUE QTY;
989     OUTPUT OUT=ALLVAL SUM=TOTVAL TOTQTY;
```

3. Here, the dataset "MARGIN" is the input dataset. This dataset contains a calculation of the margin for each US sale, according to the amount by which normal value exceeds US price. (See lines 882-878, where the margin is calculated for each US sale.) In this manner, the dataset MARGIN contains a sale-by-sale calculation of the total margin for each US sale.

4. The "PROC MEANS" programming step and the "VAR" statement at lines 987-988 are used to total the net value (VALUE) and quantity (QTY) for all US sales. These totals are then saved in the dataset "ALLVAL" under the columns "TOTVAL" and "TOTQTY", respectively (line 989). In other words, this "ALLVAL" dataset contains one row of data listing the total value and total quantity for all US sales.[1]

5. The actual zeroing of negative margins is implemented at lines 999-1002, as follows:

[1] The log note that follows this step explains that the dataset "WORK.ALLVAL" created above has one observation, or row of data, with four variables, or columns. Other than total value (TOTVAL) and total quantity (TOTQTY), this dataset also contains two standard system variables (_FREQ_ _TYPE_) that are unrelated to the calculation.

```
999     PROC MEANS NOPRINT DATA=MARGIN;
1000    WHERE EMARGIN GT 0;
1001    VAR EMARGIN QTY VALUE;
1002    OUTPUT OUT=ALLPUDD SUM=TOTPUDD MARGQTY MARGVAL
```

6. Again, the input dataset is MARGIN. This dataset contains a sale-by-sale calculation of the total margin for each US sale in the column of "EMARGIN." This "EMARGIN", is the "extended" margin, i.e., the total dumping margin, for each US sale, calculated by multiplying the unit margin of each particular US sale by that sale's total quantity.

7. Here, the PROC MEANS programming step and the "VAR" statement at lines 999 and 1001, respectively, are used to total the extended margin (EMARGIN), quantity (QTY), and total net value (VALUE) for US sales. The programme step "WHERE EMARGIN GT 0" at line 1000 limits the pool of sales to be subjected to the "VAR" statement to those sales that have extended margins greater than ("GT" in the SAS language) zero. The resulting total extended margins, quantity, and net value for US sales with positive margins are labelled "TOTPUDD", "MARGQTY", and "MARGVAL," and are put into the dataset "ALLPUDD" at line 1002.

8. TOTPUDD, the total positive extended margins, then serves as the numerator in the weighted-average margin calculation in lines 1004-1009.

```
1004    DATA ANSWER;
1005    MERGE ALLVAL ALLPUDD;
1006    PERTMARQ=(MARGQTY/TOTQTY)*100;
1007    PERTMARV=(MARGVAL/TOTVAL)*100;
1008    WTAVMARG=TOTPUDD/TOTVAL;
1009    WTAVPERC=WTAVMARG*100
```

9. Here, the datasets ALLVAL, which was created at line 989, and ALLPUDD are merged, creating a single line of data that lists, among other data, TOTVAL, which is the total value of all US sales, and TOTPUDD, which is the total positive extended margin excluding US sales that have negative margins.

10. At line 1008, the total positive extended margins calculated at lines 999-1002 (TOTPUDD) are divided by the total net value of all US sales, calculated at lines 987-989 (TOTVAL) to reach the weighted-average margin (WTAVMARG). This fraction is then multiplied by 100 at line 1009 to convert it to a percentage figure.

11. The results, as output to the dataset "ANSWER" (line 1004) are then printed at lines 1011-1012, as shown on page 142 of the output of the programme. *See* **Ex.JPN-12.f.5**. The total value of NSC's positive margins (TOTPUDD) are divided by the total net value (TOTVAL) of all NSC's US sales to reach a weighted-average percentage margin (WTAVPERC) of 36.1422 percent.

(ii) Application of Zeroing Methodology in Administrative Reviews

12. The same calculation methodology was applied in the subsequent administrative reviews. **Ex. JPN-14d** at lines 763-789 after the message "CALCULATE OVERALL MARGIN" and **Ex. JPN-15d** at lines 808-844 show the same calculations. **Ex. JPN-14d.3 and 15d.2** show results of these calculations with respect to the fourth and fifth administrative reviews, respectively. The total positive dumping margins (TOTPUDD) was the basis of the dumping rate in these administrative reviews. *See* **JPN-14d.3 and Ex. JPN 15d.2 at 27**. Yet there were a number of sales producing negative margins that were never accounted for in this total. *See* **Ex. JPN-14d.2, and Ex. JPN 15d.2 at 23**. In fact, over half of NSC's sales in the fifth review, for example, resulted in negative dumping margins and were never counted. **Ex. JPN 15d.2**. *See* also Memorandum for the File from Doreen

Chen through Rick Johnson regarding Analysis for Nippon Steel Corp. ("NSC") for the Final Results of Administrative Review of Certain Corrosion-Resistant Carbon Steel from Japan, p. 1 (14 Feb. 2000) (**Ex. JPN 15c**).

(2) Average-to-Transaction Methodology

13. The USDOC's comparison of individual US transactions to weighted-average home market prices is demonstrated by the SAS programming beginning on line 369 of **Ex**. **JPN-12(f)**. Here, two sets of average home-market comparison prices are calculated, first by CONNUM[2] *and* by level of trade at lines 369-373, and then by CONNUM *only* at lines 381-385. In other words, average home-market prices are calculated based on two different grouping criteria. The reason for the two different averaging methodologies is that the programme later attempts to match these home-market prices to US sales first by CONNUMs sold at the same level of trade. If no match is found at the same level of trade, then it attempts to match to all sales of the particular CONNUM regardless of level of trade.

14. Lines 369-373 are included here for convenience:

```
369    PROC MEANS NOPRINT DATA=HMSALES;
370    BY CONNUMH CUSTLOTH;
371    VAR NETPRIH COMH TAXH MLVH;
372    WEIGHTH QTYH;
373    OUTPUT OUT=HM1 SUM= FMV COMH TAXH MLVH;
```

15. The dataset HMSALES contains all individual home market transactions that passed the cost test. Line 370 designates that the averaging should take place for sales of each CONNUM at each level of trade (CUSTLOTH). The "VAR" statement at line 371 designates which variables to weight average; NETPRIH is the name of the field containing the net unit price for each transaction. Line 372 designates that the averages should be weighted according to the quantity (QTYH) of sales involved in the calculation. The resulting weight averages are included in a new dataset called "HM1" at line 373, where the resulting variables are named; the resulting weight-average net price is labelled "FMV".

16. Lines 381-385 perform a similar averaging of prices for all sales of each CONNUM without regard to the level of trade:

```
369    PROC MEANS NOPRINT DATA=HMSALES;
370    BY CONNUMH;
371    VAR NETPRIH COMH TAXH MLVH;
372    WEIGHTH QTYH;
373    OUTPUT OUT=HM2 SUM= FMV COMH TAXH MLVH;
```

17. The resulting datasets HM1 and HM2 are then matched to individual US transactions at lines 652-674:

```
652    DATA MARGIN1 NOFMV1 (DROP=FMV COMH TAXH MLVH);
653    MERGE US (IN=A) HM1 (IN=B);
654    BY CONNUMH CUSTLOTH;
655    IF A & B THEN DO;
656    INDDOL=INDH*EXRATE;
657    IND2DOL=INDH2*EXRATE;
658    COMDOL=COMH*EXRATE;
```

[2] "CONNUM" is a term used in USDOC's SAS programme to mean a control number, which represent one type of the product under consideration.

```
659     FLAG='HM WITH LT';
660     OUTPUT MARGIN1;
661     END;
662     ELSE IF A & NOT B THEN OUTPUT NOFMV1;
663
664     DATA MARGIN2 NOFMV2 (DROP=FMV COMH TAXH MLVH);
665     MERGE NOFMV1 (IN=A) HM2 (IN=B);
666     BY CONNUMH;
667     IF A & B THEN DO;
668     INDDOL=INDH*EXRATE;
669     IND2DOL=INDH2*EXRATE;
670     COMDOL=COMH*EXRATE;
671     FLAG='HM W/O LT';
672     OUTPUT MARGIN2;
673     END;
674     ELSE IF A & NOT B THEN OUTPUT NOFMV2;
```

18. In the first set of programming at lines 652-662, USDOC matches each individual US transaction (as contained in the dataset "US") with the average home-market prices by CONNUM *and* level of trade (line 653). US sales that are matched successfully with average home-market prices based on this criteria are included in the dataset MARGIN1. US sales that are not matched successfully to average home-market prices using CONNUM *and* level of trade are included in the dataset "NOFMV1" at line 662. For those unmatched US sales, the programme then tries to match them to the home-market prices averaged by CONNUM *only* (contained in the dataset "HM2") at line 665. US transactions that are matched successfully using CONNUM only are included in the dataset MARGIN2.

19. These two databases (MARGIN1 and MARGIN2) are then combined at line 823 (along with the dataset CV containing US sales compared to constructed value) to calculate the actual transaction-specific margins. In lines 823-878, the average home-market prices listed under the variable FMV are adjusted and converted to US dollars (based on various criteria) to reach the foreign unit price in US dollars (FUPDOL). FUPDOL, the average home market value in US dollars, is then compared to the transaction-specific US price (USPR) at line 881 to calculate the unit margin (UMARGIN), as printed out in page 140, the last page of **Ex. JPN-12.f.3**. In this manner, individual US transaction prices are compared to average home-market prices.

(3) Sales Not in the Ordinary Course of Business

20. USDOC's application of the "10/90 test" to determine when and to what extent comparison-market sales should be disregarded as below cost is shown in Exhibit **JPN-12(f)(1)** at lines 312-331 of the SAS programme log, as follows:

```
312     DATA HMSALES HMBELOW;
313     MERGE HMCOP (IN=A) COPTEST (IN=B);
314     BY CONNUMH;
315     IF A;
316
317     IF PCTQABOV GT 90 OR ((10 LE PCTQABOV LE 90) AND
        COPTEST='ABOVE') THEN DO;
318     OUTPUT HMSALES;
319     END;
320
321     IF PCTQABOV LT 10 THEN DO;
322     IF ((MONBELOW GT 1) OR (MONSOLD=1 AND MONSOLD=MONBELOW))
```

```
323     THEN OUTPUT HMBELOW;
324     ELSE OUTPUT HMSALES;
325     END;
326
327     IF ((10 LE PCTQABOV LE 90) AND COPTEST='BELOW') THEN DO;
328     IF (MONBELOW GT 1) OR (MONSOLD=1 AND MONSOLD=MONBELOW)
329     THEN OUTPUT HMBELOW;
330     ELSE OUTPUT HMSALES;
331     END;
```

21. Here, the dataset COPTEST on line 313 is a summary list of the results of comparing each sale's price with the average cost of production for the respective CONNUM. A printout of this dataset is included on page 35 of the output section of **Ex**.**JPN-12(f)**. This printout shows that, for each CONNUM, USDOC has determined, among other data, the total quantity of sales above cost (QTYABOVE), the total quantity of sales below cost (QTYBELOW), and the percentage of sales by quantity that are above cost (PCTQABOV). The variable MONSOLD lists the number of months in which the particular CONNUM was sold, while the variable MONBELOW lists the number of months in which at least one sale below cost occurs. The variables PCTQABOV, MONSOLD, and MONBELOW are important because they are the criteria by which individual sales are judged above or below cost in the programming at lines 312-331.

22. The dataset HMCOP, shown in line 313, is a list of the individual home market sales to be judged as either above or below the cost of production. As described above, COPTEST is the dataset containing, among other data, the percentage of sales for each CONNUM that are above cost. The "MERGE" statement at line 313 and "BY CONNUMH" at line 314 assign the relevant percentages and other CONNUM-specific summary data (as printed on page 35 of the output section of **Ex**. **JPN-12(f)**) to each sale according to the CONNUM sold. (For instance, if the dataset COPTEST shows that 92 per cent of sales of a given CONNUM are above cost, that CONNUM-specific figure is assigned to all individual home-market sales of that CONNUM). To determine whether a particular sale passes or fails, each sale in HMCOP is then judged according to the criteria listed in lines 317-331 and output to either HMSALES (sales that pass the cost test) or HMBELOW (sales that do not pass the cost test).

23. The "90/10" test is implemented at lines 317-331. First, sales are tested on the following two sets of conditions:

i. If the percentage of sales of a specific CONNUM passing the cost test is greater than ("GT") 90 per cent of total sales of that CONNUM, then all sales of that CONNUM pass.

ii. If:

(a) the percentage of sales of a specific CONNUM passing the cost test is less than ("LT") or equal ("=") to 90 per cent of total sales of that CONNUM; *and*

(b) the percentage of sales of that CONNUM passing the cost test is greater than or equal to 10 per cent of the total quantity of sales of that CONNUM; *and*

(c) the net price of that particular sale is above the average cost (designated where the variable COPTEST equals "ABOVE"),

then that particular sale passes the cost test. All three conditions must be satisfied for a particular sale to pass and be included in the dataset HMSALES. If any one of these three conditions is not met, the sale fails the cost test.

Second, if sales satisfy neither set of the above-mentioned conditions, they are then evaluated at lines 321-325. Here, sales of CONNUMs that have less than 10 per cent of sales above the average cost (line 321) (PCTQABOV LT 10) are tested to see if they satisfy the following criteria at line 322:

i. whether the number of months in which sales were made below cost is greater than one; or

ii. in cases where sales of that CONNUM were only made in one month, whether below-cost sales were made in that month.

If sales satisfy either of the above two conditions, then the sale fails the cost test and is included in the dataset HMBELOW. If sales meet neither condition, then the "ELSE" statement at line 324 makes such sales pass the cost test to include them in the dataset HMSALES. In sum, for CONNUMs with less than 10 per cent of sales above cost, all sales of that CONNUM may still pass if those sales were made in multiple months (more than one) and the below-cost sales occurred in only one month.

25. Finally, lines 327-331 perform the same type of evaluation for sales of CONNUMs where (a) the percentage of above-cost sales is greater than or equal to 10 but less than or equal to 90 and (b) the individual sale evaluated is below the average cost. Like in lines 321-325, sales of this type fail the cost test if the number of months in which below-cost sales occur exceeds one, or if sales occur in only one month and that month includes below cost sales.[3] Such failing sales are included in the dataset HMBELOW. If sales of this type do not satisfy the "number of months" condition, these sales then pass the cost test and are included in HMSALES (according to the "ELSE" statement at line 330).

26. In this manner, the "90/10" standard was implemented. In sum, more than 90 per cent of sales of a CONNUM had to be above cost in order for all sales of that CONNUM to pass the cost test without further testing based on additional criteria. If between 10 and 90 per cent (inclusive) of sales are above cost, the individual sale price is then examined to determine if it is above or below cost. Only those individual sale prices that are above cost are used without additional testing. Any individual sales with prices below cost, where the CONNUM falls between 10 and 90 percent, would be used if such a CONNUM passed the "number of months" test. Finally, if the CONNUM-specific ratio falls below 10 percent, even individual sales that are above cost must pass the "number of months" standard before passing.

(4) Profits Used for Constructed Value

27. USDOC establishes a lower limitation on the profit ratio used for constructed value (CVPROFIT) at lines 356-361 of the SAS programme log *See* Exhibit **JPN-12(f)(4)**. Here, the company's actual profit ratio is calculated at line 359:

359 PRORATIO=PROFIT/TOTHMCOP;

28. The variable PROFIT represents the actual total amount by which revenue (TOTSLVAL) exceeds total cost (TOTHMCOP), the calculation of which is shown at line 358. This calculated profit ratio is evaluated at line 360 to determine whether it exceeds eight percent.

360 IF PRORATIO GT 0.08 THEN CVPROF=PRORATIO;

[3] We note that this last evaluation for CONNUMs sold in only one month is extraneous since the programming here is evaluating individual sales that are below cost. By definition, if a below-cost sale is made and sales of that CONNUM occur in only one month, there will be a below-cost sale in that month.

29. Literally, this line states that, if the calculated profit ratio is greater than eight percent, then set CV profit (CVPROF) equal to the calculated profit ratio. Line 361 then states that, if this is not the case (i.e., if the calculated profit ratio is not greater than eight percent), USDOC will set CV profit equal to eight percent.[4] The variable CVPROF is then used to calculate the per-unit CV profit later in the programme at line 800, which is added to total cost of manufacturing and packing at line 801 to reach total constructed value (TOTCV).

30. USDOC did not use the lower threshold of 10 per cent for calculating general and administrative expenses in the original investigation only because the actual general and administrative expenses exceeded this threshold, as shown at line 220:

220 GNA=COM*[**];

Here, general and administrative expenses (GNA) are calculated as [**] per cent of the cost of manufacturing (COM).

[4] While the reproduction of Ex.JPN-12.f.4 is not clear, USDOC stated this calculation in the *Concurrence Memorandum* (21 June 1993), at 26, Ex-JPN-12.c.

ANNEX E-3

REPLIES OF THE UNITED STATES TO QUESTIONS OF THE PANEL – FIRST MEETING

I. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS

Q1. The United States argues that certain US legal instruments cited by Japan are discretionary rather than mandatory and therefore cannot be challenged as such under the WTO Agreement. Please provide the Panel with detailed information regarding the legal status and interrelationships, if any, of the following instruments under US law, and in particular whether they are mandatory or discretionary. In particular, in light of the relevant WTO dispute settlement reports, the Panel would like to know whether each of these instruments have an operational life of their own under US law, and whether the DOC is *required* to follow their provisions in sunset reviews.

(i) Tariff Act of 1930 (as amended by the URAA)

1. The Tariff Act of 1930, as amended (the statute or "the Act") is US law and, while the law is mandatory, there are provisions which are discretionary in nature. The US Department of Commerce ("Commerce") is legally bound to ensure that the criteria set out in the statute are satisfied. Consequently, the statute has an operational life in its own right and is the operational basis for Commerce's activities in respect of anti-dumping measures.[1]

2. The language contained in the relevant provisions under examination indicates whether a particular provision is mandatory or discretionary (*e.g.*, by the use of "shall" or "will", and by the use of modifiers, such as "normally"). To the extent that there is no discretionary language contained in a particular provision, the provisions of the US anti-dumping law are mandatory.

(ii) Statement of Administrative Action

3. A "Statement of Administrative Action" (or "SAA") is typically required when the Executive Branch of the US Government submits legislation implementing a trade agreement to Congress that will be considered under so-called "fast-track" procedures.[2] Because the Uruguay Round Agreements Act ("URAA") was submitted to Congress under "fast-track" procedures, an SAA was required. In the case of the SAA that accompanied the URAA, the function of the SAA is set forth in the SAA itself, as follows:

> This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.

---

[1] *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 29 June 2001 ("*US Export Restraints*"), para. 8.91.

[2] Under "fast-track" procedures, Congress may not amend the legislation in question; it may only approve or disapprove.

> As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.[3]

4. In other words, the SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute and, as a general proposition, the SAA ranks supreme in terms of legislative history.[4] The unique legal status granted to the SAA, however, is only in respect to its interpretive authority *vis à vis* the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US anti-dumping statute, and cannot be independently challenged as WTO-inconsistent.[5]

(iii) Sunset Regulations

5. Commerce's regulations are US law and, while the regulations are mandatory, there are provisions which are discretionary in nature. Commerce's regulations have force and effect of law and must be followed where the language of the specific provision leaves no discretion. The regulations, however, have many provisions which provide for the exercise of discretion by the applicable decision-maker. The regulations are issued in accordance with US federal agency rule-making procedures and are accorded controlling weight by US courts unless they are arbitrary, capricious, or manifestly contrary to the statute. Thus, the regulations have an independent operational life of their own.[6]

(iv) Sunset Review Policy Bulletin

6. Under US law, the Sunset Policy Bulletin is considered a non-binding statement, providing evidence of Commerce's understanding of sunset-related issues not explicitly addressed by the statute and regulations.[7] In this regard, the Sunset Policy Bulletin has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[8] The Sunset Policy Bulletin does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a

---

[3] SAA, page 656. The reference to "section 1103" is to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"). Among other things, the 1988 Act provided the Administration with fast-track negotiating authority with respect to the Uruguay Round.

[4] *See supra* note 1.

[5] *US Export Restraints*, paras. 8.98 - 8.100.

[6] *US Export Restraints*, paras. 8108 - 8.113.

[7] Sunset Policy Bulletin, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (Emphasis added.) Exhibit JPN-6.

[8] As a matter of US administrative law, Commerce practice cannot be binding in the sense that Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

particular case, and in conjunction with US sunset laws and regulations, the Sunset Policy Bulletin does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

Q2. Regarding US practice in sunset reviews, the Panel notes that previous panels have held that practice as such cannot be challenged under WTO law. In light of the findings in previous WTO dispute settlement reports on this issue, please indicate what constitutes US practice in sunset reviews, where it can be found and whether it is challengeable under WTO law.

7. Japan identified the SAA and the Sunset Policy Bulletin as the "practice and procedures" establishing the alleged "irrefutable presumption" in violation of Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[9]

8. What Japan refers to as "practice" consists of nothing more than individual applications of the US AD law in the context of sunset reviews. While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its past precedent, that precedent is *not* binding on Commerce, and is, therefore, irrelevant for purposes of WTO dispute settlement. Japan's alleged "practice" simply consists of specific determinations in specific sunset proceedings. The sort of "practice" alleged by Japan does not constitute a measure within the meaning of the *Understanding on Rules and Procedures Government the Settlement of Disputes* ("DSU"), and for that reason alone, the Panel should dismiss Japan's claims regarding US "practice."

9. The Dispute Settlement Body ("DSB") (and the panels whose reports it adopts) has authority to issue binding determinations only with respect to particular parties in a dispute before it and only with respect to *that particular dispute*. It cannot – and should not – attempt to say how the WTO agreements might apply to possible future disputes. As the panel noted in *Export Restraints*, administrative agencies are free under US law to depart from past "practice" if a reasoned explanation is given for doing so[10], and US "practice" therefore does not have "independent operational status" that can independently give rise to a WTO violation.[11]

10. The Appellate Body expressed similar views in *Wool Shirts*[12] and *US Import Measures*[13] finding that panels are to resolve only the particular dispute before them. Nor would findings on possible future practice be wise. As noted by the panel in *EC Audiocassettes*[14], "[I]t would [not] be appropriate to reach findings on a 'practice' *in abstracto* when [a panel] had determined that the actions taken in a particular investigation were not inconsistent with the Agreement and that the 'practice' was not pursuant to mandatory legislation."

11. More fundamentally, the "future practice" of a Member simply cannot be regarded as a "measure" subject to dispute settlement, because it is purely speculative. For that reason, the DSU applies only to measures "taken", not to measures "that may possibly be taken in the future".[15]

---

[9] Japan First Submission, paras. 118 *et seq*.

[10] *US Export Restraints*, para. 8.126.

[11] *See id*.

[12] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997 ("*Wool Shirts*"), pages 19-20.

[13] United States - Import Measures on Certain Products from the European Communities, WT/DS165/AB/R, Report of the Appellate Body, adopted 10 January 2001 ("US Import Measures"), para. 92.

[14] *EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan*, ADP/136, Report of the Panel, issued on 28 April 1995 (unadopted), para. 365.

[15] Articles 3.3 and 4.2 of the DSU; *see also US Import Measures*, para. 70, where in finding that a particular measure was not within the panel's terms of reference, the Appellate Body considered, among other things, the fact that the measure had not yet been taken at the time the European Communities requested consultations.

Q7. With respect to the Statement of Administrative Action:

(a) Does the language used in the third paragraph of the introductory section of the SAA indicate that the SAA is simply an authoritative interpretative guide on the meaning of the Statute?

12. Yes; under US law, the SAA is considered an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round agreements and the anti-dumping statute in any judicial proceeding in which a question arises concerning such interpretation or application.[16]

(b) What is meant by the terms "particular authority" in the same introductory paragraph of the SAA?

13. "Particular authority" means that the SAA is entitled to more weight than ordinary legislative history, such as House or Senate reports, when interpreting an ambiguous statutory provision.

(c) If the text of the Statute itself were different from the SAA, would the SAA determine in any way the content of the Statute?

14. No. The text of the statute prevails always. As stated above, the SAA is merely the authoritative tool for interpreting the statute, but it cannot override or modify plain statutory provisions.

(d) Is the SAA only used as an interpretative guide in the event that the Statute is ambiguous, or is the SAA followed by the DOC, absent any statutory ambiguity? If so, is the DOC obliged to follow the SAA in either of the following senses:

(i) because the SAA has obligatory content; or

15. The SAA is used as an interpretive guide. Where there is no textual ambiguity in the relevant statutory provision, the plain text of the statute is applied. The SAA has no force of law and cannot stand on its own.

(ii) because the SAA articulates a binding policy from which DOC may not deviate without prior notice, which notice it has not given.

16. The SAA provides interpretative guidance with respect to the statute. It is not a statement of policy, binding or otherwise.

(e) In sunset reviews, does the DOC follow the provisions of the SAA as an authoritative interpretation of the Statute?

17. Commerce conducts its sunset reviews consistent with the applicable statutory provisions. In certain circumstances, the SAA provides additional guidance that complements the statutory provisions. As a matter of course, Commerce considers such guidance in making its sunset determinations.

(f) If the DOC were to depart from a particular provision of the SAA, what process would it need to follow and what authority would be needed? If the DOC departed from the SAA, could the DOC be successfully challenged under US law, or how would such a

[16] 19 U.S.C. §3512(d).

departure be viewed under US law, for example, in terms of legitimate expectations of interested parties?

18. The SAA does not contain "provisions" of law, is not binding, and does not create any obligations independent of those found in the anti-dumping statute. Thus, a party cannot have any expectations concerning the SAA because the obligations concerning sunset reviews are found in the statute, not in the SAA. Each determination made in every sunset review, including the ultimate decision concerning likelihood, stands on the facts in the administrative record presented in each sunset review. The standard of review applied by US courts in reviewing Commerce's sunset determinations requires that the final determination be in accordance with law and supported by substantial evidence in the administrative record.

Q8. With respect to the US Sunset Regulation:

(b) Could the US please explain precisely what it means by the term "ministerial" in describing the reference to the "not likely" standard in the Sunset Regulations?

19. With respect to the regulations, the term "ministerial" means that the administering authority (the Secretary of Commerce) must perform some procedural act in accordance with the regulatory provision and that the regulatory provision contains no substantive obligations. A ministerial act is one which requires neither an exercise of discretion nor an agency's expertise to perform. For example, section 351.222(i)(1)(ii) provides that, when the Secretary has made a negative likelihood determination (the so-called "not likely" determination), the Secretary shall publish in the *Federal Register* the notice of revocation of the order not later than 240 days after initiation of the sunset review. Section 351.222(i)(1)(ii) merely sets forth the period of time within which Commerce is required to publish notice of the substantive determination already made.

(c) In respect of DOC Regulations 19 CFR 351.222(i) (Exhibit JPN-5), both parties are requested to indicate whether this regulation is mandatory or discretionary and why. Japan is invited to respond to the US contention that this regulation is not substantive in nature and deals with time periods, and in respect of sub-regulation (iii), is unenforceable.

20. Section 351.222 does not contain any substantive obligations. Parts of section 351.222(i) are mandatory. In particular, the obligations contained in subparts (i)(1)(i) - (iii) are procedural and require Commerce to revoke an anti-dumping order within particular time limits in specific circumstances.

21. Specifically, Section 351.222(i)(1)(i) is mandatory and procedural, and requires that Commerce revoke an order if no domestic interested party files a notice of intent or the notice is inadequate, not later than 90 days after the date of publication in the *Federal Register* of the notice of initiation of the sunset review.

22. Section 351.222(ii)(1)(ii) is mandatory and procedural, and requires that Commerce revoke the order if Commerce makes a negative likelihood determination, not later than 240 days (or 330 days where the review is fully extended) after the date of publication in the *Federal Register* of the notice of initiation of the sunset review.

23. Section 351.222(iii) is also mandatory and procedural, and requires that Commerce revoke an anti-dumping order if the US International Trade Commission ("USITC" or "Commission") makes a negative likelihood determination in a sunset review, not later than seven days after the date of publication in the *Federal Register* of the notice of USITC's determination concluding the sunset review. In addition, section 351.222(i)(1)(iii) could not impose any substantive obligation on the USITC because these are Commerce regulations and the USITC is an independent agency, with its

own regulations, within the executive branch of the US Government. Commerce does not have the authority to promulgate regulatory obligations for the USITC.

(d) If there is a disagreement between the United States and Japan as to the proper interpretation of the Regulation or the legal status of the regulation in US law, how should the Panel resolve that interpretative issue? If the Panel is in doubt, does that simply mean that Japan failed to prove its case?

24. The text and context of section 351.222(i) of Commerce's Regulations make clear that this provision is procedural in nature and does not contain any substantive obligations. The section of Commerce's regulations encompassing section 351.222 was added in 1998 in order to implement the provisions of US law governing sunset reviews. The regulatory provisions, including amendments to section 351.222, are procedural in nature and the *Federal Register* notice announcing these provisions is entitled "Procedures for Conducting ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders."[17] Japan has not demonstrated that the United States' explanation as to its own regulation is incorrect or that Japan's reading of the provision is correct. If the Panel is in doubt, Japan has failed to prove its case.

25. It is an accepted principle that questions concerning the meaning of municipal law are questions of fact that must be proven.[18] Likewise, it is equally well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[19] While the Panel is not bound to accept the interpretation presented by the United States, the United States can reasonably expect that the Panel will give considerable deference to the United States' views on the meaning of its own law and regulations.[20]

Q9. With respect to the Sunset Policy Bulletin:

(a) What is the legal implication of the introductory words in Part 1 under the heading, "In general": "in accordance with Section 752 (c)(1) of the Act, in determining whether revocation of an anti-dumping order…"? Does the DOC act in accordance with the Statute, the SAA, the regulations, or the Bulletin, or some combination of these?

26. As previously discussed, the Sunset Policy Bulletin contains guidance regarding the conduct of sunset reviews. For the sake of transparency, Commerce used the Sunset Policy Bulletin to organize in one place the relevant provisions and guidance found in the statute, the regulations, and the legislative history. To this end, Section I.A.1 of the Sunset Policy Bulletin, entitled "In general", reproduces the relevant statutory provisions.

27. As discussed above, Commerce must act in accordance with the requirements of the statute and the regulations. The SAA merely provides interpretive guidance when acting in accordance with a statutory provision. Commerce also normally applies the methodologies outlined in the Sunset Policy Bulletin, but may act differently in any particular case provided it explains the reasons for the change.[21]

---

[17] *Procedures for Conduction ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*, 54 Fed. Reg. 13516 (20 March 1998).

[18] *See, e.g., India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 64, 73-74, and cases and authorities cited therein.

[19] *See, e.g., United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R, Report of the Panel, adopted 27 January 2000 ("*US 301*"), para. 7.108 & n. 681.

[20] *US 301*, para. 7.19.

[21] For example, Commerce has the discretion to make exceptions to its practice concerning the submission of information. *See e.g., Preliminary Results of Full Sunset Review; Mechanical Transfer Presses from Japan* , 65 Fed. Reg. 753, 759 (January 6, 2000)(Commerce requested submission of factual information in case briefs).

(b) Under US law, is the DOC allowed not to follow the provisions of the Sunset Policy Bulletin in cases where it deems this necessary? Have there been cases of such departure?

28. The purpose of the Sunset Policy Bulletin is to set out, in as comprehensive terms as possible, guidance with respect to sunset reviews and Commerce's conduct of them, both in terms of the procedural and substantive issues that may arise. As a result, Commerce does not "follow" the provisions of the Sunset Policy Bulletin; rather Commerce assesses the facts in each case, in light of the statutory and regulatory provisions, and considering the guidance in the Sunset Policy Bulletin on methodological or analytical issues not expressly addressed by the statute or the regulations.

29. With respect to an analysis of the likelihood of dumping in a sunset review, Japan admits that Commerce's Sunset Policy Bulletin addresses the limited universe of practical scenarios that could arise in the period after imposition of the order - *i.e.* continued existence of dumping, no dumping but depressed import volumes, total cessation of exports, and no dumping and import volumes at or near pre-order levels. That these scenarios are provided for in the Sunset Policy Bulletin does not mean that the outcome is predetermined, even when the facts in a particular case fit one of the scenarios. The outcome in each case is determined on the facts of that particular case and must be supported by the evidence on the record of the sunset review at issue. Consequently, each Commerce sunset determination is made on the factual record in that case and, as a result, that final determination cannot be characterized necessarily as a determination either "in accordance with" or a "departure from" the provisions of the Sunset Policy Bulletin.[22]

(c) In light of the use of the phrase "not likely" in Section 4 of the Bulletin, is the DOC free to adopt a "likely" standard in its dumping determinations in sunset reviews? For the DOC to be able to depart from the provisions of the Bulletin in certain circumstances, is it necessary that the relevant provisions of the Bulletin be amended, or, does the Bulletin as it stands allow the DOC to depart from these rules without need for such an amendment?

30. First and foremost, Commerce applies the likelihood standard set forth in the anti-dumping statute. The use of the phrase "not likely" in the Sunset Policy Bulletin is not intended to and does not establish a substantive obligation for sunset reviews. It is a shorthand expression describing a negative sunset determination. The Sunset Policy Bulletin provides guidance for Commerce in conducting sunset reviews. It does not require Commerce to act in any particular manner, but rather describes how Commerce normally would analyze likelihood in a variety of factual situations.

(d) In cases where the DOC departs from the provisions of the Bulletin in a given sunset review, what protection would it have against an interested party which claims that it had a legitimate expectation based on the Policy Bulletin that the DOC would follow a certain course of action in that sunset review? Under US law, does the DOC have to inform interested parties in advance of its intent to depart from certain provisions of the Bulletin in a given sunset review and offer them an opportunity to comment?

31. The Sunset Policy Bulletin is a statement of policy and provides a framework for Commerce's conduct of sunset reviews. Commerce issued the Sunset Policy Bulletin in an attempt to be as transparent as possible with respect to Commerce's approach to sunset reviews. In an area in

[22] The US Court of International Trade has held, "As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve." *Rhodia, Inc. v. United States*, Consol. Court No. 00-08-00407, Slip. Op. 2000-109 (CIT 9 September 2002) at 15; *see also*, *Zenith Electronics. Corporation v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996).

which the statute (not to mention the AD Agreement) provides authorities with extremely broad discretion, the United States considered it valuable to provide interested parties with guidance as to the approach Commerce likely would take under given circumstances. The alternative and clearly less desirable approach would be a less transparent system wherein the parties in a sunset review would have little or no idea how the administering authority would address issues raised in sunset reviews.

32. An interested party would expect Commerce to not be arbitrary and capricious in Commerce's application of the law and in its analysis of identical or similar factual situations. If Commerce determined to change its analysis and to do so would represent a change from past practice, Commerce would explain its determination in the case and normally provide parties an opportunity to comment on the change before issuing a final determination. In the final determination, Commerce would then address comments made by a party on that issue.

II. EVIDENTIARY STANDARDS FOR SELF-INITIATION OF SUNSET REVIEWS

Q10. Assume *arguendo* that Article 11.3 creates a presumption that an anti-dumping duty should be terminated after five years and that the initiation of a sunset review is an exception to that general presumption. Do you consider that automaticity of self-initiation under US law has the effect of undermining or reversing this presumption? Is there any situation in which the United States would allow the application of the general rule contained in Article 11.3 (i.e. permitting the duty to expire instead of self-initiating a sunset review)? More generally, is self-initiation mandatory under US law or does the DOC have the discretion not to self-initiate a sunset review?

33. Regardless of whether such a presumption exists, the plain text of Article 11.3 provides for initiation on the administering authority's own initiative. As the Appellate Body stated in *German Steel* (in discussing the parallel sunset provision of the *Agreement on Subsidies and Countervailing Duties* ("SCM Agreement"), Article 21.3), "[T]he principle obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review.".[23]

34. The United States self-initiates sunset reviews in every case pursuant to section 751(c)(2) of the Act.

Q11. Assume *arguendo* that the US domestic producers in a given sunset review informed the DOC before the initiation of the sunset review that they were not interested in proceeding with the review. Would that constitute sufficient grounds for the DOC not to self-initiate that particular sunset review or would it simply afford a basis not to proceed with a review?

35. If the US domestic producers provided Commerce with written notice that the industry no longer had an interest in the maintenance of a particular anti-dumping duty order, Commerce would not initiate a sunset review and would revoke the order.

Q12. Article 11.3 refers to the reviews "initiated" by investigating authorities "on their own initiative".

(a) In the ordinary sense, does the word "initiate" or the phrase "to take an initiative", require that there be at least some reason to either choose to do or not to do something? Is this what the term "initiate" means in the context of Article 11.3 (i.e. not a standard of sufficient evidence but at least some sort of rationality standard by which you choose

[23] *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, AB-2002-4, WT/DS213/AB/R, circulated 28 November 2002, para.108 (emphasis in original).

whether or not to initiate a sunset review)? If so, does US law comply with that proposition?

36. Article 11.3 only requires that the administering authority take the necessary steps to initiate the sunset review. Article 11.3 does not require that the administering authority have a reason for self-initiating the sunset review, nor is there any other evidentiary standard prescribed for the self-initiation of sunset reviews.[24]

(b) Is your reading of the word "initiation" in Article 11.3 purely a procedural one? Does "initiation" not have to have any substantive reason or requirement (no matter how thin)? If you believe that it is purely procedural, please explain why the drafters used the phrase "on their own initiative" in Article 11.3? Is this phrase also purely procedural? If so, why was it necessary to put in those words? Does this phrase require the investigating authority to have a reason in order to initiate a review on its own initiative?

37. Initiation is a procedural act. The use of the phrase "on their own initiative" simply describes the self-initiation by the administering authority, in contrast to an initiation based on a duly motivated request from the domestic industry. Article 11.3 does not require the administering authority to have a reason to self-initiate a sunset review, nor is there any other evidentiary standard prescribed for the self-initiation of sunset reviews.[25]

(c) Does the word "initiate", as used in Article 11.3, mean the same thing as in footnote 1 of the Agreement? Does initiating a review mean the same thing as initiating an investigation?

38. No. The word "initiate" in footnote 1 only applies to investigations "as provided in Article 5". Initiating a sunset review under Article 11.3 does not mean the same thing as initiating an investigation under Article 5 because the standards for initiating these proceedings are different. For example, Article 11.3 contains no criteria for initiating a sunset review; an administering authority may only self-initiate an investigation under Article 5.6 if sufficient evidence of dumping, injury, and causal link exists.

39. The Appellate Body in *German Steel* stated, in discussing the Article 21.3 sunset provision and Article 11 investigations provision of the SCM Agreement, that "our review of the context of Article 21.3 of the SCM Agreement reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with evidentiary standards set forth in Article 11 of the SCM Agreement relating to initiation of investigations".[26] Similarly, there is no obligation in Article 11.3 of the AD Agreement to comply with the evidentiary requirements of Article 5 of the AD Agreement relating to investigations.

Q13. In paragraph 23 of Japan's oral statement, Japan states that "Article 11.3 first requires that the administering authority make a threshold decision as to whether to begin a sunset review". Indicate any textual or contextual support in Article 11.3 or elsewhere in the Agreement for the view that an investigating authority has to make a decision as to whether or not to initiate a sunset review. In your response, please comment on: (i) paragraph 7 of the EC third party oral statement (that the word "determine" in Article 11.3 indicates that the decision to initiate a sunset review requires that an evidentiary standard must be met); and (ii) paragraph 11 of Norway's third party oral statement (that under Article 11.3, it is not simply a

[24] *See German Steel*, para. 116.
[25] *See German Steel*, para. 116.
[26] *German Steel*, para. 116, and discussion at paras. 114-115.

matter of analyzing whether continuation of the order is necessary, but also of determining whether "initiation" itself is necessary).

40. The only decision the administering authority need make is whether to self-initiate the sunset review. The word "determine" simply means that the administering authority must decide the issue of likelihood and that this determination must rest on a sufficient factual basis, namely on evaluation of the evidence that it has gathered during the original investigation, the intervening reviews, and the sunset review.[27] The drafters chose to provide an evidentiary standard in Article 11.3 for initiation of sunset reviews based upon a request from the domestic industry, but chose not to do so for cases of self-initiation by the administering authority.

41. To suggest that Article 11.3 requires a determination of whether initiation is "necessary" is counterintuitive because it presumes the outcome. In other words, in order to determine whether a sunset review is itself necessary, the administering authority would have to determine whether there was a likelihood of continuation or recurrence of dumping and injury. Article 11.3 does not require that the administering authority have a reason or reasons for its decision to self-initiate a sunset review.

III. *DE MINIMIS* STANDARD IN SUNSET REVIEWS

Q15. Article 11.9 of the *SCM Agreement* states that its *de minimis* standard applies "[f]or the purpose of this paragraph". This phrase is not, however, found in Article 5.8 of the *Anti-dumping Agreement*. How and to what extent is this relevant to determining whether or not the *de minimis* standard in Article 5.8 applies in AD sunset reviews?

42. The inclusion of the phrase for the purposes of this paragraph in Article 11.9 of the SCM Agreement is not relevant to the analysis under the AD Agreement. Article 5 is entitled "Initiation and Subsequent Investigation" and the *de minimis* standard for investigations is found in Article 5.8. There is no *de minimis* standard in Article 11 of the AD Agreement generally, and there is no *de minimis* standard in Article 11.3 of the AD Agreement specifically.

Q16. How do you respond to Brazil's argument in paragraph 13 of its oral statement that the application of two different *de minimis* standards under US law would give rise to inconsistent results whereby an exporter with a greater dumping margin would be able to escape the imposition of the original duty while another exporter with a dumping margin below *de minimis* could be subjected to the duty perpetually. Does that show that there is an internal inconsistency in the policy of the DOC or is there any other explanation?

43. Original investigation and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation. For example, in a sunset review, the administering authorities are called upon to focus their enquiry on what would happen if an existing anti-dumping duty were to be removed. In contrast, in an original investigation, the administering authorities must investigate the existence, degree, and effect of any alleged dumping in order to determine whether dumping exists and whether such dumping is causing injury to the domestic industry so as to warrant the imposition of a duty in the first instance. As the Appellate Body in *German Steel* stated (discussing Article 21.3 of the SCM Agreement): "These qualitative differences may also explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review."[28]

[27] *See German Steel* , para. 137.
[28] *German Steel*, para. 89.

44. The fact that the United States provided a *de minimis* standard for sunset reviews in its domestic legislation does not give rise to an obligation under Article 11.3 or the AD Agreement.

Q17. Would a reading of the Anti-Dumping Agreement that imposed no *de minimis* standard in respect of sunset reviews lead to inconsistency that is repugnant to a coherent interpretation of the Anti-Dumping Agreement? Why or why not?

45. No. The Members of the WTO agreed in the AD Agreement to *de minimis* standards for investigations and did not provide a *de minimis* standard for reviews. The purposes of an original investigation and a sunset review are different. The original investigation is to determine whether the discipline should be imposed in the first instance. The sunset review is to determine whether that discipline should continue. The analysis in an investigation is focused on whether there is dumping and injury presently; the present amount of dumping (*i.e.*, dumping during the period of investigation) is readily quantifiable. The analysis in a sunset review is necessarily forward-looking and predictive and is, therefore, inherently qualitative.[29]

IV. CUMULATION AND NEGLIGIBILITY IN SUNSET REVIEWS

Q22. What is the legal nature and role of the term "anti-dumping investigations" in the first sentence of Article 3.3 of the Agreement? Does it have the effect of limiting the scope of application of the provisions of Article 3.3 to investigations only? Please respond in detail, including, to the extent relevant, with reference to footnote 9 of Article 3 and the reference to "[a] determination of injury for the purposes of Article VI of GATT 1994" in Article 3.1. If Article 3.3 is only partially applicable to sunset reviews, then what are the specific elements of Article 3 (and Article 3.3) that apply?

46. As explained fully in the United States First Submission, the term "anti-dumping investigation" in the first sentence of Article 3.3 of the Agreement limits application of the requirements of Article 3.3 to original investigations only.

Article 3.3 of the AD Agreement provides:

> Where imports of a product from more than one country are simultaneously subject to anti-dumping *investigations*, the investigating authority may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the *volume of imports from each country is not negligible* and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. (Emphasis added.)

47. On its face, Article 3.3 applies to investigations, not reviews. Indeed, Article 3.3 is the only provision in Article 3 that specifically refers to investigations. Moreover, Article 3.3, unlike Article 11, refers to the present ("*is* more than *de minimis"*; *"is* not negligible") (emphasis added). By contrast, Article 11 refers to "likely" or future events. Furthermore, Article 3.3 nowhere refers to Article 11.3 sunset reviews, or any other reviews under Article 11.

48. Quite simply, considering the ordinary meaning of the terms of Article 3.3, there is no support for the contention that Article 3.3 cumulation concepts apply beyond the context of an initial investigation.

---

[29] *See id.*

49. Additionally, unlike other provisions in Article 3, Article 3.3 contains no reference to injury. Furthermore, negligibility and *de minimis* dumping standards contained in Article 3.3 are not referred to in defining injury in footnote 9 to Article 3. Indeed, the Appellate Body in *German Steel* recently concluded that injury is not defined with reference to the concept of subsidization, or by analogy dumping.

50. For a discussion of the legal significance of footnote 9 to Article 3, the United States refers the Panel to the Second Submission of the United States.

Q23. Why and in what way would an historical negligible import volume be relevant to the "determination" required to be made under Article 11.3? Please respond, in detail, in conjunction with Japan's allegations concerning the application of the negligibility standard in sunset reviews.

51. As the United States has emphasized in its various submissions, the negligible imports criterion set forth in Article 3.3 of the Agreement does not apply in sunset reviews conducted pursuant to Article 11.3.

52. The sunset review now before the Panel involves an original investigation that was conducted prior to the effective date of the Uruguay Round agreements. Were a new investigation to be conducted now in 2002 and subject imports from Japan were negligible, the investigation would be terminated with respect to such goods. However, because Article 11.3 does not incorporate a negligibility criteria, there is no requirements that the order regarding imports from Japan be revoked on the basis of negligibility. Nonetheless, under US law, the fact that imports from Japan are comparatively modest in volume would be a consideration under the discernible adverse impact analysis. In that analysis, the USITC evaluates whether imports from each country included in a sunset review are likely to have a discernible adverse impact on the domestic industry producing like products. If they do not, The USITC will not cumulate the impact of such imports in a sunset review with imports from other countries.

53. The United States has fully explained in its submissions that merely because import volume may have fallen below what would be the negligible threshold in an investigation following imposition of the orders, does not and should not result in the automatic termination of the review. Indeed, if Japan were correct that the authority is required to revoke an order based merely on the fact that current levels of imports may be considered negligible under Article 5.8, it would lead to a perverse result. The purpose of the anti-dumping duty order was to reduce injury caused by unfair acts in the market or to require adjustment of prices to eliminate dumping and injury. As a result of the order, dumped imports may have decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. Under Japan's argument, because certain imports cannot compete in the marketplace under the constraints of the order, *i.e.*, without dumping and are at low levels, the order should then be revoked so as to allow for dumping again.

V. BASIS FOR DETERMINATION OF DUMPING IN SUNSET REVIEWS (ORDER-WIDE OR COMPANY-SPECIFIC)

Q25. Article 11.4 of the Anti-Dumping Agreement stipulates that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Article 11]."

(a) How do you interpret the language "regarding evidence and procedure" in Article 11.4? Does this language simply repeat the content of Article 6? Why, in your view, did the drafters in some other instances only refer to the number of the particular provision

that is cross-referenced, while in Article 11.4 they appear to mention at least some of the content of Article 6 in the cross-reference?

54. Article 11.4 of the AD Agreement stipulates that the Article 6 provisions "regarding evidence and procedure" shall apply to reviews under Article 11. Thus, not all of the provisions of Article 6 are applicable to Article 11 reviews; rather, only the provisions of Article 6 regarding evidence and procedure are so applicable. This incorporation by reference was clearly intended to preclude reliance on Article 6 to mandate substantive criteria of decision in Article 11 reviews, precisely what Japan is urging on the Panel in this case.

(b) Do all provisions contained in Article 6 concern evidence and procedure? If not, which provisions of Article 6 do not fall within this category, and for what reason? What criteria may guide the Panel in distinguishing between evidentiary/procedural provisions and other provisions (if any) of Article 6?

55. Individual paragraphs in Article 6 may be comprised solely of evidentiary/procedural provisions or may be comprised of both substantive and evidentiary/procedural provisions. The key in determining whether there are substantive aspects to a paragraph in Article 6 is whether it includes or delimits the criteria that may be employed in the proceedings to which Article 6 applies. Thus, for example, Article 6.2 contains the substantive provision that, "failure to [attend a meeting] shall not be prejudicial to that party's case," and Article 6.5.2 provides that, under certain circumstances, "the authorities may disregard [certain] information".

(c) What are the textual and contextual considerations that would support or undermine the proposition that all provisions of Article 6 concern evidence and procedure? In this respect, in particular, what is the legal nature and role of the Title of Article 6 ("Evidence"), and the role of the reference in Article 6.14 to "procedures"? Is there negotiating history that would suggest that all provisions of Article 6 concern evidence and procedure, or that would suggest that certain of those provisions may not be evidentiary or procedural?

56. As indicated above, while all of the individual paragraphs in Article 6 have some evidentiary/procedural component, several of them also have a substantive component. What is of paramount importance is that substantive criteria may not be incorporated into Article 11.4 as a consequence of the reference there to Article 6. To the best of our knowledge, we are unaware of any negotiating history that illuminates this issue.

(d) Is there any interpretative guidance to be derived from the fact that Article 11 specifically refers to the provisions of Articles 6 and 8?

57. No. The language in Article 11 incorporating by reference Article 6 is substantially different from the language in Article 11 that incorporates Article 11 by reference into Article 8.

Q26. US states in paragraph 162 of its first written submission that US law requires that dumping determinations in sunset reviews be made on an order-wide basis. However, the United States also seems to submit, in paragraph 167 of its first written submission, that the dumping determinations in the instant sunset review were made on a company-specific basis.

(a) How does the United States reconcile these two propositions?

58. Likelihood of dumping in the event of revocation was determined by Commerce in the instant sunset review on an order-wide basis. Margins likely to prevail in the event of revocation, however, were reported to the USITC on a company-specific basis for its consideration in making the likelihood of injury determination.

(b) Assume *arguendo* that the Agreement requires investigating authorities in sunset reviews to make their dumping determinations on a company-specific basis. Does the United States consider that DOC's reporting to the ITC the dumping margins calculated in the original investigation would suffice to fulfil that requirement?

59. As stated above, margins likely to prevail in the event of revocation were reported to the USITC on a company-specific basis.

(c) Do the dumping margins reported by the DOC to the ITC in the instant sunset review reflect the result of individual likelihood determinations carried out by the DOC with respect to each Japanese exporter during the course of the instant sunset review? Or, did the DOC carry out its likelihood determinations on an order-wide basis but nevertheless report the individual dumping margins to the ITC? Please cite the relevant portions of the record.

60. Reporting of dumping margins is purely a function of US law. There is no requirement to quantify dumping margins likely to prevail in a sunset review under the AD Agreement. As stated above, likelihood of dumping in the event of revocation was determined by Commerce in the instant sunset review on an order-wide basis. *See* Final Results of Sunset Review, 65 Fed. Reg. at 47381.

VI. DUMPING MARGINS IN SUNSET REVIEWS

Q27. What methodology formed the basis for the calculation of the dumping margins in the original investigations and in the subsequent administrative reviews? Please indicate the relevant portions of the record to substantiate your response. What is the legal basis in the Agreement that permits or precludes the use of such methodology(y)(ies), or that governs certain aspects of these methodologies, in a sunset review?

61. The only paragraph of the Agreement governing the criteria to be employed in sunset reviews is Article 11.3. That paragraph does not dictate the methodology or methodologies to be employed in such reviews. Under the AD Agreement, the administering authority is not required to calculate a margin of dumping. The analysis is necessarily a qualitative, rather than quantitative, one.

62. In US anti-dumping investigations initiated on the basis of petitions filed prior to the effective date of the URAA, Commerce's standard methodology was to make dumping comparisons between average foreign market values and individual US transaction prices (*i.e.*, "average-to-transaction").[30] Under that methodology, no dumping duty – positive or negative – was computed for US sales made at non-dumped prices.[31] The anti-dumping investigation in this case was initiated on the basis of a petition filed prior to the effective date of the URAA[32], *i.e.*, prior to 1 January 1995 (which was also the date the WTO Agreement entered into force with respect to the United States). Commerce, therefore, utilized average-to-transaction comparisons in calculating the dumping margins for the final less-than-fair-value determination. In administrative reviews under the URAA, section 777A(d)(2) of the Tariff Act of 1930, as amended, requires that Commerce compare "export prices (or constructed

[30] *See* 19 C.F.R. 353.44 (1994).

[31] This practice was entirely consistent with the agreements in effect at that time. In *EC - Audio Tapes*, paras. 347 - 366, Japan challenged under Articles 2.1 and 2.6 of the Anti-Dumping Code the average-to-transaction approach employed at that time by the EC on the grounds that it involved "zeroing." The *EC -Audio Tapes* panel rejected Japan's challenge, pointing out that the Anti-Dumping Code permitted the collection of dumping duties with respect to each dumped transaction.

[32] *See Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products from Japan*, 58 Fed. Reg. 37154 (9 July 1993).

export prices) of individual transactions to the weighted average price of sales of the foreign like product....".[33] Consequently, the margins determined in the two completed administrative reviews in this case were based on average-to-transaction comparisons.[34]

Q28. Article 18.3 of the Agreement states, in part:

> **"...the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement. ...**
>
> **18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph."**

(a) Given that the original dumping margins are used by the DOC as a basis for the determination of likelihood of continuation or recurrence of dumping in US sunset reviews, on what legal basis does the United States argue that the provisions of the present Agreement are not applicable to the dumping component of this sunset review, but that the Agreement is applicable to other aspects of the review?

63. The United States disagrees with the premise of the question. The original dumping margins were not a basis for the determination of the likelihood of continuation or recurrence of dumping in the instant sunset review. Rather, Commerce found likelihood of continuation or recurrence of dumping based on the existence of dumping and the significant decline in imports of the subject merchandise after imposition of the order. Under Article 11.3, Commerce is not required to (1) conduct a new investigation, (2) quantify current or past dumping margins, or (3) apply any particular methodology to the consideration of dumping margins. Accordingly, and consistent with its obligations under the Agreement, Commerce in this case reasonably relied on evidence of dumping and import volumes over the life of the order.

VII. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

A. "LIKELY" AND "NOT LIKELY"

Q35. Pursuant to Article 11.3 of the Anti-Dumping Agreement, any definitive anti-dumping duty shall be terminated not later than five years from its imposition unless the investigating authority determines that the expiry of the anti-dumping duty would be "likely" to lead to continuation or recurrence of dumping and injury in a review initiated before that date.

(a) Does the concept of "likely" or "likelihood", as it appears in Article 11.3, refer to a range of probability?

64. The term "likely" must be considered using the ordinary meaning of the term. As the dictionary definitions illustrate, the term "likely" has varying common meanings, including "plausible" as well as "probable". The negotiators purposely chose the word "likely" rather than

---

[33] 19 U.S.C. § 1677f-1.

[34] *See Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Anti-Dumping Duty Administrative Review*, 64 Fed. Reg. 12951 (16 March 1999)*; Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Anti-Dumping Duty Administrative Review*, 65 Fed. Reg. 8935 (23 February 2000).

"probable" or "range of probability." This deliberate choice of this term cannot be considered inadvertent. Whereas, the term "likely" refers to something within the realm of credibility or plausibility[35], the English term "probable" may have a connotation of a degree of mathematical certainty[36], particularly when used in the phrase "range of probability."

65. Read in light of the object and purpose of Article 11.3, the term "likely" cannot be read to mean "a range of probability." In determining the likelihood of continuation or recurrence of dumping or injury, the authorities must engage in a counterfactual analysis – they must decide the likely impact in the future based on an important change in the status quo – the revocation of the order and the elimination of the restraining effects of the order. The goal of Article 11.3 is thus to set a framework for an evaluation that is inherently prospective and incapable of reduction to meaningful mathematical definition. This goal would be compromised if the term "would be likely" were remoulded to require reduction to a mathematical number.

(b) On the basis of a probability scale from 0 to 100, do you agree with the proposition that "not likely" means between 0 and 50, whereas "likely" falls between 50 and 100?

66. No. For the reasons explained in the answer to question 35(a), whether something is likely to occur, particularly in the context of a sunset review, cannot be reduced to mathematical numbers.

(c) Does the word "likely" simply mean something that is more likely than not, and "unlikely", something that is less likely than not to occur?

67. No. The concept of "likely" as used in Article 11.3 does not contemplate a comparative analysis.

(d) Can there be any future event whose probability of happening can be classified as being neither "likely" nor "unlikely"? Can there be a future event whose probability of happening is both "likely" and "unlikely"? Do you agree with the proposition that if a state of affairs is judged to be likely, it cannot simultaneously be judged to be unlikely?

68. "Likely" must be considered using the ordinary meaning of the term and dictionary definitions. The term "likely" could have meanings ranging from the "possible" to the "probable." Thus, "likely" may mean something more than a mere possibility, but something less than a "probability". In other words, "likely" falls between "possible" and "probable" on a continuum of relative certainty.

Q36. Pursuant to Article 11.3 of the *Anti-dumping Agreement,* any definitive anti-dumping duty *shall be terminated* not later than five years from its imposition *unless* the investigating authority determines that the expiry of the anti-dumping duty would be "likely" to lead to continuation or recurrence of dumping and injury in a review initiated before that date, whereas the US Sunset Regulations state that the Secretary will *revoke* an order *only where* the Secretary determines that revocation is *not likely to* lead to continuation or recurrence of dumping. Does the United States agree with this characterization? Does the use of the unlikely standard to trigger revocation place a more onerous burden of proof upon exporters that is inconsistent with the requirements of Article 11.3?

69. No. The use of the term "not likely" in the regulations does not provide a substantive obligation. It is a reference to a negative likelihood determination. As discussed above, the regulations using the term "not likely" are procedural in nature and the references to the negative likelihood determination are to denote when the time line for publication of the revocation notice

[35] *Webster' s II New Riverside University Dictionary* (1994).
[36] S*ee id*.

begins to run and when it ends in accordance with the regulations. The anti-dumping statute, at section 751(c)(1), provides the substantive obligation in sunset reviews and states that Commerce shall conduct a sunset review to determine whether revocation of the order "would be likely to lead to continuation or recurrence of dumping".

Q37. In what sense do the United States Sunset Regulations and the Policy Bulletin use the terms "not likely" while the statute uses the term "likely"? On the basis of the legal relationship under US law between the statute and the regulation, how does the DOC apply both of these standards?

70. In both the regulations and the Sunset Policy Bulletin, the term "not likely" is used in the context of a sunset determination to refer to a negative likelihood determination. Neither the regulations nor the Sunset Policy Bulletin use the term "not likely" to set out any standard to be used in making sunset determinations. The likelihood standard for sunset reviews is found in the anti-dumping statute at section 751(c)(1). As such, there is no conflict between the likelihood standard as set out in the statute and the term "not likely" as used in the regulations and the Sunset Policy Bulletin when referencing a negative likelihood determination.

Q40. Article 11.3 requires that any definitive anti-dumping duty shall be terminated not later than five years from its imposition unless the investigating authority "determines" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury in a review initiated before that date. What is the meaning and content of the word "determine" in Article 11.3? Which, if any, obligations does it cast upon an investigating authority in a sunset review? More specifically, does it carry with it any obligations on the part of the authority investigating authority as to what steps it needs to take to inform itself in order to make a determination?

71. The meaning given to the word "determine" in Article 11.3 is its ordinary meaning - "to decide" something. In the context of Article 11.3, the administering authority must decide whether there is a likelihood of continuation or recurrence of dumping and injury if the duty were removed. The only obligation is that there must be sufficient evidence in the record to support the administering authority's decision.

Q41. In paragraphs 34 and 35 of its oral submission, Japan argues that an investigating authority in a sunset review should consider certain additional positive evidence to carry out a prospective analysis. Which "other factors" should or must an investigating authority consider beyond historical facts? Where in the Agreement do you find the legal basis for your view?

72. The analysis conducted in a sunset review must perforce be forward-looking because the purpose of an 11.3 review is to predict the future behaviour of exporters subject to an anti-dumping duty if the discipline of the order were removed. Thus, consideration of factors which served to advance this predictive analysis may be relevant to the enquiry. Other factors which may be considered are cost, price, market or economic data that the administering authority deems relevant to the likelihood enquiry.

Q49. The United States addresses, in paragraph 25 of its oral statement, its view of the qualitative nature of DOC's determination of likelihood of continuation or recurrence of dumping in sunset reviews.

(a) Does the United States view the likelihood analysis concerning the dumping component in a sunset review as solely a qualitative – as opposed to a quantitative - one? If the US views this as solely qualitative, how does it make the distinction between "likely" and "not likely"?

73. The analysis in a sunset review is inherently a qualitative one - whether there is a likelihood of continuation or recurrence of dumping in the future. The amount or magnitude of dumping is not material to the issue of whether dumping will continue or recur in the absence of the discipline. As the Appellate Body concluded in *German Steel*, there is no *de minimis* requirement in the context of a sunset reviews.[37] There is then no necessity to quantify the margin of dumping for this reason, and Article 11.3 contains no language to indicate that quantification of the margin of dumping is necessary for any other reason. Article 11.3 only requires a determination as to whether dumping is likely to continue or recur, not a determination that dumping is likely to continue or recur at a particular level, in order to make an affirmative likelihood determination.

74. Regarding whether "likelihood," as that term is used in Article 11.3, is based on probabilistic concepts, the United States has pointed out the distinction between the notions of likelihood and probability. Moreover, even if the Panel were to find probabilistic concepts to be built into "likelihood," this would not imply any obligation to quantify a precise level of dumping for purposes of sunset reviews. Indeed, it would not even imply an obligation to quantify precise probabilities for such purposes. The United States is unaware of efforts by any Member to quantify precise probabilities in the context of sunset likelihood determinations.

(b) If so, how does the United States reconcile this view with the phrase "to the extent necessary" in Article 11.1 of the Anti-Dumping Agreement, which might be taken to require that some sort of quantitative criterion must apply to the determination of the likelihood of dumping?

75. There is no obligation in Article 11.1 to quantify the level of dumping when making a determination whether an anti-dumping duty should remain in force. Article 11.1 merely sets forth the general obligation that, after the imposition of the anti-dumping duty, the continued application of that duty is subject to certain disciplines. The general rule of Article 11.1 underlines the requirement for the periodic review of dumping duties and highlights the factors that must inform such reviews.[38] Like Article 11.1, Article 11.3 does not contain any substantive obligation to make a determination on a quantitative basis. Rather, Article 11.3 requires that the administering authority make a determination based on the likelihood of future dumping, an inherently predictive and qualitative analysis.

(c) How does the United States reconcile its qualitative view with its use of quantitative factors such as changes in import volumes and the existence of dumping margins?

76. Commerce uses the *existence* of dumping margins in making its qualitative analysis, but does not consider the *magnitude* of the margins in making that analysis. The focus of Commerce's qualitative analysis is on factors that indicate whether it is likely dumping will continue or recur in the future. The main elements in Commerce's analysis of past behaviour - whether dumping exists or exporters are able to ship at pre-order quantities - are highly probative indicators of an exporters' future behaviour. These indicators are qualitative in nature.

77. Commerce does impose its own *de minimis* standard in sunset reviews, but this *de minimis* standard is not imposed pursuant to any international obligation. The present magnitude of the dumping is not material as to whether dumping will continue or recur in the future. Article 11.3 provides that the administering authorities must determine whether dumping is likely to continue or recur. A present margin of dumping at zero is not necessarily dispositive of whether dumping will recur. Indeed, the AD Agreement recognizes this fact by virtue of footnote 22.

---

[37] *German Steel*, para. 92.
[38] *See German Steel*, para. 70.

78. Import volumes are important because they can be probative of the ability of an exporter to sell with the discipline of an order in place and the effect that order may have on future behaviour. If an exporter cannot sell in the United States at pre-order volumes with an order in place, even if the exporter is not dumping, this fact may indicate that the exporter cannot sell at the pre-order volumes without dumping if the discipline were removed. The magnitude of the changes in the import volumes is not the focus of Commerce's analysis, rather it is the fact that the volumes have decreased significantly and remained at the depressed levels since the imposition of the duty. In other words, the absence of dumping may be possible only because the import volumes are small, and thus import volumes may be expected to increase to pre-order levels after the order is revoked.

(d) The United States also points out that, in its view, the existence of present dumping is highly probative of the fact that it will continue. Could the United States identify and explain the qualitative factors, if any, that the DOC considers in its dumping determinations in sunset reviews?

79. Commerce primarily relies on evidence of the existence of dumping in the period prior to the sunset review and the effects that the order has had on import levels since the imposition of the order. Where probative and where "good cause" is shown, production capacity, market and cost factors, and other economic data are also considered. Commerce may also consider other evidence that would be relevant to its likelihood determination, such as public announcements by exporters of future plans.

80. An exporter is the only party that can shed light on what the exporter believes will be its pricing behaviour in the future, because only the exporter is in possession of the knowledge of its future plans. If the exporter is dumping with the discipline of an order in place, only the exporter can explain how this behaviour would change if the order were removed. The exporter may submit any evidence in a sunset review it believes demonstrates whether dumping by that exporter is likely to continue or recur.

(e) The Panel notes that changes in import volumes are a factor used by DOC to make its determination of likelihood of continuation or recurrence of dumping. Does DOC consider that it is carrying out an analysis of the likelihood of dumped imports or the likelihood of dumping, or both, and what are the reasons for this view? Does DOC agree that the likelihood of dumping in a sunset review is governed generally by Article 2, which involves a quantitative assessment of the difference between export price and normal value? If so, how does it reconcile this with the view - if that is DOC's view - that the Article 11.3 assessment of likelihood is a qualitative assessment?

81. Commerce is analyzing whether dumping is likely to continue or recur in the absence of the discipline. An analysis of the likelihood of dumping under Article 11.3 does not require a determination of the magnitude of the margin of dumping because the amount of dumping is not relevant to the issue of whether dumping will continue or recur if the discipline is removed. In other words, the issue in an Article 11.3 sunset review is not *how much* the exporters may dump in the future, but simply *whether* they will dump in the future if the order were to be revoked. Given that there is no obligation under Article 11.3 to calculate a margin of dumping, the provisions of Article 2 relevant to the calculation of a margin of dumping are not applicable to sunset reviews.

(f) Please clarify whether this view concerning the nature of the determination concerns the dumping component of a sunset review only, or, does it also apply to the injury component in sunset reviews?

82. The likelihood analysis required by Article 11.3 of the AD Agreement is essentially a qualitative analysis, given the prospective and predictive nature of the enquiry. Although the likelihood analysis is a qualitative one, it is not devoid of certain quantitative elements. Under Article 11.3, the investigating authority must determine the likelihood of the continuation or

recurrence of material injury if the orders are revoked, which requires the assessment of likely volume, price effects as well as relevant industry factors. In so doing, the authority considers statistical information on such factors as import volumes, price effects, and financial indicators for the domestic industry prior to and after imposition of the orders.

Q50. In paragraph 42 of its oral statement, Japan argues that in the instant sunset review the Japanese respondents were effectively given only 15 days to submit their substantive responses. How does the United States respond to this assertion?

83. On May 14, 1998, Commerce published in the Federal Register the final schedule for sunset reviews of "Transition Orders", or orders which pre-dated the WTO Agreement.[39] This notice indicated the sunset review of corrosion-resistant steel from Japan was scheduled to be initiated in September 1999. Subsequently, Commerce sent pre-initiation letters to all parties on record who had participated in prior proceedings concerning corrosion-resistant steel from Japan in order to provide advance notice of the initiation of the sunset review. Thus, Japan and Japanese producers, including NSC, knew over 15 months prior to the scheduled date for initiation when the sunset review on corrosion-resistant steel from Japan was to be initiated.

84. Japan's claim in its oral statement that it only had 15 days "after it knew" that it was required to file a substantive response is incorrect. The Japanese exporters knew they would have to file a substantive response when Commerce published its schedule of sunset reviews 15 months before initiation of the instant review. Japan claims that it did not know until day 15 because that is when the US domestic industry filed its notice of intent to participate. Thus, it appears that the Japanese exporters gambled on the participation of the US domestic industry to determine whether they would prepare a substantive response. Nothing in Commerce's regulations required the Japanese exporters to wait until the US producers filed their notice of intent. The obligation of the Japanese exporters under Commerce's regulations to file a substantive response in the instant review arose not later than the date Commerce initiated the sunset review. The Japanese exporters' failure to prepare their substantive response until day 15 after initiation was each individual company's choice.

Q51. Please indicate the rules regarding deadlines for the submission of information in a sunset review under US law, and explain whether NSC complied with those deadlines in the instant sunset review.

85. The procedural deadlines for sunset reviews are found in Commerce's regulations at sections 351.218, 351.309, and 351.310. NSC submitted their substantive and rebuttal responses, as well as their case and rebuttal briefs in a timely manner. In the instant sunset review, NSC requested an extension for submission of its case brief and Commerce granted extensions for all parties' case and rebuttal briefs.

Q52. Under US law, does the notice of intent to be filed by domestic producers in sunset reviews contain any substantive argumentation in relation to dumping, or does it only contain the intent of domestic producers? If the latter, when during the sunset review do the domestic producers have to submit their substantive submissions to the DOC?

86. Section 351.218(d)(1)(ii) of Commerce's regulations contains the requirements for a notice of intent from domestic interested parties. Both domestic interested parties and respondent interested parties must submit their substantive submissions on day 30 after initiation in accordance with section 351.218(d)(3)(i) of Commerce's regulations.

[39] *Sunset Initiation Schedule*, 63 FR 29372. Exhibit JPN-18.

Q53. Under US law, if an interested party in a sunset review wants to submit additional substantive information in addition to the information submitted in its substantive response to the questionnaire, does it have to show "good cause" before those issues are to be considered?

87. Commerce's regulations at section 351.218(d)(3)(iv)(B) provide parties the opportunity to submit any information they wish for the Secretary to consider in the sunset review. The statute at section 752(c)(2) and Commerce's regulations at section 351.218(d)(3)(iv) require a demonstration of "good cause" by the party submitting the information concerning "other factors" before DOC considers such information in a sunset review.

Q54. Is the Panel correct in understanding that, generally under US law and also in the instant sunset review, both domestic producers and the Japanese respondents submitted simultaneously their substantive submissions on day 30 of the sunset review and that none of these interested parties had the opportunity to comment on substantive issues after that date in the absence of "good cause"?

88. The Panel's understanding is not correct. After the filing of substantive responses by day 30, parties may subsequently submit substantive rebuttal comments by day 35. Both the US domestic producers and NSC did so in the instant review. In addition, parties may submit case briefs and rebuttal briefs to comment on any and all issues raised during the sunset review, and may request a public hearing. NSC and the domestic producers submitted case and rebuttal briefs in the instant review. Finally, Commerce's regulations at section 351.302 provide that a party may request an extension of any deadline.

Q55. In your view, is it reasonable to expect an interested party to be aware of all substantive issues that may affect the outcome of the sunset review within the first 30 days of a sunset review and in the absence of knowing what the domestic producers might present to the DOC so that they can submit relevant substantive information to the DOC?

89. The statute, Commerce's sunset regulations, and the Sunset Policy Bulletin are all public, published documents. These documents contain all of the information parties need to know with respect to Commerce's conduct of a sunset review and the substantive issues that may affect the outcome of a sunset review. In addition, interested parties have an opportunity to rebut submissions filed by other parties. Moreover, Commerce's regulations provide for extension of any deadline upon request.[40]

Q56. Considering the length of time of a sunset review and the prospective nature of the analysis that it may involve, is it possible that during the review certain issues may arise that can be relevant to the DOC's likelihood determinations regarding dumping? In such cases, under US law, do the interested parties have to show good cause so that those issues are taken into account by the DOC or will the DOC take these events into account on its own initiative?

90. Yes, it possible that during a sunset review certain issues may arise that can be relevant to the Commerce's likelihood determinations regarding dumping. Generally, a party must demonstrate "good cause" before issues or information regarding other price, cost, market or economic factors are considered. "Good cause", however, can be demonstrated by a showing that the issue is "relevant to Commerce's likelihood determinations." In addition, Commerce may consider issues and information it has determined are relevant to the sunset review without a demonstration of "good cause" from an interested party. Whether Commerce will consider an issue or information is dependent on the facts in each case.

[40] *See* section 351.302 of Commerce's regulations.

Q57. Article 6.2 of the Anti-Dumping Agreement requires that: "*Throughout* the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests" (emphasis added).

(a) Does Article 6.2 of the Agreement apply to sunset reviews, in light of the cross-reference to Article 6 in Article 11.4?

91. Yes.

(b) Assume *arguendo* that Article 6.2 applies to sunset reviews. The Panel understands that, under US law, substantive responses to the questionnaires in a sunset review need to be submitted within the first 30 days of the review. Given that the duration of a full sunset review is much longer than that, does this approach comply with Article 6.2 of the Agreement?

92. Article 6.1.1 requires that parties be given 30 days to respond to a questionnaire. DOC has published its "questionnaire" in the regulations at section 351.218 generally and provides the full 30 days for response to this questionnaire in accordance with Article 6.1.1. DOC's regulations also provide that parties, in addition to their substantive responses, may submit substantive rebuttal responses, case briefs, rebuttal briefs, and request a public hearing. In addition, parties may request an extension of any deadline.[41]

Q58. With respect to the legal nature and content of the "good cause" standard applied by the United States in sunset reviews:

(a) In which US legal instrument(s) is this standard contained? How and to what extent is it a mandatory or discretionary standard?

93. The "good cause" standard is contained in the statute at section 752(c)(2) and DOC's regulations at section 351.218(d)(3)(iv). The standard is both mandatory and discretionary in nature. The statute provides that Commerce is required to consider "other factors", such as other price, cost market, or other conditions, where "good cause is shown". The statute also provides that Commerce will determine when "good cause" exists or the other factors are relevant to the likelihood determination. Thus, while the statute makes it mandatory for Commerce to consider other factors where good cause is shown, it leaves to Commerce's discretion to determine whether "good cause" has been demonstrated in the first instance.

(b) Please explain the concept of "good cause" and how it may be shown in practice under US law. Refer to any relevant legal instruments on this issue.

94. Pursuant to section 752(c)(2) of the Act, "good cause" is a threshold requirement that a party must meet for Commerce to consider other factors in making the likelihood determination. The statute leaves the determination of whether "good cause" has been shown to the discretion of Commerce. In sunset reviews, Commerce determines "good cause" on a case-by-case basis. The "other factors" information must be directed to or explain how the elements that Commerce "normally" considers in a sunset review (existence of dumping and depressed import levels) may not be dispositive in a particular case.

95. For example, in *Sugar & Syrups from Canada*[42], Commerce initially determined that the US domestic industry had failed to demonstrate "good cause" for Commerce to consider a pricing issue in the sunset review. Commerce reconsidered and found "good cause" to examine the issue because

[41] *See* section 351.302 of Commerce's regulations.
[42] 64 Fed. Reg. 48362 (September 3, 1999). Exhibit JPN 25(m).

both the US domestic industry and the Canadian exporter argued convincingly that the issue of current market pricing and costs for the subject merchandise was relevant to the issue of the likelihood of future dumping. Also, in *Brass Sheet & Strip from the Netherlands*[43], Commerce determined that "good cause" was shown because the exporter argued convincingly that information concerning its position in the US market was unique and could serve to explain why the exporter did not have pre-order levels of imports since imposition of the order. Thus, Commerce determines that "good cause" exists where a party can demonstrate that the information submitted addresses or explains that the existence of dumping or depressed import levels are not necessarily dispositive of the issue of likelihood of continuation or recurrence of dumping.

(c) Is the Panel correct in considering that the requirement of good cause under US law is not a standard that applies independently? Rather, the primary standard is the determination of likelihood of continuation or recurrence of dumping, on the basis of past dumping margins and import volumes, and the "good cause" standard is an additional limited or conditional standard which applies only in relation to secondary considerations of possible "other factors" that might be relevant to this primary determination?

96. Yes; the requirement of good cause contained in section 752(c)(2) is not a standard that applies independently. Rather, any showing of "good cause" for consideration of other factors in a sunset review must be directed to the elements Commerce considers highly probative to making the likelihood determination, namely the existence of dumping margins and depressed import levels.

(d) How does the US respond to Japan's argument that the requirement of good cause effectively limits the interested parties' ability to fully defend their interests in sunset reviews?

97. As fully discussed in the Sunset Policy Bulletin, Commerce normally will make its likelihood determination based on the existence of dumping margins and depressed import volumes. The "good cause" standard simply requires parties to make a threshold showing that their submissions concerning "other factors" are likely necessary for and relevant to Commerce's reasoned consideration of the likelihood issue, given the statutory elements Commerce considers. Consequently, although parties may submit any information they wish, consideration of the "other factors" information is required only to the extent the information is relevant to an explanation that the existence of dumping or depressed import volumes is not indicative of the likelihood of continuation or recurrence of dumping.

(e) Subsection 2 of section 1675(c) of the US Statute, under the heading "consideration of other factors" states that if good cause is shown the investigating authority shall also consider other factors as it deems relevant. Do you think this language is restrictive in the sense that it does not comport with the requirement to "determine" in Article 11.3 because it requires that good cause must be shown to take into account those other matters and because it may create an artificial constraint on the consideration of other factors that might have a bearing on the determination of likelihood?

98. Neither Article 11.3, nor any other provision of the AD Agreement provides the factors that an administering authority must consider in making the likelihood determination. Nevertheless, if the "other factors" have a bearing on the likelihood determination, *i.e.*, they are likely necessary for a reasoned consideration of the likelihood issue, then "good cause" will have been shown and the information will be considered.

[43] 65 Fed. Reg. 735 (January 6, 2000). Exhibit JPN-25(l).

(f) Why does the US law contain a threshold requirement of "good cause" to entertain certain factors which in certain circumstances on their faces may appear to be relevant without showing good cause?

99. Neither Article 11.3, nor any other provision of the AD Agreement provides the factors to be considered in making a likelihood determination. The " good cause " requirement is intended to limit consideration of "other factors" to those cases wherein it is determined that the factors are relevant to the likelihood determination.

Q59. What was the nature and content of the additional information provided by NSC in its 11 May 2000 case brief? Did NSC present arguments in support of the DOC accepting that information under the "good cause" standard? If so, what was the nature of these arguments?

100. NSC attempted to explain the depressed import levels of the subject merchandise since the imposition of the order by asserting that the existence of the reduced levels was not a material factor for consideration in Commerce's likelihood determination. NSC explained that it had a steady US customer base and had a controlling interest in a US galvanizing company which made the subject merchandise. NSC argued that this US subsidiary would be servicing the US customers of NSC and that NSC would not need to increase its imports in the event the order were revoked.

101. NSC submitted the information and the argument for the first time in its rebuttal case brief. NSC did not provide any arguments in support of consideration of this information under the "good cause" standard either at the time the information was submitted or later. NSC also did not request an extension of time for submission of the information at that time or later. In addition, NSC neither explained why this information and argument were being submitted at such a late point in the sunset review, nor how this information would counteract the fact that NSC continued to dump after the imposition of the order.

Q60. The Final Sunset Determination in the instant sunset review indicates that the additional information submitted by NSC on 11 May 2000 would not change the DOC's ultimate conclusion regarding the likelihood of continuation. Why and how did the DOC extend its determination to encompass consideration of the "even if" scenario, considering that the good cause criterion was already in place under US law and assuming that the DOC was relying upon that criterion? What weight, if any, should the Panel attach to this "even if" proposition?

102. Commerce made the determination that, even had the information been considered, it would not have affected the final affirmative sunset determination. This alternative determination was made to address any potential adverse decision by a reviewing court or panel stating that Commerce should have accepted this information and considered it for the final sunset determination. Were a reviewing court or panel to find that Commerce's determination to reject the information was not in accordance with law or supported by substantial evidence, Commerce has already indicated the determination it would make on remand after consideration of the information, and the reviewing court or panel should consider the alternative determination as Commerce's determination.

Q61. Once the DOC decided that it was not going to accept the information supplied by NSC in its case brief on 11 May 2000, when and how did the DOC inform NSC of that fact?

103. Commerce informed NSC in the Final Sunset Determination and the accompanying Decision Memorandum issued on 27 July 2000, and published in the *Federal Register* on 2 August 2000.

Q62. What was the legal basis for the DOC to decline to consider the additional information submitted by NSC on 11 May 2000?

(a) Did the DOC refuse to consider that information because NSC missed the deadline? Or, is the Panel to understand that although the deadline for the submission of such information was missed, the DOC nevertheless applied the good cause standard to this information and found that good cause did not exist?

104. In the Final Decision Memorandum, Commerce determined that NSC did not submit evidence of "good cause" in its substantive response as required by section 351.218(d)(3)(iv) of Commerce's regulations. In fact, NSC did not make any arguments at any time in support of the submission of the information during the sunset review. As a consequence, Commerce determined that "good cause" did not exist to examine NSC's other factors.

(b) Was the DOC required to explain *why* the submission was out of time (i.e. rather than simply that it was out of time)? If so, on what legal basis?

105. Yes; Commerce explained in the Final Decision Memorandum that NSC failed to provide the relevant information in its substantive response, as required by Commerce's regulations.

(c) Is there a possibility under US law for the DOC to accept additional information beyond Day 30 of a sunset review? If so, please cite to the relevant legal instrument.

106. Yes; parties may request an extension of any deadline contained in Commerce's regulations.[44] For example, in the instant review, NSC requested an extension of the deadline for submission of the case briefs on 5 May 2000. Commerce granted the request and extended the deadlines for both the case and the rebuttal briefs.

107. Furthermore, section 351.301 of Commerce's Regulations provides that Commerce can request information at any time during an administrative proceeding, including a sunset review.

(d) Do you agree with the proposition that there is a difference between deciding that a particular piece of information is not relevant to the determination of continuation, and deciding that the information is relevant to the determination, but that the information is not determinative of the outcome of the determination?

108. Yes.

(e) Do you agree that although an investigating authority may believe that the information submitted cannot outweigh the evidence before the authority, this does not determine the relevance of that information?

109. Yes.

(f) Do you agree that by relating the good cause requirement to the timeliness of the substantive submission the DOC effectively may make determinations that do not take into account certain facts that may be relevant to the sunset review?

110. In this case, NSC first submitted its information and argument concerning "other factors" in its case rebuttal brief. Section 351.218(d)(3)(iv) of Commerce's regulations require that such information and argument must be provided in a party's substantive response. NSC did not do so. In any event, the question of whether timeliness precluded consideration of NSC's other factors is moot in this case because NSC failed to request an extension of time or to make any arguments concerning "good cause" during the sunset review.

[44] *See* section 351.302 of Commerce's Regulations.

111. It is possible that Commerce could make a sunset determination without consideration of certain relevant facts because the party submitting the certain facts did so in an untimely fashion. Nevertheless, as a practical matter, administering authorities must be able to establish and enforce deadlines if they are to finish sunset reviews in accordance with the obligations of the AD Agreement. Under US law and regulations, interested parties have all the opportunities to defend their interests required by the obligations of the AD Agreement. In addition, section 351.302 of Commerce's regulations provides that a party may request an extension of any deadline and section 351.301 of Commerce's regulations provides that Commerce may request information at any time during an administrative proceeding.

(g) Suppose that in a given sunset review the DOC considered that a particular piece of information would be relevant to its determinations but that information was submitted in an untimely manner. Would the DOC be obliged to decline to consider that information under US law, or, would it have the discretion to still use it?

112. Section 351.302 of Commerce's regulations provides that Commerce has the discretion to waive or extend any of its procedural regulatory deadlines. Section 351.302(c) provides that a party may request an extension of a specific time limit and section 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations.

(h) If there are certain cases in which the DOC considered information although it was submitted after the deadline could you please provide copies of the relevant documents that show that the DOC did so?

113. In general, Commerce may accept submissions after regulatory deadlines in administrative proceedings and has done so. For example, in the anti-dumping investigation of *Certain Hot-Rolled Carbon Steel from Ukraine* (66 Fed. Reg. 50401, 3 October 2001), Commerce accepted additional factual information from an exporter which was submitted three days after the deadline established by Commerce for submitting a response to a supplemental questionnaire. Commerce allowed this information on the record because Commerce did not believe it to be unreasonable to consider in light of the deadline for completing the investigation.

114. In the anti-dumping investigation of *Certain Hot-Rolled Carbon Steel from South Africa* (66 Fed Reg. 37002, 37004, 16 July 2001), the majority of an exporter's questionnaire responses were submitted after the applicable deadlines. In that case, Commerce received the exporter's submissions anywhere from one to eighteen days late. These responses and accompanying data were similarly served late on other parties to the proceeding. Nonetheless, on numerous occasions, Commerce accepted such submissions and allowed the exporter to correct the deficiencies in its questionnaire responses.

115. In the instant sunset review, NSC submitted information more than seven months after the deadline, unlike the cases cited above where the submitters were days or weeks untimely. In addition, NSC had 15 months to prepare their substantive response, including the untimely submitted information.

Q63. By refusing to consider the information submitted by NSC on 11 May 2000, did the DOC effectively resort to "facts available" within the meaning of Article 6.8 of the Agreement? If so, did the DOC take into account the provisions of 6.8 and those of Annex II to the Agreement?

116. No, Commerce did not resort to "facts available" because Commerce had all the information on the record necessary to make the final sunset determination.

Q64. The Panel notes that the United States has referred to the 30-day requirement as being consistent with Article 6.1.1 of the Anti-Dumping Agreement. Please explain the similarities and differences, if any, as to requirements for the submission of information in US sunset reviews, administrative reviews and investigations. Are parties in administrative reviews and investigations allowed to provide information other than (additional to) the substantive information provided only in the first 30 days? Does a "good cause" standard apply in administrative reviews and investigations? If so, is it the same as the standard applied in sunset reviews? If not, please explain any differences.

117. Under the US system, a "proceeding" begins on the date of the filing of a petition and ends on, *inter alia*, the revocation of an order.[45] A anti-dumping duty proceeding consists of one or more " segments".[46] A "segment" refers to a portion of the proceeding that is separately judicially reviewable. For example, an anti-dumping duty investigation, an administrative review, or a sunset review each would constitute a segment of a proceeding.[47]

118. Each segment has a beginning (initiation) and an end (final determination or final results). Each segment contains its own discrete administrative record. Each segment of the proceeding has different deadlines for submissions of factual information and for argument. Each final determination is based solely on the information placed upon and contained in the administrative record for that segment. The final determination, and the discrete record upon which it is based, is subject to judicial review.

119. In any proceeding conducted by Commerce, whether an investigation, administrative review, or sunset review, parties may submit any information they believe relevant for the Secretary's consideration in that proceeding. Extensions of Commerce's regulatory deadlines may be requested.

120. Parties in investigations and annual administrative reviews generally may submit additional information after the first 30 days provided for questionnaire responses. Although Commerce has a generic form questionnaire for investigations and annual administrative reviews, this questionnaire is significantly modified in each case depending on the complexity of the product and other factors.

121. Deadlines are specifically designed to allow a respondent sufficient time to prepare responses to detailed requests for information, and to allow Commerce sufficient time to analyze and verify that information, within the statutorily-mandated time lines for completing investigations and annual administrative reviews. Commerce recognizes that parties may encounter difficulties in meeting certain deadlines in the course of any investigation or review and Commerce established a specific regulation which governs requests for extensions of specific time limits (*i.e.*, 19 CFR 351.302(c)).

122. In addition, Commerce normally sends one or more additional, supplemental questionnaires in each investigation or annual administrative review to afford parties an opportunity to remedy deficiencies in the original questionnaire responses. The complexity of the issues and the work required for an investigation or an annual administrative review in collecting and analyzing data (*e.g.*, cost and pricing information and company financial records) and calculating dumping margins necessitates broader submission time lines than one would find necessary in the sunset review context.

123. The "good cause" standard is required by statute only for sunset reviews.

Q65. The Panel understands that in this sunset review because the DOC found that there was dumping and that import volumes had declined following the imposition of the measure, it

[45] 19 CFR 351.102 (definition of "proceeding").
[46] 19 CFR 351.102 (definition of "segment of proceeding").
[47] *See* 19 CFR 351.102 (definition of "segment of proceeding", examples under para. 2).

concluded that dumping was likely to continue. In this process did the DOC also consider possible "other factors" on the basis of its own experience or on the basis of the information submitted by interested parties?

124. In the final sunset determination, Commerce did not consider "other factors." Nevertheless, Commerce also determined that, had it considered NSC's "other factors" claim concerning import volumes, it would not have affected the ultimate outcome because Commerce determined there was a likelihood that dumping would continue or recur based on the existence of dumping since the imposition of the order.

Q66. The Sunset Policy Bulletin indicates that the DOC will normally determine that revocation of the duty is likely to lead to continuation or recurrence of dumping where certain patterns are evident with respect to dumping and import volumes. Do you agree with the proposition that, if an investigating authority revokes an anti-dumping duty after five years, exporters of the subject product may increase their export price so that perhaps there would be no more dumping? Why or why not?

125. The reasons an exporter may or may not raise its export price are known only to the exporter. The exporter also may be inclined to increase the level of dumping without the discipline of the order in place. While, theoretically, an exporter may raise its price if an anti-dumping duty is removed, Commerce determined in this case that such an effect was not likely because the Japanese exporters have continued dumping despite the imposition of the order.

Q67. Is the Panel to understand that, in the view of the United States, once the investigating authority has found that dumping continued and import volumes decreased after the imposition of the duty, this established sufficient grounds to conclude that dumping is likely to continue? Or is there some further analysis that the DOC carries out beyond these two past facts?

126. Pursuant to the statute and as described in the Sunset Policy Bulletin, once Commerce has found that dumping has continued and import volume remained depressed in the period following imposition of the duty, Commerce *normally* will determine that there is a likelihood that dumping will continue or recur. Explanations and arguments concerning these elements are considered and "other factors" also may be considered. The final sunset determination in each sunset review, however, is made on the facts in that particular case.

127. In this case, Commerce found that the Japanese exporters had been dumping and that import volumes declined and remained depressed since the imposition of the order. Despite NSC's late attempt to explain how the depressed import volumes were not indicative of its future behaviour, no other information was presented during the sunset review concerning the future behaviour of the Japanese exporters. Consequently, Commerce determined that the existence of dumping by the Japanese producers and the significant decline in the import volumes since the imposition of the order demonstrated that it was likely they would dump if the order were removed.

Q68. In making its likelihood determination, does the DOC inquire whether there is a causal relationship between the disciplining measure and the behaviour of the exporters? Does it consider whether there is any other reason that would explain the exporters' behaviour? Does the DOC in this respect carry out a "but for" test (i.e. import volume would not decrease but for the continuation of the measure, or "but for" the continuation of the measure there would be a recurrence or continuation of dumping) to understand whether it is the duty that brought about the conduct or some other factor? What, in your view, is the proper test, and where in US law is the test contained?

128. Commerce does not conduct a counterfactual enquiry in making the likelihood determination. An exporter is the only party that can explain its pricing behaviour and the exporter is provided the

opportunity to explain present and possible future behaviour in the sunset review proceeding if it chooses to do so. In this case, NSC attempted to explain why its import volumes remained depressed and why these lesser levels were not probative of future behaviour. Significantly, however, NSC never explained or attempted to explain why, despite the fact that it has been dumping since the imposition of the order, it would stop dumping if the order were removed.

Q69. What factors relating specifically to the imposition of an *ad valorem* anti-dumping duty determine the exporters' behaviour in terms of their pricing, and therefore in terms of the dumping margin after a percentage anti-dumping duty has been applied (which presumably is paid for by importers at the time of importation)? What is the reason for the DOC's belief that it is the imposition of the duty that determines the behaviour of the exporters after the imposition of the duty and not some other factors? In this case, although it was found that the dumping margins of the Japanese exporters had decreased significantly after the imposition of the measure, the DOC nevertheless reported the original dumping margins to the ITC. Does that not reflect the DOC's assumption that the rates determined in administrative reviews do not apply because imposition of the duty has affected administrative review rates? If that is not so, then why did the DOC not report to the ITC the most recent rate?

129. Only the individual exporters know why they price as they do. Commerce begins with the guideline that imposition of the duty affects the behaviour of the exporters and that, if the exporters are dumping with an order in place, they will dump without an order in place. In a sunset review, parties may submit information and argument that this guideline is unfounded and is inapplicable in that particular case because other factors demonstrate that the exporter will stop dumping once the order is revoked.

130. Sunset analysis is, as explained above, a qualitative analysis rather than a quantitative one. The focus of the enquiry in a sunset review is on future behaviour of the exports without the discipline of the order. The current magnitude of the margin of dumping is not material to the enquiry of whether the exporters are likely to dump, at any level, in the event the order is revoked. Indeed, the issue of *why* exporters dump is neither required nor examined in any type of proceeding, whether original investigation, annual administrative review, or sunset review because either an exporter is dumping or it is not. Consequently, the mere existence of dumping after the imposition is highly probative of an exporter's behaviour, absent some other explanation known only to the exporter itself, absent the discipline of an order.

131. Commerce *normally* reports to the ITC the dumping margin from the original investigation because this rate most reasonably reflects the behaviour of the exporters without the discipline in place. Where dumping margins have declined and import levels have increased or remained steady after imposition of the order, however, Commerce may conclude that exporters are likely to continue dumping at the lower rates found in a more recent administrative review.

132. In the instant sunset review, Commerce reported the dumping margins from the original investigation because import volumes declined significantly after issuance of the order, continued to decline over the life of the order, and decreased in both administrative review. Thus, the rates for the original investigation were more probative of exporter behaviour without the discipline of the order than more recently determined dumping margins.

Q70. Section 1675(c) of the US Statute states that the administering authority should consider the weighted average dumping margins determined in the investigation and the subsequent reviews. Please explain what is meant by subsequent reviews and what binds you in respect of what you are required to consider under that provision.

133. Section 752(c) of the Act (19 U.S.C. §1675(c)) requires Commerce to consider the dumping margins determined in the investigation and the subsequent administrative reviews. The subsequent

reviews are the administrative reviews of the anti-dumping duty order, if any, conducted after the issuance of the order. The provision simply requires Commerce to consider dumping margins found in the those proceedings in making its likelihood determination. In the instant sunset review, Commerce considered the fact that Japanese exporters were found to be dumping in the administrative reviews covering the 1996-1997 and 1997-1998 periods.

Q71. Under US law, is the ITC allowed to disregard or alter the dumping margin reported by the DOC in a sunset review? How does the margin reported by DOC affect the ITC's injury determinations?

134. The "magnitude of dumping" to be used by the Commission in five-year review investigations is defined by the Act as "the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title".[48] The ITC cannot alter the dumping margin reported by the DOC.

135. Section 752(a)(6) of the Act states that "the Commission *may* consider the magnitude of the margin of dumping" in making its determination in a five-year review.[49] As such, the magnitude of the margin of dumping is one of a list of factors that the ITC may consider in determining the likely impact of subject merchandise on domestic producers of like products.

Q72. Article 3.5, first sentence, of the Anti-Dumping Agreement states that: "It must be demonstrated that the dumped imports are, *through the effects of dumping* ... causing injury..." (emphasis added). Does the USITC regard dumping as a quantitative matter in its injury analysis, including in its consideration as to whether prices are likely to be undercut, depressed or suppressed? How does the ITC use the dumping margins reported by the DOC in its analysis of injury and whether dumping is causing or likely to cause injury?

136. Article 3.5 of the AD Agreement provides with respect to investigations: "[i]t must be demonstrated that the *dumped imports* are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the means of this Agreement." (Emphasis added). Based on the plain text of Article 3.5, it is, thus, the dumped imports that must be shown to be causing injury before an anti-dumping duty may be imposed. The Agreement, moreover, gives specific direction by reference to paragraphs 2 and 4 of Article 3.5 pertaining to the manner in which effects of the dumped imports are to be assessed. Paragraph 3.2 instructs the investigating authorities to consider the volume and price effects of the dumped imports. Paragraph 3.4 specifies relevant economic factors that an investigating authority must consider in assessing the impact of dumped imports. The Agreement's focus on the volume and price effects of the dumped imports for the purposes of determining material injury is underlined by Article 3.1 itself, which mandates the determination of injury "shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of dumped imports on the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

137. In sunset reviews, US law provides that the USITC may consider the magnitude of the dumping margin in assessing whether injury is likely to continue or recur. The focus remains, nonetheless, on the likely volume and likely price effects of the dumped imports. Nothing in the AD Agreement directs the authority to consider the size of the dumping margin, if any, in conducting a sunset review.

Q73. In sunset reviews, how does the United States treat the concepts of "dumping that is causing injury" and "likely dumping that is likely to lead to a continuation or recurrence of

[48] 19 U.S.C. § 1677(35)(C)(iv).
[49] 19 U.S.C. § 1675a(a)(6) (emphasis added).

injury"? Is a causal link analysis required? If so, what is the nature of the causal link analysis carried out by the USITC in a sunset review?

138. The exact phrase "likely dumping that is likely to lead to a continuation of recurrence of injury" does not appear in Article 11. The Panel's language appears to be a paraphrase of next the last sentence of Article 11.3, which states that an anti-dumping duty order shall be terminated unless "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." As such, Article 11.3 requires the conditions necessary for the continued imposition of the anti-dumping order, namely likely dumping and likely injury if the order was lifted.

139. While there is only a subtle difference between the language employed by the Panel in its question and the text used in the Agreement, the difference is important. The Panel's language presumes that the elimination of dumping as such is the appropriate focus of the likelihood determination pertaining to injury conducted as part of a sunset review under Article 11.3. In fact, it is the expiry of the duty or anti-dumping duty order and its effect that the Agreement directs the investigatory authority to consider in determining whether injury is likely to continue or recur. Dumping may well continue after the expiry of the duty. Under US law, the USITC only reaches its likelihood of injury determination after Commerce makes its determination that there is a likelihood of the continuation or recurrence of dumping.

Q74. Do the obligations in Article 3, including those in Article 3.3, 3.4 and 3.5, apply in sunset reviews?

140. As the United States explained in its response to Panel Question 22 and in earlier submissions, the obligations set forth in Article 3.3 of the AD Agreement do not extend to sunset reviews conducted under Article 11.3 of the Agreement.

141. The Article 11.3 injury standard is not the same as the standard for injury in original investigations, although they contain some of the same elements. The injury determinations in original investigations are governed by the provisions of Article 3 of the Agreement. Article 3.1 of the AD Agreement further specifies the factors that investigating authorities must consider in reaching "[a] determination of injury for purposes of Article VI of GATT 1994."

142. The aim of the Article 11.3 review is to determine whether revocation of the countervailing duty would be likely to lead to continuation or recurrence of injury. Footnote 9 to Article 3 indicates that the term *injury* as used throughout the Agreement "shall be interpreted in accordance with the provisions of this Article". In turn, Article 3 specifies three general criteria – volume, price effects and impact on the domestic industry – that are pertinent to any *injury* determination under the Agreement.

143. The focus of a review under Article 11.3, however, differs from that of an original investigation under Article 3. The nature and practicalities of the two types of inquiries demonstrate that the tests for the two cannot be identical. In an original investigation, the investigating authorities examine the condition of an industry that has been exposed to the effects of the dumped imports. In that investigation, an authority examines the relationship between import-related factors (such as relative and absolute increases in import volumes and underselling and other price effects) to industry-related factors (such as trade, financial and employment data that have a bearing on the state of the industry and that may be indicative of present injury or imminent threat of injury).[50] Five years later, as a result of the countervailing duty order, dumped imports may have either decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties.

[50] *See* Articles 3.2 and 3.4 of the AD Agreement.

144. Thus, the enquiry contemplated in a review conducted pursuant to Article 11.3 is counterfactual in nature, and entails application of a different standard with respect to the volume, price and relevant industry factors. An authority must decide the likely impact of a prospective change in the status quo, *i.e*., the revocation of the dumping duty order and the elimination of its restraining effects on volumes and prices of imports.

VIII. OTHER

Q76. Taking into account the complexities of what is raised by the domestic industry in a sunset review, does providing five days for rebuttals meet the "reasonableness" standard referred to in Article X:3 of the GATT 1994?

145. Article X:3(a) is limited to the *administration* of certain laws, regulations, judicial decisions and administrative rulings of general application, *not* to the laws, regulations and administrative rulings themselves.[51] Article X:3(a) requires uniformity of treatment with respect to persons similarly situated.[52] Section 351.218(d)(4) of Commerce's regulations provide that all parties must submit rebuttals to substantive responses within five days of the filing of the substantive responses (with the opportunity for extensions pursuant to section 351.302). Commerce has uniformly and consistently applied this provision in the administration of its sunset reviews.

146. Prior to implementation of Commerce's Sunset Regulations, parties commented on the proposed five-day limit for rebuttal case briefs in Commerce's regulations at section 351.218(d)(4). There was some concern that the five-day period was insufficient. Consequently, every sunset initiation notice, including the initiation notice for the instant sunset review[53], provides explicit notice that requests for extension of the five-day deadline would be considered from interested parties pursuant to section 351.218(d)(4) of Commerce's regulations.

---

[51] *United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, adopted 23 August 2001 ("*Japan Hot-Rolled Steel*"), para. 7.267.

[52] *United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*, WT/DS179/R, Report of the Panel, adopted 1 February 2001 ("Korea Stainless Steel"). *See Initiation of Five Year Sunset Reviews of Anti-Dumping and Countervailing Duty Orders*, 64 Fed. Reg.47767, 47769 (September 1, 1999).

[53] *See Initiation of Five Year Sunset Reviews of Anti-Dumping and Countervailing Duty Orders*, 64 Fed. Reg.47767, 47769 (1 September 1999).

ANNEX E-4

COMMENTS BY JAPAN ON US REPLIES TO PANEL QUESTIONS – FIRST MEETING

I. INTRODUCTION

1. This submission rebuts certain responses provided by the United States Government ("USG") in answer to the Panel's questions raised in connection with the first Panel meeting. Japan will take this opportunity to primarily rebut only those arguments that have not yet been addressed, or those in which the USG did not properly address the Panel's questions, as our second submission and answers to the Panel's questions largely already reflected our rebuttals to the USG's answers to the Panel's questions. Further, in this submission, Japan does not address each of the USG's answers to particular questions. Rather, Japan will address the USG's responses to particular issues raised within the Panel's questioning.

2. In addition, Japan reserves the right to present additional rebuttal arguments to the USG's answers to the Panel's questions at the second Panel meeting.

II. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS

A. THE SUNSET POLICY BULLETIN IS ACTIONABLE AS A GENERAL PRACTICE

3. In an attempt to argue that the Sunset Policy Bulletin is discretionary, the USG asserts that the Sunset Policy Bulletin is a non-binding statement by USDOC, which provides general "guidance" on how it will conduct its sunset reviews.[1] The USG asserts that it may depart from the Sunset Policy Bulletin at any time so long as it simply explains its reasons for doing so.[2] This is simply not the case. As discussed in our second submission, the Sunset Policy Bulletin is in fact a concrete independently operational instrument that has a "functional life" of its own.[3]

4. Under US administrative law principles, general policy statements like the Sunset Policy Bulletin have binding effect when the agency bases its "enforcement actions on the policies or interpretations formulated in the document."[4] USDOC has followed the precepts of the Sunset Policy Bulletin in all 228 sunset review determinations where the domestic industry participated.[5] In all of those cases, USDOC applied the precepts of the factual scenarios established in the Sunset Policy Bulletin to determine whether to continue the imposition of anti-dumping duties. There are no other provisions in either the statute, the Sunset Regulations, or the SAA that establishes precisely how USDOC conducts its analysis. USDOC bases its determinations in sunset reviews entirely on the instructions or else in accord with the Sunset Policy Bulletin. Thus, under US administrative law for all practical purposes the Sunset Policy Bulletin is binding.

5. The USG's assertion in response to the Panel's second question that "practices," especially "future practices," by a Member are not actionable is without merit.[6] As fully explained in our second

---

[1] *See* USG Answers to the Panel's Questions, at para. 6 (11 Dec. 2002) (answering question 1).

[2] *See id*. at para. 6 and 31 (answering Panel questions 1 and 9).

[3] *See* Japan Second Submission, at paras. 7 – 15 (11 Dec. 2002).

[4] *See id*. at n. 17 (citing *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1021 (D.C. Cir. 2000)).

[5] *See* Ex. JPN-31.

[6] *See* USG Answers to the Panel's Questions, at paras. 7-11 (answering question 2).

submission,[7] a concrete independently operational instrument that USDOC has followed in all 228 sunset review determinations is certainly an actionable measure before this Panel.

6. Moreover, the USG's future practice argument is a desperate attempt by the USG to diffuse USDOC's consistent and complete compliance with the Sunset Policy Bulletin. Indeed, when asked by the Panel in question 9(b) if the USG could point to instances where USDOC has declined to follow the Sunset Policy Bulletin, the USG could not point to a single case.[8] Instead, the USG claims that the 228 applications of the Sunset Policy Bulletin are "nothing more than individual applications of the US AD law."[9] It also argues that USDOC does not "follow" the provisions of the Sunset Policy Bulletin; rather, USDOC simply assesses the facts of the individual case in light of the "guidance" provided by the Sunset Policy Bulletin.[10]

7. Contrary to the USG's argument, these affirmative sunset review determinations represent more than simply "individual applications" of the Sunset Policy Bulletin. The USG conveniently ignores the fact that USDOC specifically referred to the factual scenarios in the Sunset Policy Bulletin and explained how respondents fit into one of the three "likely" scenarios in section II.A.3 in all these affirmative determinations. USDOC rarely examines other factors to refute the presumption based on these scenarios that dumping would be likely to continue or recur. [11] As a result, not once has USDOC made a negative determination in a sunset review when the domestic industry has elected to participate. No other fact demonstrates more effectively that the Sunset Policy Bulletin has a "functional life" of its own.

8. The Sunset Policy Bulletin, therefore, is a de facto mandatory WTO-inconsistent instrument having a "functional life" of its own. The Bulletin is thus actionable under the AD Agreement.

B. SECTION 351.222(I)(1)(II) OF USDOC'S SUNSET REGULATIONS IS A MANDATORY OBLIGATION AND NOT SIMPLY MINISTERIAL

9. In response to the Panel's question as to whether section 351.222(i) of USDOC's Sunset Regulations is mandatory or discretionary, the USG asserted that "{s}ection 351.222 does not contain any substantive obligations."[12] This statement seems quite odd, as Japan fully discussed in its second written submission.[13] Further, the USG's attempt to equivocate by asserting that section 351.222(i)(1)(ii) is both mandatory and procedural is only half true. The provision is mandatory and has both procedural and substantive implications, as discussed in our second submission.[14]

---

[7] *See* Japan Second Submission, at paras. at 8-14.

[8] *See* USG Answers to the Panel's Questions, at paras. 28-29 (answering question 9(b)).

[9] *See id*. at para. 7.

[10] *See id*. at para. 28.

[11] The USG claimed that it requested parties to submit factual information in their case briefs in *Mechanical Transfer Presses from Japan*. *See* USG Answers to the Panel's Questions, at n. 21. In that case, however, USDOC did not request other factors, but requested past import volume information. USDOC requested "evidence with respect to *pre-* and post-order market share." *Preliminary Results of Full Sunset Review; Mechanical Transfer Presses from Japan*, 65 Fed. Reg. at 757. The past market share is a part of past import volume information that the Sunset Policy Bulletin requires USDOC to collect in applying the four scenarios. *See* section II.A.4 of the Sunset Policy Bulletin. USDOC thus attempted to collect the very information as required in considering the four scenarios under the *Bulletin*. In the affirmative final determination in that case, USDOC found that the case did not satisfy the "not likely" standard, stating "we are not convinced based on evidence on the record that respondents' market share was maintained." *Final Results of Full Sunset Review: Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 25705, *Issues and Decision Memo*, at cmt. 1 (3 May 2000) *available at* http://ia.ita.doc.gov/frn/summary/japan/00-10926-1.txt.

[12] USG Answers to the Panel's Questions, at para. 20 (answering question 8(c)).

[13] *See* Japan Second Submission, at paras. at 43-53.

[14] *See id*. at paras. 50-53.

10. Moreover, the USG's assertion that the Panel should give considerable deference to its views on the meaning of its own laws and regulations misses the point.[15] The deference the Panel should afford is not unlimited. As the Appellate Body in *India – Patent Protection*[16] found, a Panel's deference ends once a Member establishes a *prima facie* case.[17] Once evidence and argumentation has been put forward establishing that the challenged measure is inconsistent with a Member's WTO-obligations, the burden then shifts to the challenged Member to rebut the prima facie case against it. In this case Japan has clearly established a prima facie claim against the WTO-consistency of section 351.222(i)(1)(ii).[18] It is now up to the USG to attempt to rebut the prima facie case against it.

11. In addition, simply because a panel gives a Member deference when explaining the meaning of its own laws does not mean that a panel will simply accept any explanation the Member provides. A panel must "examine" the nature of the Member's challenged municipal law, and simply will not accept wholesale the Member's explanation of its meaning. The findings of the panel in *United States – Anti-Dumping Act of 1916*[19] supports this conclusion. In that case the panel states:

> Thus, our understanding of the term "examination" as used by the Appellate Body is that panels need not accept at face value the characterization that the respondent attaches to its law. A panel may analyze the operation of the domestic legislation and determine whether the description of the functioning of the law, as made by the respondent, is consistent with the legal structure of that Member. This way, it will be able to determine whether or not the law as applied is in conformity with the obligations of the Member concerned under the WTO Agreement.[20]

III. EVIDENTIARY STANDARDS FOR SELF-INITIATION OF SUNSET REVIEWS

A. INITIATION UNDER SECTIONS 751(C)(1) AND (2) ARE MANDATORY

12. The USG's statement that USDOC would not initiate a sunset review if the domestic industry shows no interests in the maintenance of an anti-dumping duty[21] appears inconsistent with the USG's other answers and, in any event, is wrong. When answering question 1, the USG replied that the statutory provisions using "shall" or "will" are mandatory.[22] In Japan's first submission, we establish that sections 751(c)(1) and (2) of the Tariff Act of 1930 (the "Act") mandate USDOC automatically to self-initiate sunset reviews through use of the phrases "shall conduct" and "shall publish," respectively.[23] As the USG points out, these are mandatory provisions because there is no modifying discretionary language, such as "normally." The USG confirms this interpretation in answering question 10, when it asserted that it automatically initiates all sunset reviews pursuant to section 751(c)(2) of the Act.[24] Yet, in the very next paragraph, in answering question 11, the USG contradicts itself by admitting that, if a domestic party sent written notice that the industry was no longer interested in maintaining the order, USDOC would not automatically initiate the sunset

---

[15] *See* USG Answers to the Panel's Questions, at para. 25 (answering question 8(d)).

[16] *See* Report *of* the Appellate Body, *India – Patent Protection For Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R at paras. 73-74 (19 Dec. 1997) (hereinafter "*India – Patent Protection*").

[17] *See id*.

[18] *See* Japan First Submission, at paras. 95-101; *see also* Japan Second Submission, at paras. 43-53.

[19] *See* Report of the Panel, *United States – Anti-Dumping Act of 1916*, WT/DS136/R at para. 6.51 (31 March 2000).

[20] *Id.*

[21] *See* USG Answers to the Panel's Questions, at para 35 (answering question 11).

[22] *See id.*, at para. 2 (answering question 1).

[23] *See* Japan First Submission, at para. 15.

[24] *See* USG Answers to the Panel's Questions, at para. 34 (answering question 10).

review.[25] Indeed, the USG could not show any anti-dumping duty orders that expired as a result of non-initiation – because there are none.

13. The USG's response to question 11 therefore is also misleading. From the USG's response, it would appear that USDOC has discretion to self-initiate a sunset review. As the USG's own statements point out, however, this is not the case. Automatic self-initiation under section 751(c)(1) and (2) of the Act is mandatory.

IV. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

A. THE APPROPRIATE "LIKELY" STANDARD REQUIRES THAT DUMPING WILL "PROBABLY" CONTINUE OR RECUR

14. In response to the Panel's question 35 regarding the nature of the "likelihood" standard and the level of certainty implied by the standard, the USG claimed that '"likely' falls somewhere between 'possible' and 'probable' on a continuum of relative certainty."[26] The USG's assertion that "likely" cannot be interpreted to mean that an event is probable flies not only in the face of previous panel determinations,[27] but also in the judgments of its own municipal courts. The US Court of International Trade (hereinafter "USCIT") expressly held that "likely" means "probable" in the context of a countervailing duty sunset review:

> It is not sufficient for Commerce merely to indicate the possibility that benefits could still be given under the program. Rather, Commerce must make factual findings that would indicate whether such benefits would be probable, considering how substantial the benefits are likely to be or whether they would continue for any significant time period beyond the end of the sunset review.[28]

15. Consequently, the USG's assertion that '"likely' falls between 'possible' and 'probable'" is blatantly inconsistent with the accepted interpretation of "likely" under both WTO and US jurisprudence. There is no middle ground as the USG asserts.

16. In addition, the USG stated in its response to question 49 that USDOC only considers the existence of dumping margins in its qualitative analysis of "likelihood," and does not consider the magnitude of those margins in its analysis.[29] This response illustrates precisely how flawed USDOC's "likelihood" analysis is in the first place. First, conducting a "dumping" determination without quantitative analysis is contrary to Article 2 of the AD Agreement, as we discussed in our previous submissions.[30] Second, USDOC does not even engage in either a quantitative or qualitative analysis of the "likelihood" of dumping. USDOC's rigid compliance with the Sunset Policy Bulletin precludes any consideration of the likely magnitude of the margins based on the underlying facts in an individual case. For USDOC, past dumping margins and import volume are the beginning and the end of the analysis; given the consistency with which USDOC has decided to continue orders in its

---

[25] *See id.*, at para. 35 (answering question 11).

[26] USG *id.*, at para. 68 (answering question 35(d)).

[27] *See* Japan Second Submission, at para. 43 n. 49 (citing the panel determinations' in *US – DRAMs*, WT/DS99/R, at para. 6.45 and *Mexico – HFCS*, WT/DS132/R, at para. 7.177).

[28] *See AG def Dillinger*, Slip Op. 02-107, at 18 (emphasis in original) (citing *Usinor Industeel, S.A. v. United States*, Slip Op. 02-39 at 13 (Ct. Int'l Trade 2002), which held that "likely" in the context of the USITC's injury determination means probable not possible).

[29] *See* USG Answers to the Panel's Questions, at para. 76.

[30] *See* Japan Second Submission, at paras. at 87-91, and 109-110; *see also* Japan Answers to the Panel's Questions, at paras. 54, and 145-147.

sunset reviews, its analysis is literally meaningless. Such a practice is contrary to the prospective requirement to "determine" whether dumping is "likely" to occur in the future.[31]

B. THE 30-DAY PERIOD FOR SUBMITTING A SUBSTANTIVE RESPONSE UNREASONABLY LIMITS A RESPONDENT'S ABILITY TO PRESENT AN EFFECTIVE DEFENSE

17. The USG's response to question 50 is distortive and misleading. The USG asserts that NSC had over 15 months to prepare for the sunset review and that NSC should not have "gambled" on the domestic industry's non-participation.[32] The USG goes on to note that nothing in its regulations requires a respondent to wait until the domestic industry files their notice of intent to participate.[33] The USG continues to miss the point of Japan's argument.

18. As discussed in our second submission,[34] respondents should not be obliged to go through the time and expense of preparing a substantive response when they may not have to do so. At the very least respondents should not be burdened with preparing a substantive response before receiving the questionnaire, *i.e.*, the notice of initiation in the US sunset review process.[35] Article 6.1.1 of the AD Agreement requires the authorities to give respondents a definite 30-day period in which to respond to the authorities' questionnaire. The authorities cannot expect that a respondent will be fully prepared to submit its substantive response at any time as the USG implies. Furthermore, the 30-day period in Article 6.1.1. does not allow an authority to make a party's response conditional upon the actions of another party. A party must have the full 30 days to develop its response and not be forced to spend some of that period waiting for another party to act. USDOC's 30-day rule is inconsistent with Article 6.1.1.

19. In an attempt to mitigate its WTO-inconsistency, not only with respect to Article 6.1.1. but also Articles 6.1, 6.2, and 6.6, the USG relies on the fact that NSC could have asked for an extension of time in which to file its substantive response.[36] The grant of an extension of the initial 30-day deadline, however, is a separate obligation of the authorities in addition to the 30-day rule under Article 6.1.1. Furthermore, the potential extension of the 30-day period is not a good defense against Japan's claim that USDOC did not fulfill its WTO obligations by failing to give respondents an ample and a full opportunity to present evidence. The question is whether the respondent may, under Articles 6.1, 6.2 and 6.6, be restricted to the first 30-day period to present their substantive information to defend their case.

20. When asked in which cases, if any, has USDOC accepted and considered information submitted past the initial deadline, the USG cited two original investigations, instead of sunset reviews.[37] These cited investigations are irrelevant to sunset reviews because section 351.301(b)(1) of USDOC's regulations sets the deadline only for original investigations, not sunset reviews. Moreover, the deadline for submitting evidence under section 351.301(b)(1) is far after the due date of the initial questionnaire response.[38] The section provides:

---

[31] *See* Japan Second Submission, at paras. 54-61 (discussing further USDOC's WTO-inconsistent retrospective likelihood analysis).

[32] *See* USG Answers to the Panel's Questions, at para 84 (answering question 51).

[33] *See id*.

[34] *See* Japan Second Submission, at paras. 74-76.

[35] *See id*.

[36] *See* USG Answers to the Panel's Questions, at paras. 84 and 88 (answering questions 51 and 54)

[37] *See id.*, at paras. 113-114 (answering question 62).

[38] *See* 19 C.F.R. § 351.301(b)(1). According to a sample schedule of original anti-dumping investigation, the deadline to submit the information is 161 days from the date of initiation, or 28 days after the preliminary determination. This deadline will be extended when the due date of the preliminary determination is extended. *See* Annex III to Part 351 – Deadlines for Parties in Antidumping Investigations, 19 C.F.R. Pt. 351, Annex III.

> {A} submission of factual information is due no later than:
>
> (1) For a final determination in a countervailing duty investigation or an antidumping investigation, seven days before the date on which the verification of any person is scheduled to commence, except that factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed.[39]

21. In contrast, USDOC's Sunset Regulations do not have similar provisions. The Sunset Regulations only allow the submission of substantive evidence and argumentation during the first 30-day period after initiation.[40] USDOC strictly applied this 30-day period to the instant case.

22. Most telling is the USG's response to question 64. In that question, the Panel asked whether USDOC requires all substantive information in investigations and administrative reviews to be submitted in the first 30-days after initiation and whether there is a "good cause" standard in those proceedings. The answer is "no," but the USG dodges the question. In the USG's answer, it conveniently ignored section 351.301(b) of USDOC's regulations, and instead cited section 351.302, which provides for extensions of time.[41] As discussed above, in original investigations, for example, USDOC will normally accept new information until one week before the scheduled verification, in accordance with section 351.301(b), or 28 days after the preliminary determination according to USDOC's sample schedule.[42] When USDOC has refused to allow filing of late information, the Appellate Body has found that USDOC must accept information even after respondents have missed the due date under section 351.301(b)(1).[43] The 30-day deadline in sunset reviews is therefore far from reasonable in light of USDOC's own investigation standards and Appellate Body precedent.

23. The USG cites to a single sunset review case – *Transfer Presses from Japan* – in which it permitted new information to be filed past the 30-day deadline.[44] The USG fails to acknowledge, however, that it was USDOC that requested the information in the first place. Furthermore, the requested information consisted of past market shares.[45] The irony of this case, therefore, is that the only reason USDOC requested the information was because the Sunset Policy Bulletin specifically requires USDOC to consider past import volume in terms of market share.[46]

24. In this case, USDOC did not request or accept substantive information after the initial 30-day period. USDOC specifically refused to consider information submitted with the case brief. Such a clear dichotomy between USDOC's treatment of original investigations on the one hand and this sunset review on the other, show just how biased and subjective USDOC's rejection of NSC's information was. The USG's argument, in an attempt to justify the 30-day limit, that "deadlines are specifically designed to allow . . . Commerce sufficient time to analyze and verify that information"[47] is without any reasonable grounds.

---

[39] 19 C.F.R. § 351.301(b)(1).

[40] *See* 19 C.F.R. § 351.218(d)(3)(iii).

[41] *See* USG Answers to the Panel's Questions, at para. 117-123 (answering question 64).

[42] *See* 19 C.F.R. Pt.351, Annex III.

[43] The Appellate Body determined that USDOC must accept the data that NSC submitted after the deadline under *section* 351.301(b), stating "if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information." *United States – Anti-dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001), at para 83.

[44] *See* USG Answers to the Panel's Questions, at n. 21, quoting Preliminary Results of Full Sunset Review; Mechanical Transfer Presses from Japan 65. Fed. Reg. 753, 758 (6 January 2000) (USDOC requested submission of factual information in case brief) (hereinafter "Mechanical Transfer Presses from Japan").

[45] *See Mechanical Transfer Presses from Japan*, 65. Fed. Reg. at 757. *See also supra* footnote 11.

[46] *See* the Sunset Policy Bulletin, section II.A.4.

[47] *See* USG Answers to the Panel's Questions, at para. 121 (answering question 64).

25. Further support for our point is the USG's own admission in its answer to question 64 that the requirement to show "good cause" as the precondition to present other evidence does not exist in any other proceedings before USDOC.[48] There is no conceivable reason for USDOC to restrict the submission of evidence in sunset reviews when it does not do so in any other proceeding. In sunset reviews especially, USDOC should be even more willing to accept other evidence due to the prospective nature of the determination requirement under Article 11.3. The whole of USDOC's sunset regime, from its Sunset Policy Bulletin to its 30-day rule, demonstrate the USG's systemic design to continue anti-dumping duties in perpetuity. This makes USDOC's practice highly inconsistent with Article 11.3.

C. THE "GOOD CAUSE" REQUIREMENT SOLIDIFIES USDOC'S IRREBUTTABLE PRESUMPTION AND IS WTO-INCONSISTENT

26. In response to question 58(b), the USG claims that USDOC's sunset review of the order on *Sugar & Syrups from Canada* reflects an instance where USDOC reconsidered its initial preliminary determination and found "good cause" to examine the issue presented.[49] The USG provides a misleading interpretation of this case. In the final results of the sunset review in *Sugar & Syrups from Canada*, USDOC merely determined the existence of dumping margins in a recent period indicated that dumping was likely to continue or recur in the future.[50] USDOC had initially found that petitioner did not establish "good cause" based on its sales volume argument,[51] and therefore rejected the petitioner's "other evidence" that respondent was likely to continue dumping.[52] In the preliminary results, USDOC ignored the respondent's cost information submitted with its rebuttal response.[53] USDOC decided in the final results, however, to accept petitioner's allegations on the existence of dumping margins in its case brief and used the respondent's information in order to confirm the existence of dumping margins, as required by the Sunset Policy Bulletin, justifying continuation of the imposition of the anti-dumping duty.[54] Again, this case reflects USDOC's use of the "good cause" standard to strictly enforce the presumption of the Sunset Policy Bulletin. It does not rebut the notion that USDOC needs to restrict respondent's ability to present other prospective evidence that would otherwise show the absence of a likelihood to dump in the future.

27. The USG's answers to question 58 makes clear that the four scenarios in the Sunset Policy Bulletin are the primary standard USDOC uses to determine the likelihood of dumping, and that all other factors are secondary. The USG also admitted that respondents must rebut the presumption, once the likelihood of dumping is established in accordance with three scenarios in section II.A.3 of the Sunset Policy Bulletin, by showing "good cause." The "good cause" standard is a threshold requirement that must be satisfied before other factors are examined.[55] The USG further asserts that

---

[48] *See id.*, at para. 123 (answering question 64).

[49] *See id.*, at para. 95 (answering question 58(b)).

[50] *See Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 Fed. Reg. 48362, 48363-64 (3 September 1999) (Ex. JPN-25m).

In *Brass Sheet & Strip from the Netherlands*, which the USG also quoted in its answer to question 58(b), at para. 95, USDOC finally rejected the respondent's good cause argument and evidence. *See Final Results of Full Sunset Review; Brass Sheet & Strip from the Netherlands*, 65 Fed. Reg. 735, 738 (6 January 2000) (Ex. JPN-25l).

[51] *See* Preliminary *Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 Fed. Reg. 20253, 20254 (26 April 1999) ("The USBSA did not address whether dumping continued at any level above *de minimis* after the issuance of the order. Rather, the USBSA argued that imports of the subject merchandise fell dramatically immediately following the issuance of the order in 1980.") (Ex.JPN-26).

[52] *See id*., 64 Fed. Reg. at 20255-57.

[53] *See Final* Results *of Full Sunset Review: Sugar and Syrups from Canada*, 64 Fed. Reg. 48362, 48363 (3 September 1999).

[54] *See id.*, 64 Fed. Reg. at 48363-64.

[55] *See* USG Answers to the Panel's Questions, at para 97 (answering question 58(d)).

"other factors" will only be examined in those instances where the information shows that USDOC may not base its sunset review determination on the continued existence of dumping or depressed import volumes – historical evidence.

28. This is precisely Japan's point. First, the Sunset Policy Bulletin, by setting forth the primary standard, does not allow USDOC to take any positive action to collect information relevant to a prospective analysis. USDOC's positive action is limited to the collection of past dumping margins and import volumes, and no more. The Sunset Policy Bulletin*'s* good cause requirement thus unduly restricts USDOC's ability to review other information.

29. Second, the Sunset Policy Bulletin sets the pre-established presumption that the existence of dumping, in any amount, results in USDOC's affirmative determination in sunset reviews. In other words, there is no effective case-by-case examination made in USDOC's sunset reviews. The final results of sunset reviews are pre-determined when the review is initiated because the very basis of initiating a sunset review is the continued imposition of anti-dumping duties since the original investigation. It is, therefore, logical that all the previous 228 sunset reviews in which the domestic industry participated fell into one of the three "likely" scenarios.

30. Finally, the Sunset Policy Bulletin establishes an unreasonably high burden of proof for respondents to rebut the presumption. It shuts down any effective examination of other factors.

31. The likelihood of dumping determinations in accordance with the Sunset Policy Bulletin therefore do not bear any consistency with the requirements under Article 11.3. As discussed in our previous submissions, there should be no threshold requirement before examining other evidence. The prospective nature of sunset reviews requires that USDOC consider all relevant information.

32. In paragraphs 101 and 127 of its answers, the USG claims that NSC did not provide any additional argumentation to support the acceptance of this evidence, and no other information was presented during the sunset review concerning NSC's future behaviour, and therefore, USDOC was justified in rejecting NSC's other evidence.[56] Again, the fact that a respondent has to argue why USDOC should accept evidence in the first place is inconsistent with the obligation to make a prospective determination under Article 11.3.[57] Also, the USG's claim that more evidence of future behaviour was required to force USDOC to examine NSC's "other evidence" is astounding. It is hard to imagine what more evidence is required to show that the joint-venture precludes NSC from wanting to continue dumping in the future.

33. Please also note that the USG's reference to NSC's "rebuttal case brief" in paragraphs 101 and 110 is incorrect. NSC submitted "other evidence" in its case brief not its "rebuttal case brief."

D. USDOC'S REPORTING OF WTO-INCONSISTENT DUMPING MARGINS TO THE USITC FOR PURPOSES OF ITS INJURY ANALYSIS IS INCONSISTENT WITH THE USG'S OBLIGATIONS UNDER ARTICLE 11.3

34. In its response to question 73, the USG did not answer whether the USITC is required to find a causal link between likely dumping and future injury in its "likelihood" of injury analysis under Article 11.3. Instead, the USG claims that the USITC simply evaluates whether the expiry of the anti-dumping duty is likely to cause injury. It states that the USITC does not factor into its analysis what effects future dumping may have on the domestic industry. The USG explains that, "{d}umping may well continue after the expiry of the duty. Under US law, the USITC only reaches its likelihood of injury determination after Commerce makes its determination that there is a likelihood of the

[56] *See id.*, at para. 101 and 127 (answering questions 59 and 67).
[57] *See* Japan Second Submission, at para. 63-65.

continuation or recurrence of dumping."[58] This completely misconstrues the nature of the injury analysis.

35. Once USDOC finds that dumping is likely to continue, and reports the margin "likely" to prevail upon revocation, the USITC must evaluate whether future dumping at the reported rate is likely to cause injury in the future.[59] As discussed in our second submission, the magnitude of dumping is directly relevant to the USITC's injury analysis.[60]

36. The USG, however, states that the injury obligations contained in Article 3 do not apply to sunset reviews under Article 11.3.[61] The USG believes that only the barest of the injury criteria – volume, price effects, and impact on the domestic industry apply to sunset reviews.[62] This is a complete misinterpretation of the relevance of footnote 9 and the rest of Article 3. The "general criteria," which the USG refers to in Article 3.1,[63] are set forth in greater detail throughout the rest of the provisions in Articles 3.3, 3.4 and 3.5. For a detailed examination of the proper interpretation of Article 3 and its implications in the USITC's injury analysis, please see our second submission.[64]

V. CONCLUSION

37. As stated above, the USG's responses to the Panel questions are unsubstantiated and without merit, or otherwise did not answer to question that was being asked. We urge the Panel to take Japan's rebuttal comments above into consideration in its review of the US responses.

---

[58] USG Answers to the Panel's Questions, at para. 139 (answering question 73).

[59] As the USG admitted in its answer to question 71, the USITC must accept USDOC's reported rate for the injury analysis. *See* USG Answers to the Panel's Questions, at para. 134. The USITC may not, and did not in this case, make an independent analysis on the magnitude of the dumping margins likely to prevail.

[60] *See* Japan Second Submission, at paras. 150-152.

[61] *See* USG Answers to the Panel's Questions, at paras. 140-141.

[62] *See id*. at para. 142.

[63] *See* id., at para. 142-143.

[64] *See* Japan Second Submission, at paras. 89-92 and 150-152.

ANNEX E-5

COMMENTS BY THE UNITED STATES ON JAPAN'S REPLIES TO PANEL QUESTIONS – FIRST MEETING

1. The United States does not intend to comment on every response by Japan to the Panel's questions, particularly where the issues raised have been addressed in prior written submissions of the United States. Instead, the United States will comment briefly on those specific responses where additional points or emphasis is warranted.

I. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS

2. With respect to Questions 1 and 2, the Sunset Policy Bulletin does not have a functional life of its own. Japan's assertion that the Sunset Policy Bulletin is "codified" US practice is a misstatement of US law. The Sunset Policy Bulletin is not "codified" in any sense; it is not legislation nor is it a regulation. It does not have the force and effect of US law. The Sunset Policy Bulletin provides guidance for the US Department of Commerce's ("Commerce") conduct of sunset reviews and, consequently, Commerce may deviate from it provided Commerce provides an explanation for the change in practice.

3. With respect to Question 8, Japan again mischaracterizes Commerce's sunset regulations by stating that these regulations articulate the substantive standards for Commerce's conduct of a sunset review. Commerce's sunset regulations are procedural in nature and in application. The act of revoking an antidumping duty order requires process and these regulations, in particular section 351.222(i)(1)(ii), provide the procedural mechanism and time lines for implementing a negative likelihood determination by revoking the antidumping duty order. The regulations are mandatory in that Commerce shall revoke the antidumping order within the specified time lines if a negative likelihood determination is made. There are no substantive elements in this section of Commerce's regulations.

II. *DE MINIMIS* STANDARD

4. With respect to Questions 15, 16, and 18, Japan's answers ignore the fundamental difference between investigations, in which a *de minimis* standard is required under Article 5.8 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), and sunset reviews. In the context of Article 5.8, the function of the *de minimis* standard is to determine whether a product is being introduced into the commerce of another country at less than its normal value and, thus, warranting the imposition of an antidumping duty order in the first instance. For example, in an investigation, if the investigating authority found that a product was being sold with a margin of dumping of more than two percent, imposition of an antidumping duty would be warranted if the dumped imports were found to cause injury.

5. By contrast, the focus of the sunset review is the future. Other factors could warrant maintaining the duty beyond the five-year point, *even if* the margin of dumping was determined currently to be *zero*, as stated in footnote 22 of the AD Agreement, because dumping may be likely to recur absent the discipline of the duty. This distinction between the purpose of an investigation and the purpose of a sunset review supports the conclusion that, absent an express reference to the

contrary, there is no basis to assume or infer an intent that the *de minimis* standard for investigations applies in sunset reviews.[1]

6. With respect to Question 19, the United States observes that Japan's answer espouses a general principle that any provision of the AD Agreement is potentially applicable *mutatis mutandis* to any other provision of the AD Agreement. This approach to treaty interpretation turns the customary rules of treaty interpretation on their head.

7. The Appellate Body in *Corrosion-Resistant Steel from Germany* addressed Article 22 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), entitled "Public Notice and Explanation of Determinations," and found that neither Article 22.1 (establishing notification and public notice obligations) nor Article 22.7 (stating that the provisions of Article 22 apply "*mutatis mutandis*" to the initiation and completion of reviews pursuant to Article 21 and to decisions to apply duties retroactively) establishes any evidentiary standards applicable to the initiation of sunset reviews.[2] Article 12 of the AD Agreement is perfectly analogous to Article 22 of the SCM Agreement. Neither Article 12.1 (establishing notification and public notice requirements) nor Article 12.3 (stating that the provisions of Article 12 apply "*mutatis mutandis*" to the initiation and completion of reviews pursuant to Article 11 and to decisions to apply duties retroactively) of the AD Agreement establishes any evidentiary standards applicable to the initiation of sunset reviews, including Article 12.1's reference to Article 5.

III. CUMULATION AND NEGLIGIBILITY

8. With respect to Question 22, in purporting to explain the legal nature and role of the term "antidumping investigation" in Article 3.3 of the AD Agreement, Japan effectively ignores the use of that term. The term "antidumping investigations" limits the application of Article 3.3 to investigations only. Indeed, Article 3.3 is the only provision in Article 3 that specifically refers to "investigations." This choice of words cannot be considered inadvertent. Article 3.3 refers to the present; Article 11, by contrast, refers to likely or future events. Further, nowhere does Article 3.3 refer to Article 11.3 sunset reviews, or any other reviews under Article 11. This lack of cross-reference is particularly significant in light of the frequent cross-referencing throughout the AD Agreement.[3] Simply put, considering the ordinary meaning of the terms of Article 3.3, there is no textual support for the contention that Article 3.3 cumulation concepts apply beyond the context of original investigations.

9. Japan insists that footnote 9 and Article 3.1 of the AD Agreement explicitly state that all provisions of Article 3 apply to injury determinations. However, neither Article 3 nor any other provision in the AD Agreement contains an express statement that all provisions of Article 3 apply to all injury determinations. The statement in footnote 9 says nothing more than that, whenever the term "injury" appears, it shall have the same meaning. Thus, footnote 9 has no applicability with respect to Article 3.3, because Article 3.3 does not contain the word "injury." This is not surprising since the assessment of negligible volume and *de minimis* margins referred to in Article 3.3 are functions to be performed before injury is addressed. Further, the very general language of footnote 9 cannot overcome the specific language limiting Article 3.3 to investigations.

10. Nor may the presence of a reference to "injury" be inferred through an argument that "injury" or "non-injury" is implied in the terms "*de minimis* margins" or "negligible imports." In *Corrosion-Resistant Steel from Germany*, the Appellate Body found that *de minimis* margins are not necessarily

---

[1] *See United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*Corrosion-Resistant Steel from Germany"*), WT/DS213/AB/B, Report of the Appellate Body circulated on 28 November 2002 (unadopted), para. 87.

[2] *German Steel*, paras. 110-112.

[3] *See Corrosion-Resistant Steel from Germany*, para. 82.

"non-injurious," and this rationale is equally applicable to negligible imports. Moreover, since Article 5.8 provides that an investigation will be terminated if there is negligible injury, the reference to negligible imports in the same paragraph cannot be construed to mean "no injury" without rendering the reference to negligible injury meaningless. Such a construction would be contrary to the customary rules of treaty interpretation. Thus, footnote 9 does not provide support for Japan's argument that all of the requirements of Article 3 apply to sunset reviews though footnote 9.

11. Attempting to breathe life into its argument, Japan argues for the first time that if Article 3.3 of the AD Agreement does not apply to sunset reviews, then the authorities cannot cumulatively assess whether imports from that one country are likely to collectively cause injury if the orders were lifted. According to Japan, GATT Article VI:1 provides that imports from one country are to be "condemned" if such imports cause material injury to the domestic industry of the importing country; further, GATT Article VI:1 is incorporated into Article 3 as a whole via Article 3.1 of the AD Agreement. Japan argues that Article 3.3 is an express exception to the GATT "requirement" that injury must be assessed with respect to imports from a single country. If the express exception to GATT VI:1 in Article 3.3 does not apply to sunset reviews, Japan continues, then cumulation is not permitted in sunset reviews. Japan's contention should be rejected.

12. As Japan makes clear in its answer to Question 24, its sole challenge to the US International Trade Commission's ("USITC") determination is that the USITC did not consider whether imports were negligible in cumulating the imports from various countries. Japan has never challenged the USITC's *ability* to cumulate as inconsistent with the AD Agreement. Thus, any arguments as to whether cumulation is permitted in the context of sunset reviews is outside the Panel's terms of reference and should not be substantively decided by this Panel.

13. Further, Japan has not articulated the bases for this assertion that Article 3.3 of the AD Agreement is applicable to sunset reviews. Also, Japan's premise that GATT Article VI:1 prohibits a Member from considering the simultaneous presence of imports from more than one country in making its injury determination is inaccurate; GATT Article VI:1 merely articulates the understanding that, "dumping, by which products of one country are introduced into the commerce of another country . . . is to be condemned if it causes" material injury to the domestic industry. Subsequent agreements and the conduct of GATT signatories, including Japan, supports this conclusion. Article 8 of the Antidumping Code negotiated during the Tokyo Round and adopted by twenty-five countries, including Japan, stated:

> If several suppliers *from one or more countries are involved*, antidumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury *from the country or countries* concerned[.]

This indicates that, contrary to Japan's assertion, the language of Article VI of the GATT does not prohibit a finding of injury from multiple countries. Moreover, it was the shared view of many countries that injury determinations on a multi-country basis were both contemplated and permissible. Indeed, several Members (*e.g.*, the EC, Australia, and Canada) had cumulation provisions in their domestic laws prior to the Uruguay Round.

14. If Japan were correct that Article VI of the GATT required that injury determinations be done on an individual country basis only, then cumulation would not be permissible under any circumstance. Articles 3.3 and 5.8 of the AD Agreement clearly indicate that Article VI of the GATT does not require injury determinations to be performed only on a single-country basis.

15. Finally, merely because Article 11 of the AD Agreement is silent on the issue of cumulation does not mean that cumulation is not permissible in a sunset review; rather, it can also indicate that cumulation is discretionary.

16. With respect to Question 23, the United States re-emphasizes that the negligible imports criterion set forth in Article 3.3 of the AD Agreement does not apply in sunset reviews conducted pursuant to Article 11.3. As such, Japan's contention that historic import volumes must be used to estimate future import volumes for purposes of a *negligibility* assessment is incorrect. If "historically" refers to the time of the original investigation, then negligible margins would have resulted in termination with no injury assessment and no outstanding order to review. If import levels "historically" fell to negligible levels after an order is entered, this decline in imports probably would reflect the restraining effects of the order and would have little or no relevance on the determination of what the level of imports would be if the restraining effects were lifted.

IV. DUMPING MARGINS

17. With respect to Question 27, in US antidumping investigations initiated on the basis of petitions filed prior to the effective date of the Uruguay Round Agreements Act, Commerce's standard methodology was to make dumping comparisons between average foreign market values and individual US transaction prices (*i.e.*, "average-to-transaction").[4] Under that methodology, no dumping duty – positive or negative – is computed for US sales made at non-dumped prices.[5]

18. The antidumping investigation in this case was initiated on the basis of a petition filed prior to the entry-into-force of the WTO Agreement with respect to the United States,[6] *i.e.*, prior to 1 January 1995.[7] Commerce, therefore, utilized average-to-transaction comparisons in calculating the dumping margins for the final less-than-fair-value determination.

19. In administrative reviews under current US law, section 777A(d)(2) of the Tariff Act of 1930,[8] requires that Commerce compare "export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product[.]" Consequently, the margins determined in the two completed administrative reviews in this case were based on average-to-transaction comparisons. Contrary to Japan's assertion in response to Question 27,[9] these reviews were conducted after the effective date of the WTO Agreement.

20. In the sunset review, in determining that dumping was likely to continue or recur in the event of revocation, Commerce found that Japanese producers/exporters had continued to dump throughout the life of the order and that import volumes were significantly lower than pre-order volumes.[10] Commerce further concluded that the margins from the original investigation best reflected the rate of dumping likely to prevail in the event of revocation, explaining that the original dumping rates were the most probative of future dumping behaviour because they reflect "the behaviour of exporters

---

[4] *See* 19 C.F.R. 353.44 (1994).

[5] This practice was entirely consistent with the agreements in effect at that time. In *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, Report of the Panel (28 April 1995), (unadopted) ("*EC - Audio Tapes*"), paras. 347 - 366, Japan challenged under Articles 2.1 and 2.6 of the Anti-Dumping Code the average-to-transaction approach employed at that time by the EC on the grounds that it involved "zeroing." The *EC -Audio Tapes* panel rejected Japan's challenge, pointing out that the Antidumping Code permitted the collection of dumping duties with respect to each dumped transaction.

[6] *See Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products from Japan*, 58 Fed. Reg. 37154 (July 9, 1993).

[7] *See United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel adopted 19 March 1999, para. 6.12.

[8] 19 USC. 1677f-1.

[9] *See* the Government of Japan's Responses to the Panel's Question s on 8 November 2002 in connection with the First Substantive Meeting of the Panel, para. 78.

[10] *See Commerce Issues and Decision Memorandum for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan, Final Results*, at 6 (2 August 2000).

without the discipline of an order in place."[11] Thus, consistent with its policies and practices, Commerce reported the original dumping margins to the USITC for use in the injury phase of the review.

21. Regarding how the margin likely to prevail in the event of revocation is usually determined, the *Statement of Administrative Action* ("*SAA*") explains by way of guidance that the "Administration intends that Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behaviour of the exporters and foreign governments without the discipline of an order . . . in place."[12] Similarly, the Sunset Policy Bulletin states that, "[e]xcept as provided in paragraphs II.B.2 and II.B.3, the Department normally will provide to the [USITC] the margin that was determined in the final determination in the original investigation," and that, "the Department normally will provide the company-specific margin from the investigation for each company[.]"[13] Commerce may report a lower, more recently calculated margin for a particular company if "dumping margins declined or dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased."[14]

22. With respect to Questions 27 and 31, 32, and 33, Article 11.3 of the AD Agreement does not require administering authorities to calculate or recalculate dumping margins in sunset reviews. The *magnitude* of the dumping margins in the original investigation and over the life of the antidumping order has no part in Commerce's analysis of the likelihood of continuation or recurrence of dumping in this case. In fact, original dumping margins are not a basis for the likelihood of dumping determination. And while the findings in post-order assessment reviews may be a basis for that determination, the magnitude of the post-order dumping margins plays no role whatsoever in the analysis. Finally, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* has no application in the instant dispute because it involved (1) an *investigation* subject to the AD Agreement, (2) average-to-average price comparisons under Article 2.4.2 of the AD Agreement, and (3) consideration of the EC's dumping calculation methodology. *None* of those circumstances was present in the case at hand.

V. LIKELIHOOD AND THE OBLIGATION TO "DETERMINE"

23. With respect to Questions 38, and 39, Japan mischaracterizes the scenarios contained in the Sunset Policy Bulletin by repeatedly stating that these scenarios constitute "irrebuttable presumptions." The scenarios are neither "irrebuttable" nor presumptions. They are simple articulations of Commerce's approach given particular circumstances in a sunset review and state how Commerce *normally* would determine likelihood. In addition, Commerce's regulations provide interested parties with opportunities to submit any information they deem relevant to the sunset review, including information relevant to the scenarios outlined in the Sunset Policy Bulletin.

24. With respect to Questions 39, 41, and 42, Japan's answers incorrectly assert that the "good cause" standard forecloses Commerce from the examination of "other factors" and that Commerce has "never" examined "other factors" in making a likelihood determination. Under US administrative law precepts, any agency making a determination with an administrative record, such as Commerce in antidumping proceedings, must address all issues and the supporting information in making its final determination. The "good cause" standard ensures that the information presented by interested parties that must be addressed in the administrative proceeding is relevant to the determination to be made - the likelihood of the continuation or recurrence of dumping if the order were revoked.

[11] *Id.* at 8.
[12] *SAA* at 890 (220).
[13] Sunset Policy Bulletin, 63 Fed. Reg. at 18873.
[14] *Id.*

25. The US antidumping statute leaves it to Commerce's discretion to determine when the "good cause" standard is met. Commerce has found "good cause" in at least two cases - *Sugars & Syrups from Canada* and *Brass Sheet & Strip from the Netherlands*. In both cases, Commerce examined the "other factors" information in making the likelihood determination.

26. With respect to Question 40, the United States concurs with Japan's citation to the *Corrosion-Resistant Steel from Germany* panel with respect to the standard to be applied by the administering authorities to "determine" likelihood in a sunset review. Although the underlying sunset determination involved a countervailing duty, Article 21.3 of the SCM Agreement parallels the AD Agreement's sunset provision in Article 11.3. Both the panel and the Appellate Body in *Corrosion-Resistant Steel from Germany* found US law to be consistent with respect to the obligation to determine likelihood in a sunset review.

ANNEX E-6

THIRD PARTY REPLIES BY BRAZIL TO QUESTIONS BY THE PANEL

7. The Panel notes the statement of Brazil in paragraph 6 of its oral statement that the plain language of Article 5.8 suggests that de minimis standard applies to sunset reviews. In your view can one read Article 5.8 by focusing upon one sentence? How do you read the third sentence of Article 5.8 to which you attach significance in light of its first and second sentences? More particularly, how do you consider the use of the word "investigation" in the first sentence and "cases" in the second, bearing in mind that no similar language has been used in the third sentence on which you seem to be relying in this respect?

Reply

1. Brazil does not believe that any provision of the Anti-dumping Agreement should be interpreted by focusing only on a single sentence. As Brazil discussed in its oral statement, no single Article of the Agreement should be read in a vacuum. All provisions of the Anti-dumping Agreement are related to one another by the common thread of certain basic principles concerning antidumping measures. Accordingly, the definition of *de minimis*, contained in the third sentence of Article 5.8, does not lose its meaning outside of Article 5.8, but has implications to other provisions of the Agreement, such as Article 11. The absence of the words "investigation" and "cases" in the third sentence of Article 5.8 supports Brazil's interpretation that the definition of *de minimis* is not limited to investigations or any one type of proceedings.

2. The use of the word "cases" in the second sentence, rather than "investigations" as used in the first sentence, evidences the intent to extend the obligation to proceedings after the investigative phase (*i.e.*, sunset reviews). By requiring the immediate termination of "cases" when the margin is *de minimis*, Article 5.8 establishes that the definition of "*de minimis"* is equal to the threshold of "dumping which is causing injury." Thus, this definition must apply to the context of Article 11 reviews which purpose is to determine whether duties should be terminated.

3. The finding of the Panel in *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea* ("DRAMS")[1] that the term "cases" used in the second sentence did not include Article 9.3 duty assessment proceedings is not relevant in this case. The Panel's reasoning in DRAMS case was narrow and limited to Article 9.3 duty assessment proceedings, in which a termination of duty is not required. By contrast, Article 11, like Article 5, deals with the termination of the "cases."

16. The Panel takes note of Brazil's statement in paragraphs 21 through 24 of its oral statement regarding the issue of zeroing, and more generally the methodologies for the calculation of dumping margins.

(a) Does Article 2.4.2 apply to the dumping component of the sunset review in this case? Does the use of the phrase "investigation phase" in Article 2.4.2 of the Agreement affect your view regarding the application of the same methodologies regarding dumping calculations in investigations and sunset reviews? If so, how?

[1] WT/DS99/R (19 January 1999).

Reply

4. Notwithstanding the use of the phrase "investigative phase," Brazil believes that Article 2.4.2 applies to the dumping component of sunset reviews and administrative review, when viewed in the context of the entire Anti-Dumping Agreement. First, Article 2 is the only place in the Anti-Dumping Agreement that defines how dumping is to be calculated. Thus, the principles established in all provisions of Article 2 extend to all types of antidumping proceedings, and not just to investigations. Second, Article 2.4.2, which concerns the use of weighted-average prices, does not affect the reach of the fair comparison principle required by Article 2.4. Thus, the requirement that the margin calculation include "all comparable transactions" is required in administrative and sunset reviews, as well as investigations, by virtue of Article 2.4.

5. Two other provisions of the Agreement support the application of Article 2.4.2 to sunset and administrative reviews. Article 18.3 of the Agreement provides that "the provisions of this Agreement shall apply to *investigations, and reviews of existing measures*, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of WTO Agreement." Read in its ordinary meaning, this paragraph does not distinguish which "provisions" are applicable to reviews or investigations. The lack of differentiation indicates the Agreement was not intended to set up different rules for reviews and investigations.

6. Second, Article 9.3 establishes that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Thus, Article 9.3 makes it clear that the determination of dumping during the duty assessment phase of the proceeding, must follow the methodologies set forth in Article 2. It follows then the margin of dumping determined during an administrative review must be equal to or less than the margin of dumping resulting from an investigative phase. If the application of zeroing during the investigative phase impermissibly inflates the dumping margin, it is also impermissible to inflate the dumping margin in such a manner during the duty assessment phase. Thus, Article 9.3 shows that the principles of Article 2.4.2 apply to more than just investigations.

(b) Is the Panel to understand that, in Brazil's view, the requirement of "fair comparison" as pointed out in the chapeau of Article 2.4 applies to sunset reviews even if Article 2.4.2 does not? Does the "zeroing" methodology breach this fair comparison obligation? If so, how?

Reply

7. Yes. Even if Panel determines that Article 2.4.2 is limited to investigations, Article 2.4 clearly applies all segments of antidumping proceedings. As mentioned above, the provisions of Article 2, which is entitled "Determination of Dumping," set forth principles and obligations to be followed in establishing the existence of dumping. The Anti-Dumping Agreement does not contain a separate set of provisions applicable to the determination of dumping in administrative reviews. As such, Article 2 obligations extend to the determination of dumping in all aspects of antidumping measures, irrespective of the segment of the proceeding.

8. Furthermore, Articles 9.3 and Article 18.2, for the reasons discussed in paragraphs 5 and 6 above, also support the application of Article 2.4 to sunset reviews and administrative reviews.

9. The "zeroing" methodology, whether it is used in an investigation or a review, violates Article 2.4 because it essentially ignores those comparisons that do not yield in a positive margin. As the Appellate Body noted in the *European Communities – Anti-Dumping Duties on Imports of Cotton-*

Type Bed Linen From India ("Bed Linen"),[2] Bed Linens case, this is tantamount to changing the prices of those merchandise of those transactions with negative dumping margins to be equal to the normal value, when in reality it was higher than the normal value. Deliberately ignoring selected transactions or changing the actual price of a transaction clearly violates the fair comparison rules of Article 2.4, whether the methodology is used in an investigation or in a review.

(c) Does Article 11.3, or any other provision in the Agreement, require the calculation or re-calculation of the dumping margin by the investigating authority? What is the legal basis in the Agreement for your response?

Reply

10. In Brazil's view, Article 11.1, Article 11.2 and Article 11.3 all require the calculation or re-calculation of the dumping margin by the investigating authority. The central requirement of these Articles is that the investigating authorities must conduct a "review" to determine whether it is necessary to continue imposing the duty. Article 11.1 provides that "[a]n antidumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." Thus, under Articles 11.2 and 11.3, the investigating authority is required to review both the extent of dumping and the extent of injury at the time the "review" is conducted. The timing of the "review," by nature, is subsequent to the period of investigation. In particular, the review under Article 11.3 takes place up to five years after the investigation. A review under Article 11.2 and 11.3 would be meaningless unless there is re-examination of dumping and injury, subsequent to the analysis made in the investigative phase.

[2] WT/DS141/AB/R (1 March 2001).

ANNEX E-7

THIRD PARTY REPLIES BY THE EUROPEAN COMMUNITIES TO QUESTIONS BY THE PANEL

I. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS

ALL THIRD PARTIES

1. Regarding US practice in sunset reviews, the Panel notes that previous panels have held that practice as such cannot be challenged under WTO law.[1] In light of the findings in previous WTO dispute settlement reports on this issue, please indicate what constitutes US practice in sunset reviews, where it can be found and whether it is challengeable under WTO law.

Reply

The EC does not consider that this question is relevant with respect to the claims on which it has commented. All of the Japanese claims on which the EC has commented in the present case are, in fact, based on an inconsistency of the US law and not only of a practice from which USDOC could depart from, as it was the case in the instances quoted by the Panel in footnote 1 to its questions. Here, it is the provisions of the US Tariff Act and the US Regulations that clearly mandate a WTO inconsistent behaviour of the US administrative authorities. In particular,

- Sections 751(c)(1) and (2) of the Tariff Act and Sections 351.218(a) and (c)(1) of the *Sunset Regulations* mandate USDOC to automatically initiate sunset reviews;

- Section 351.222(i)(1)(ii) of the Sunset Regulations mandates a "not likely" standard;

- Section 752(c)(1) and (2) of the Tariff Act lists which factors can be taken into account in the sunset review determination, thus mandating a review that it is not prospective in nature;

- Sections 752(c)(4)(B) and 751(a) and (b) of the Tariff Act mandate for sunset reviews the same *de minimis* standard of administrative reviews, i.e. 0.5 per cent.

The EC considers that Sections II.A.3 and II.A.4 of the Sunset Policy Bulletin, which describe the scenarios in which USDOC will determine that revocation or termination of an order is likely to lead to continuation or recurrence of dumping, and which Japan has attacked in its third claim, can be considered as a faithful transposition of the standards contained in Section 752(c)(1) and (2) of the Tariff Act and in Section 351.218 of the *Sunset Regulations.* Therefore, these Sections of the Sunset Policy Bulletin can be considered as describing a constant practice mandated by US law.

[1] See, for example, Panel Report, *United States – Measures Treating Exports Restraints as Subsidies* ("*US – Export Restraints*"), WT/DS194/R and Corr.2, adopted 23 August 2001, para. 8.126. Also see, Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India* ("*US – Steel Plate*"), WT/DS206/R and Corr.1, adopted 29 July 2002, para. 7.20.

This said, the EC contests that the jurisprudence of previous panels to hold that practice as such cannot be challenged under WTO law is correct and should therefore be pursued. There are no principles in WTO law of the kind referred to by the Panel, according to which non-mandatory legislation, and thus "practice", could generally not be the subject of dispute settlement. The EC considers that the scope of WTO obligations and the possibilities for invoking them against measures maintained by Members must be determined in respect of each obligation on the basis of the ordinary meaning of its text read in context and in the light of its object and purpose.

The very rationale of the principle that mandatory legislation can be GATT/WTO-inconsistent is that such legislation adversely affects competitive opportunities in trade and the decisions of economic operators (*US-Superfund*, para. 5.2.2). Since the entry into force of the WTO Agreements, this rationale is codified in Article 3.2 of the DSU, which characterises the dispute settlement system of the WTO as "a central element in providing security and predictability to the multilateral trading system". Some argue that "this rationale can be taken into account even in respect of challenges against discretionary legislation" (Bhuiyan, *Journal of International Economic Law* (2002), pp. 571-604). This is because certain kinds of legislation, which formally leave a certain margin of discretion to the administration, produce, because of the way they are drafted and consistently applied, the same WTO-inconsistent effect on the economic activities of individuals as mandatory legislation.

This issue has been exhaustively discussed by the Panel in the *US – Section 301* case, in the following terms:

> "Despite the centrality of this issue […] resolving the dispute as to which type of legislation, *in abstract*, is capable of violating WTO obligations is not germane to the resolution of the type of claims before us. In our view the appropriate method in cases such as this is to examine with care the nature of the WTO obligation at issue and to evaluate the Measure in question in the light of such examination. The question is then whether, on the correct interpretation of the specific WTO obligation at issue, only mandatory or also discretionary national laws are prohibited. We do not accept the legal logic that there has to be one fast and hard rule covering all domestic legislation. After all, is it so implausible that the framers of the WTO Agreement, in their wisdom, would have crafted some obligations which would render illegal even discretionary legislation and crafted other obligations prohibiting only mandatory legislation?[2] Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23".[3]

The European Communities agrees with this approach. It would add that the pretended principle that discretionary measures may not be subject to dispute settlement as such, is further contradicted by the terms of Article XVI:4 of the WTO Agreement, which reads:

---

[2]The Panel further reasons in a footnote as follows:
"Imagine, for example, legislation providing that all imports, including those from WTO Members, would be subjected to a customs inspection and that the administration would enjoy the right, at its discretion, to impose on all such goods tariffs in excess of those allowed under the schedule of tariff concessions of the Member concerned. Would the fact that under such legislation the national administration would not be mandated to impose tariffs in excess of the WTO obligation, in and of itself exonerate the legislation in question? Would such a conclusion not depend on a careful examination of the obligations contained in specific WTO provisions, say, Article II of GATT and specific schedule of concessions?"

[3] Report by the Panel on *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999 (*US – Section 301*), para. 7.53.

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. (Emphasis added).

This provision must be given meaning and this meaning can only be that Members must do more than ensure that no specific WTO-inconsistent action is taken – they must also ensure that their laws do not specifically allow or envisage WTO-inconsistent action. This new principle introduced with the WTO Agreement is a fundamental one[4], which, by virtue of Article XVI:3 of *the WTO* Agreement, is a superior rule to provisions in the annexed agreements. Furthermore, in the case of the AD Agreement, this is specifically reaffirmed in Article 18.4, which prohibits the existence of WTO-inconsistent anti-dumping laws *per se*.

II. EVIDENTIARY STANDARDS FOR SELF-INITIATION OF SUNSET REVIEWS

ALL THIRD PARTIES

2. Many third parties have stated that Article 11.3 does not explicitly contain any evidentiary standard for the initiation of sunset reviews. Does the language "duly substantiated request" used in Article 11.3 with regard to the initiation of sunset reviews on the basis of the application of domestic producers indicate that Article 11.3 in fact contains certain evidentiary standards for the initiation of sunset reviews?

Reply

Yes. The EC considers that the reference to a "duly substantiated request" in Article 11.3 contains an implicit evidentiary standard applicable to a sunset review initiated upon a request made by or on behalf of the domestic industry. The concrete meaning of this evidentiary standard can be derived, with the adjustments necessary in the context of a sunset review, from the provisions concerning the initiation of investigations at the request or on behalf of the domestic industry, in particular Articles 5.2, 5.3 and 5.7. The same applies also to the definition of the term "by or on behalf of the domestic industry", a term which is used in Article 11.3, but the definition of which is found in Article 5.4.

The EC would like to add that, as it has already argued in its written submission,[5] the fact that a specific evidentiary standard must apply to a sunset review initiated upon a request by or on behalf of the domestic industry, supports its submission that a similar evidentiary standard must also apply to investigations initiated at the own initiative of the authorities. It would be difficult to understand why a specific evidentiary standard should apply only in the first case, but not in the second. Thus, if an implicit evidentiary standard is accepted for sunset investigations initiated at the request of domestic industry, it should also be accepted for sunset investigations initiated at the own initiative of the authorities.

3. Article 11.3 refers to the reviews "initiated" by investigating authorities "on their own initiative".

---

[4] "As a general and fundamental obligation imposed on all WTO Members, Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") requires that each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the WTO Agreement." (see *Japan – Taxes on Alcoholic Beverages*, Arbitration under Article 21(3)(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS11/13, 14 February 1997, para. 9).

[5] EC Third Party Written Submission, para. 12.

(a) In the ordinary sense, does the word "initiate" or the phrase "to take an initiative", require that there be at least some reason to either choose to do or not to do something? Is this what the term "initiate" means in the context of Article 11.3 (i.e. not a standard of sufficient evidence but at least some sort of rationality standard by which you choose whether or not to initiate a sunset review)? If so, does US law comply with that proposition?

Reply

The term "to initiate" is commonly understood to mean "to begin, introduce, set going, originate".[6] It should also be noted that the verb is a transitive one, i.e. it requires use both with a subject, i.e. the one initiating, and an object, i.e. the process or action to be initiated. The verb "to initiate" clearly implies an action performed by its author with respect to the object. Therefore, in common usage, the verb "to initiate" clearly is used to designate a conscious act. Unlike certain intransitive verbs (e.g. in the sentence "Spring has begun"), it is not commonly used to designate something that occurs automatically, or by simple force of nature.

The Community would like to add that this meaning is even more clearly present in the French version of Article 11.3, which uses the term "entrepris". In common usage, it would appear that this term clearly implies a conscious choice on behalf of its author, the "entrepreneur".[7]

The Community submits that US law is not in conformity with this interpretation of the verb "to initiate" as requiring a conscious and rational decision. As the Community has already set out in its written submission, the initiation of sunset reviews under US law is entirely automatic.[8] Accordingly, since Congress has prescribed that a sunset review be conducted in each and every case, it cannot be said that the USDOC still takes a conscious and rational decision "to initiate" the investigation. Rather, its role is limited to publishing of a notice of initiation. Accordingly, US law falls short of the minimum requirements of rational choice implicit in the term "to initiate".

In exchange, the public notice to be given of the initiative if a review, which is required by Articles 12.1 and 12.3, might be characterised as "automatic". However, the publication is clearly different from the initiation of the review, and does clearly not require the same kind of conscious decision. By reducing the role of USDOC to the publication of the notice, US law is disregarding the separate requirement for a decision "to initiate" the review contained in Article 11.3.

(b) Is the word "initiation" in Article 11.3 to be read as a purely procedural term? Does "initiation" not have to have any substantive reason or requirement (no matter how thin)? If you believe that it is purely procedural, please explain why the drafters used the phrase "on their own initiative" in Article 11.3? Is this phrase also purely procedural? If so, why was it necessary to put in those words? Does this phrase require the investigating authority to have a reason in order to initiate a review on its own initiative?

Reply

As the EC has set out in response to Question 3a, the term "to initiate", and similarly the expression "on its own initiative", imply a conscious act of choice, which in turn implies a minimum level of rationality. Accordingly, something that happens automatically, independent of anyone's choice, cannot be said to have been "initiated".

---

[6] The New Shorter Oxford English Dictionary, 1993, Vol. 1, p. 1370.
[7] The word "iniciado" used in the Spanish text seems to correspond closely to the English "initiated".
[8] EC Third Party Written Submission, para. 5.

In contrast, the EC does not consider it decisive whether the term is characterised as "procedural" or not. In fact, "procedural" means "pertaining to procedure"[9]. This term as such may relate either to a step in a procedure which is the result of conscious choice (e.g. a judgment, an order), or something that is not (e.g. the expiration of a time-limit).

The EC would like to stress that even though it agrees that the term "to initiate" implies a degree of conscious choice, this is purely a minimum requirement implicit in this particular term. In addition, the Community maintains its view that the decision to initiate a sunset review must also conform to the evidentiary requirements contained in Article 5.6.[10]

(c) Does the word "initiate", as used in Article 11.3, mean the same thing as in footnote 1 of the Agreement? Does initiating a review mean the same thing as initiating an investigation?

Reply

The EC is of the view that the word "initiate", as used in Article 11.3, means the same thing as in footnote 1 of the Agreement. This seems to follow clearly from the phrase "as used in this agreement", which seems to indicate that the footnote was intended to clarify the meaning of the term for all cases in which it is used in the Agreement, including in Article 11.3.

In this context, the EC would like to stress that footnote 1 defines the term "initiated" as meaning "the procedural action by which a Member formally commences an investigation as provided in Article 5" (emphasis added). This reference to Article 5 in footnote 1 must have a practical meaning. In the view of the EC, this practical meaning lies in the fact that evidentiary requirements for the initiation of investigations contained in Article 5 shall apply throughout the agreement, and thus also to the initiation of sunset reviews under Article 11.3.

4. Would a reading of the Anti-dumping Agreement that imposed no de minimis standard in respect of sunset reviews lead to inconsistency that is repugnant to a coherent interpretation of the Anti-dumping Agreement? Why or why not?

Reply

The EC considers that a reading of the AD Agreement that imposed no de minimis standard in respect of sunset reviews would lead to inconsistency that is repugnant to a coherent interpretation of the Agreement itself.

The EC believes that one of the basic objectives of the AD Agreement is to ensure a framework of balanced rights and obligations in the imposition and administration of this type of trade defence measures. This is reflected, *inter alia*, in the obligation of Article 11.1 to maintain in force an anti-dumping duty "only so long as and to the extent necessary to counteract dumping which is causing injury" and, in any case, to terminate it "on a date not later than five years from its imposition", unless certain specific conditions are met, i.e. "that the expiry of the duty would lead to continuation or recurrence of dumping and injury". Now, the notion of "continuation or recurrence" of dumping and injury contains a historical reference. "Continuation" is defined as "the action of continuing ("carry on, maintain, persist in, not stop an action, etc.") in something"; whilst "recurrence" is defined as "instance of recurring ("come up again for consideration"); frequent or periodic occurrence"[11]. They both refer back to an earlier definition or finding, i.e. to the original determination.

[9] The New Shorter Oxford English Dictionary, Vol. 2, 1993, p. 2363.
[10] See below, responses to questions 9 and 10.
[11] The New Shorter Oxford English Dictionary, 1993, Vol. 1, p. 494-495 and Vol. 2, p. 2510.

On this basis, the EC considers that a coherent and systemic interpretation of the AD Agreement calls for an application to sunset reviews of all those provisions of the Agreement that have a relevance for the original determination. This would also appear to be confirmed by the sketchy structure of Article 11.3, which would not make sense substantively and procedurally if not completed through its reading in combination with a number of other provisions.

5. How is the fact that Article 5.8 explicitly refers to de minimis dumping margins and negligible import volumes and injury to be reconciled with the proposition that de minimis dumping margins are non-injurious? What is the basis for this view in the text of the Agreement?

Reply

The EC does not see any contradiction between the text of Article 5.8 and the proposition that *de minimis* dumping margins are non-injurious. The EC believes, in fact, that one of the two instances in which injury caused is negligible is when dumping margins are *de minimis*. This interpretation is confirmed by the text of various articles in the AD Agreement. Article 5.8, defines what constitute "*de minimis* dumping margins" and "negligible import volumes", but is totally silent on the meaning of "negligible injury". Article 3.3 of the Agreement in regulating the "determination of injury" allows cumulation of imports from more than one country only if two conditions are met, i.e. that the margin of dumping for imports from each countries is above *de minimis* and that the volume of imports from each country is not negligible, in other words in the two cases in which the injury for each country is – by definition – not "negligible". Article 3.4 of the Agreement also includes the magnitude of the margin of dumping as one of the relevant economic factors and indices having a bearing on the state of the industry. And Article 3 clearly links the volume of the dumped imports and the injury (Article 3.1, 3.2, 3.7 and footnote 10). All of this supports that negligible import volumes in Article 5.8 may reasonably be interpreted as non-injurious imports and that the specific reference to negligible injury in Article 5.8 can be reconciled with the interpretation of *de minimis* dumping margin and negligible import volumes as non-injurious.

EUROPEAN COMMUNITIES

6. The Panel notes the EC's statement in paragraph 7 of its oral statement regarding self-initiation, in which the EC addresses the definition and import of the word "determine". In the EC's view, does this obligation relating to "determination" apply not only to the nature of the sunset review but also to the nature of a decision whether or not to initiate a sunset review?

Reply

The EC would like to clarify that the determination referred to in Article 11.3 is an act subsequent to the initiation of the investigation, and subject to different standards than the latter. Therefore, the EC does not wish to suggest that the standards for a determination under Article 11.3 should be transposed to the initiation of the investigation. However, the EC would like to point out that where a procedure is susceptible to lead to the adoption of a specific act, which is subject to certain conditions, it is normal that the initiation of the investigation is made subject to at least a prima facie appraisal of whether there is a least a remote possibility that the conditions might be fulfilled. US law, under which the initiation of sunset reviews is automatic, postpones consideration of all substantive issues to the determination stage, and thereby empties the initiation stage of all practical significance.

III. *DE MINIMIS* STANDARD IN SUNSET REVIEWS

EUROPEAN COMMUNITIES

8. Does the EC's argumentation regarding the application of the de minimis standard to sunset reviews on the basis of the text of Article 5.8 depend on the presumption that the word "investigation" used in the first sentence of that article also covers reviews?

Reply

As mentioned above in our reply to Question 3 (c), the EC is of the view that the clear provision of footnote 1 to the Agreement extends the applicability of the substantive and procedural rules on investigations contained in Article 5 to all instances in which the term "initiated" is used in the Agreement and thus also to sunset reviews under Article 11.3. This said, however, the EC believes that there are also a number of other factors whose consideration brings to the conclusion that the de minimis standard of Article 5.8 should be applied to sunset reviews. The EC has already mentioned above in its reply to question 4, the need for a coherent and systemic interpretation of the AD Agreement. It is also worth mentioning that there is an explicit cross-reference contained in Article 12.3 to Article 12.1, which in turn refers to the requirements of Article 5. Finally, there is also the requirement contained in Article 11.3 that the domestic authorities "determine" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of injurious dumping. As already mentioned in its written submission[12], the EC believes that the verb "to determine" is commonly understood to mean to find out, to ascertain, to establish, or, in more articulated terms, to carry out all those activities necessary to reach a decision, i.e. to investigate and decide. The panel in *US – Corrosion Resistant Steel from Germany*[13] defined "determine" in the parallel provision of the SCM Agreement as:

> *inter alia* 'settle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter',

and adds more precisely with regard to the determination in a sunset review:

> an investigating authority's determination of the likelihood of continuation or recurrence of subsidisation should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review.

And, further ahead, it specifies that:

> in the context of a sunset review under Article 21.3 of the SCM Agreement, an investigating authority should collect relevant facts and base its likelihood analysis on those facts.

In light of the above, the EC believes that it is not the term "investigation" which covers also a review, but the terms "review" and "determination" as used in Article 11.3 that cover also an "investigation" phase as laid out in Article 5 of the Agreement.

9. The Panel notes the EC's contention in paragraph 8 of its oral statement that non-application of evidentiary standards to the self-initiation of sunset reviews would give the investigating authorities "complete arbitrary discretion". Assuming that the sufficient evidence

[12] Paragraph 10.
[13] Paragraphs 8.90, 8.95 and 8.115.

standard referred to by the EC is not applicable to the self-initiation of sunset reviews, does it necessarily follow that initiation is arbitrary? In other words, does the phrase "on their own initiative" in Article 11.3 mean that the investigating authority should or must have a bona fide reason for self-initiating a sunset review? Is it possible to give such independent content to that phrase in Article 11.3?

Reply

At an abstract level, the EC considers it conceivable that a standard of evidence could be applied which would not be as demanding as the "sufficient evidence" standard laid down in Article 5.6, but at the same time would not leave a completely free discretion to the investigating authority.

In the concrete case of the antidumping agreement, however, the EC does not consider it necessary to develop such an intermediate standard of evidence. In fact, Article 5.6 contains a standard of evidence for the initiation of investigations on the initiative of the authorities, which is entirely transposable to Article 11.3. Moreover, footnote 1 to the AD Agreement specifically refers to Article 5 in connection with the definition of the term "to initiate". From a systematic point of view, it would therefore seem more appropriate to apply the standard of Article 5.6 to the initiation of sunset investigations, rather than to develop a different standard of evidence for each type of investigation.

The EC would like to add that even if the Panel found, however, that such an intermediate standard should be applied, US law would under no circumstances comply with it, since it provides that the initiation of sunset reviews is automatic. For instance, the initiation of a sunset review by the USDOC could not be said to be " bona fide" in any meaningful sense, since USDOC is purely implementing a US law which prescribes the initiation of a review in each and every case.

10. The Panel notes the EC's argument that given that Article 11.3 is silent as to the evidentiary standards applicable to the self-initiation of sunset reviews provisions of Article 5 should apply. The Panel also notes that although Article 11 contains several cross-references to other articles of the Agreement no such cross-reference has been made to Article 6. In EC's view, what is the intent of the drafters that can be inferred from this?

Reply

The EC does not consider that the absence of a cross-reference to Article 5 is decisive. As the Appellate Body has stated, omissions in different contexts may have different meanings, and may therefore have to be interpreted in different ways.[14]

In the view of the EC, it is impossible to interpret the sunset provision of Article 11.3 in isolation, without taking into account the context of the rest of the Agreement. In fact, Article 11.3 contains numerous terms which are given meaning in other provisions of the Agreement. To name but one example, Article 11.3 uses the term "domestic industry", the definition of which is found in Article 4. It does not appear conceivable that this term should be given a different meaning in Article 11.3, just because of the absence of a cross-reference to this provision.

The fact that Article 11.4 contains a cross-reference to Article 6 is also not decisive in the present context. The applicability of Article 6 may have been an aspect which the drafters, for reasons relating to the context of the negotiations, may have wished to clarify. However, this does not necessarily imply they wished to exclude the applicability of other provisions of the agreement.

[14] Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS142/AB/R, adopted 19 June 2000, para. 138.

It should also be noted that even though no explicit cross-reference to Article 5 is found in Article 11.3, such a cross-reference is contained in Article 12. Article 12.3 provides that the provisions of Article 12 shall also apply *mutatis mutandis* to the initiation of reviews pursuant to Article 11. Article 12.1 specifically refers to the case that "the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5" (emphasis added). Since this reference also applies, by virtue of Article 12.3, to the initiation of sunset reviews, it must be considered that it also renders the evidentiary requirements contained in Article 5.6 applicable to sunset reviews.

Finally, it must be noted that a specific reference to Article 5 is found in Footnote 1 to the AD Agreement, which defines the term "to initiate". This shows that the drafters in no way intended to exclude the applicability of Article 5, but rather seem to have assumed that this provision would apply to all types of initiations under the agreement.

11. The EC argues that in order to initiate a sunset review the investigating authority needs to have some evidence, including evidence on dumping. How can that proposition be reconciled with the view expressed by certain third parties that the authorities should not rely on historical dumping margins? Why do you believe that dumping margins that are de minimis would be probative but other historical dumping margins would not be probative of future behaviour of exporters?

Reply

The EC has never maintained that domestic authorities should not rely at all on historical dumping margins. On the contrary, and as explained above, the EC believe that the very notion of "continuation or recurrence of dumping and injury" refers back to the earlier finding in the original investigation. However, the EC contests the US legal requirements contained in Section 752(c)(1) and (2) of the Tariff Act to rely solely on "the weighted average dumping margins determined in the investigation and subsequent reviews" and, only "if good cause is shown", to consider also other factors such as "price, cost, market, or economic factors". According to the EC, domestic authorities can start their determination of "continuation or recurrence of dumping and injury" by looking at the historical dumping margins but then have to analyse also all other factors relevant for a prospective analysis of dumping. In the EC, for instance, a determination is made regarding the likelihood of continuation or recurrence of dumping if measures were revoked and its level. So, even if the dumping margin found when the sunset investigation is being carried is *de minimis* this is not decisive in order to define whether measures should continue or be repealed. Not to repeal the measure we have to establish that the margin likely to prevail is above the *de minimis*.

Similarly, the EC has never mentioned that "dumping margins that are *de minimis* would be probative but other historical dumping margins would not be probative of future behaviour of exporters".

12. Is it the EC view that an investigating authority in a sunset review should determine future dumping margins? Can an investigating authority properly conclude that there is a likelihood of continuation in cases where the dumping margin found in the most recent administrative review was below de minimis? Or, is it bound by that past data and therefore should conclude that there is no likelihood?

Reply

As already stated in its written submission[15], the EC believes that the likelihood of continuation or recurrence of injurious dumping in a sunset review should be established through a prospective analysis based on positive evidence.

The dumping margins found in the most recent administrative reviews can constitute one of the elements of this positive evidence, but cannot be the determinant factor in either of the hypotheses formulated by the panel in its question. The EC believes that a domestic authority would fail to meet the standard set by Article 11.3 if it was to rely solely on the fact that dumping had occurred in the past.

Furthermore, it is not excluded that even where the most recent administrative review had found dumping margins to be *de minimis*, the investigating authority, on the basis of all available evidence, might conclude that the margins of dumping likely to recur will be above the *de minimis* level. In this case, the investigating authority would not be required to terminate the duty. However, should the investigating authority find that the level of dumping likely to continue or recur is below the *de minimis* threshold, then it is required to terminate the duty.

IV. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

EUROPEAN COMMUNITIES AND NORWAY

15. The Panel takes note of paragraphs 14 and 15 of EC's oral statement and paragraph 18 of Norway's oral statement. Both third parties refer to the "likely" standard as a matter of probability. Do you agree with the proposition that "likely" and "not likely" are two standards that are mutually exclusive? What relevance does this have in the Panel's examination of the matter before it?

Reply

The EC agrees with the proposition that "likely" and "not likely" are two standards which are mutually exclusive.

However, the EC would like to clarify that the comparison should not be between "likely" and "not likely", but between "likely" and "not unlikely". This is due to the fact that whereas Article 11.3 provides that the anti-dumping duty shall be terminated or revoked unless it is likely that this would lead to recurrence or continuation of dumping and injury, USDOC regulations provide that the anti-dumping duty will be revoked where it is not likely that this would lead to continuation or recurrence of dumping. In other words, under US law, the duty will be continued if the continuation or recurrence of dumping and injury is not unlikely, whereas under Article 11.3, this is allowed only if they are likely.

The statement that something is "likely" implies a probability of significantly more than 50 per cent. In contrast, the statement that something is "unlikely" implies a probability of significantly less than 50 per cent. By implication, for something to be "not unlikely" it is sufficient for this event to have a probability that is significantly lower than 50 per cent.

In other words, since under US law, the duty may be continued if the continuation or recurrence of dumping and injury is not unlikely, they require a significantly lower level of

[15] Paragraphs 25 and ff.

probability for the recurrence of than the one required in Article 11.3, where it is required that this is likely.

The EC would add that the incompatibility of the US standard of likelihood is perfectly illustrated by the criteria applied by USDOC in sunset reviews, as described in the Sunset Policy Bulletin,[16] and according to which USDOC will normally determine that revocation of an anti-dumping order or termination of a suspended investigation is not likely to lead to continuation or recurrence of dumping "where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased".[17] The EC would be ready to agree that in this scenario, the concerned party would be unlikely to again have recourse to dumping, since it managed to increase its imports even without dumping, and despite the effects of an anti-dumping duty. However, there are cases where the recurrence or continuation of dumping and injury may not be "unlikely" in this sense, but there may not be sufficient information or evidence to consider it "likely". In such a case, where the investigating authority is not able to make a firm prediction that dumping and injury are likely to recur, US law requires the US authorities to maintain the anti-dumping duty. This is contrary to Article 11.3.

The record of sunset reviews conducted by the US between July 1998 and November 2002 speaks for itself. DOC never revoked an anti-dumping duty order or terminated a suspended anti-dumping investigation on the determination that continuation or recurrence of dumping was unlikely.

[16] As the EC has already set out above (response to Question 1), the Sunset Policy Bulletin describes a practice which is mandated by US law.

[17] Cf. EC Third Party Written Submission, para. 30-31.

ANNEX E-8

THIRD PARTY REPLIES BY NORWAY TO QUESTIONS BY THE PANEL

I. *DE MINIMIS* STANDARD IN SUNSET REVIEWS

13. The Panel notes that in paragraph 25 of Norway's oral statement, Norway sees no reason why the same *de minimis* standard that applies in original investigations should not apply to sunset reviews. What is the legal basis found in the Agreement that would support that view? In paragraph 26 of its oral statement, Norway refers to the definitions of the terms such as "dumping" and "injury" and argues that, once defined, these definitions apply to the rest of the Agreement and therefore *de minimis* should also apply throughout the Agreement. The language of Article 2 and footnote 9 to Article 3 seems to indicate that these definitions are, in general, applicable throughout the Agreement. However, the *de minimis* standard in the *Anti-dumping Agreement* is found in Article 5.8, rather than in Articles 2 or 3 and similar language does not exist with respect to the concept of *de minimis* in Article 5.8. On what legal basis do you find support for your view?

Reply

Article 11.3 of the Anti-dumping Agreement (ADA) discussing reviews, including sunset reviews, is "silent" as regards a *de minimis* threshold. That leaves us with two alternatives; either to apply *the same de minimis* threshold as for the initial imposition of an anti-dumping duty set out in Article 5.8, or *a different one.* The Government of Norway believes that the former is the correct alternative due to the reasoning elaborated below.

Pursuant to Article 5.8 ADA regarding the initial imposition of an anti-dumping duty, it is not allowed to impose such a measure if the margin of dumping is *de minimis* - that is less than 2 per cent. If the margin of dumping is below this threshold, it is not countervailable simply because the dumping is deemed not to be capable of causing injury.

Further, it must be clear from the *wording* of Article 11.3 ADA that the *main rule* is that an anti-dumping duty should be terminated not later than five years from its imposition[1] and that a prolongation of the duty is therefore an *exception*[2].

As stated above, a dumping margin below the *de minimis* threshold for an initial investigation is not countervailable because it is not deemed to be capable of causing injury. Taking into account that a prolongation of an anti-dumping duty is an exception, that must logically give us a *de minimis* threshold applicable in a sunset review which is higher or at least the same as for the initial investigation. In light of the fact that a prolongation is an exception, it cannot be "easier" to prolong than to impose it in the first place.

Accordingly, the correct interpretation of the Agreement cannot be that the threshold for prolongation should be lower than for the initial imposition.

[1] *Notwithstanding* the provisions of paragraphs 1 and 2....
[2] ....*unless* the authorities determine....

The purpose of the drafters when giving the wording in Article 11.3 ADA was to prevent anti-dumping duties from existing into perpetuity. The application of a *de minimis* standard which is lower than for the original imposition cannot have been what the drafters had in mind.

Therefore, the failure of the drafters to spell out a threshold standard in Article 11 or make an explicit cross-reference to Article 5.8 cannot mean that there is a lower *de minimis* standard to be applied in the context of a sunset review.

The Government of Norway finds its legal basis for this view in recognized principles of public international law as codified in Article 31 of the Vienna Convention, according to which, a treaty provision must be interpreted in its context and in light of its object and purpose.

II. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

14. The Panel takes note of Norway's statement in paragraph 21 of its oral statement regarding the use of past data in sunset reviews. Is it Norway's view that the DOC should not look to the past data at all in a sunset review, or that there are some other factual bases (e.g. present or future import volumes) that must form the basis for the determination under Article 11.3? If the answer is the latter, where in the Agreement does Norway find support for this view?

Reply

Article 11.3 of the ADA states that "any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition unless the authorities determine, in a review ... that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury". It follows from this provision that an assessment is required. Moreover, developments subsequent to the initial investigation can be of relevance in the assessment, and at least can not a priori be excluded, *inter alia* regarding developments on imports and other factors. If new developments are not taken into account, the required standard of the "likely" test of Article 11.3 cannot possibly be met by the US DOC.

We refer in this respect also to the statement by the Appellate Body in *United States – Countervailing duties on certain corrosion-resistant carbon flat steel products from Germany*, (WT/DS213/AB/R) where it held that:

> "88. At the same time, we wish to underline the thrust of Article 21.3 of the *SCM Agreement*. 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. The continuation of a countervailing duty must therefore be based on a properly conducted review and a positive determination that the revocation of the countervailing duty would "be likely to lead to continuation or recurrence of subsidization and injury." Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry." (emphasis added, footnotes omitted)

While this statement relates to another Agreement, we find that the reasoning should also apply to this case, to the effect that the competent authorities must perform a fresh determination based on credible evidence related to present circumstances and present injury. To conclude, to substantiate a “likely” finding on ”continuation or recurrence of dumping and injury”, the US will need to also review developments subsequent to the initial investigation.

QUESTION TO THE EUROPEAN COMMUNITIES AND NORWAY

15. The Panel takes note of paragraphs 14 and 15 of EC's oral statement and paragraph 18 of Norway's oral statement. Both third parties refer to the "likely" standard as a matter of probability. Do you agree with the proposition that "likely" and "not likely" are two standards that are mutually exclusive? What relevance does this have in the Panel's examination of the matter before it?

Reply

The Government of Norway is of the view that the "likely" and the "not likely" are two standards that must be mutually exclusive. The consequence must be that the US has failed to implement its WTO obligation in Article 11.3 ADA correctly and, accordingly, has also violated Article 18.4 ADA and Article XVI:4 WTO.

ANNEX E-9

REPLIES OF JAPAN TO QUESTIONS FROM THE PANEL – SECOND MEETING

I. GENERAL

JAPAN

77. Can Japan confirm that the summary table at the beginning of its first written submission continues to provide an accurate portrayal of Japan's allegations in this dispute? If not, which updating modifications would Japan make to the table? Where are such modifications, if any, to be found in Japan's request for establishment of the Panel?

Reply

1. Yes, the summary table at the beginning of Japan's first written submission remains an accurate portrayal of Japan's allegations in this dispute.

78. The Panel recalls para. 7 of Japan's oral statement at the second Panel meeting, in which Japan asserts that the Panel "must evaluate: (1) whether the establishment of [the] evidence was proper; (2) the evaluation was unbiased; and (3) the evaluation was objective." Would Japan expand on the legal basis for this argument, and, in particular, whether it rests on Article 17.6(i) of the Anti-dumping Agreement? Is Japan alleging that the DOC's establishment of the facts was improper, that the evaluation of the facts was not unbiased or objective, or both? If so, in what precise way(s)? Is this allegation referred to in Japan's Panel request? If so, where?

Reply

2. Japan was merely restating the standard of review for reviewing facts in this dispute, which rests entirely on Article 17.6(i) of the AD Agreement. Note further that in paragraph 7 of Japan's oral statement at the second substantive meeting, we were responding to US arguments concerning the obligations established by the word "determine" in Article 11.3 of the AD Agreement.

3. In response to our argument concerning this point, the United States had argued that it must merely show the panel that it had sufficient evidence to support its finding that dumping was likely to continue or recur. But, in fact, the standard set forth in Article 17.6.(i) sets a much higher standard, requiring the Panel to satisfy itself that the establishment by the authorities of the evidence was proper and that their evaluation of that evidence was unbiased and objective. It is therefore not enough for the United States to simply state or even show that it had sufficient evidence to support its decision; the Panel must review whether USDOC established and evaluated the facts in accordance with the standard under Article 17.6(i) in making its determination.

4. Japan's claim that USDOC failed to determine whether dumping is likely to continue or recur in the sunset review of corrosion-resistant steel from Japan appears in item 2(b) of Japan's panel request.[1] Japan also clams that USDOC failed to establish properly the magnitude of dumping for the

[1] *See* Request for the Establishment of a Panel by Japan (WT/DS244/4) (5 April 2002) ("As such, no attempt whatsoever is made to "determine" whether dumping is likely to continue or recur. The United States' procedures and practice in this regard, both as a general practice *and as applied in this case*, are inconsistent

purposes of the injury analysis in item 3.[2] By challenging these aspects, Japan by definition triggered the factual standard of review set forth in Article 17.6(i). There was no need to mention specifically in the panel request which part of Article 17.6(i) renders USDOC's decision faulty. We did, however, explain in our first submission how the establishment of the facts was improper and the evaluation biased and non-objective – as enshrined within the Sunset Policy Bulletin and applied in this sunset review of corrosion-resistant carbon steel flat products from Japan.[3]

II. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS/"PRACTICE"

BOTH PARTIES

79. The Panel notes the following statement by the Appellate Body, in *US – Carbon Steel*:

> **Thus, a responding Member's law will be treated as WTO-consistent until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.**[4]

The Panel further notes that the Appellate Body, in *US – Countervailing Measures on Certain EC Products*, reviewed that panel's finding regarding the consistency with the US' WTO obligations of a certain method (referred to as an "administrative practice"), as such, used by the DOC in CVD investigations.[5] In the same report, the Appellate Body stated that it was not, "by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation."[6]

> **In your view:**
>
> **(a) What, if any, are the implications of these Appellate Body findings regarding the issue of whether "practice" as such can be challenged under the WTO Agreement?**

Reply

5. Japan believes that both cases cited by the Panel support the proposition that "general practice" claims are reviewable by this Panel in accordance with the AD Agreement. The Appellate Body in *US – Carbon Steel*, cited by the Panel, explicitly accepts that "general practice" claims are

---

with the obligations of Article 11.3 of the AD Agreement and Article X:3 of the GATT 1994.") (emphasis added).

[2] *See id*., at item 3.

[3] *See, e.g.*, Japan's First Submission, at para. 148.

[4] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, 28 November 2002, para. 157.

[5] Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European* Communities ("*US – Countervailing Measures on Certain EC Products*"), WT/DS212/AB/R, 9 December 2002, paras. 129 and 146.

[6] *Ibid*, note 334.

actionable. In fact, the Appellate Body in that case simply found that a single sunset review was insufficient to prove that a "general practice" exists.[7]

6. Later the Appellate Body in *US – Countervailing Measures on Certain EC Products* examined whether certain administrative practices for calculating countervailing duties are consistent with the SCM Agreement. It has stated:

> Thus, under the "same person" method, when the USDOC determines that no new legal person is created as a result of privatization, the USDOC will conclude from this determination, *without any further analysis*, and irrespective of the price paid by the new owners for the newly-privatized enterprise, that the newly-privatized enterprise continues to receive the benefit of a previous financial contribution. This approach is contrary to the obligation in Article 21.2 of the SCM Agreement that the investigating authority must take into account in an administrative review "positive information substantiating the need for a review." Such information could relate to developments with respect to the subsidy, privatization at arm's length and for fair market value, or some other information. The "same person" method impedes the USDOC from complying with its obligation to examine whether a countervailable "benefit" continues to exist in a firm subsequent to that firm's change in ownership. Therefore, we find that the "same person" method, *as such*, is inconsistent with the obligations relating to administrative reviews under Article 21.2 of the SCM Agreement."[8]

7. Therefore, the Appellate Body has expressly found that general practices, or administrative procedures, are actionable. Thus the only question left to answer is whether the Member asserting the claim has proved that such an administrative procedure has *de facto* mandatory effect.

(b) What relevance, if any, do these findings, and your response to (a), have for the present proceedings?

Reply

8. As discussed in the answer to part a) above, because the Appellate Body in its recent findings has clarified that administrative procedures are actionable, the question then becomes whether the Member has proven that the administrative procedure is *de facto* mandatory. In this case, Japan has presented extensive evidence that, in all 227 sunset reviews in which petitioners participated, USDOC followed the precepts of the Sunset Policy Bulletin.[9] In all of those cases, USDOC has followed the dictates of the pre-established factual scenarios in the Sunset Policy Bulletin to determine whether to continue the imposition of anti-dumping duties. Japan also demonstrated that the "good cause" requirement under the Sunset Policy Bulletin impedes USDOC from making an effective examination of any prospective evidence. There are no other provisions in either the statute, the Sunset Regulations, or the SAA that establish precisely how USDOC should conduct its analysis. USDOC bases its determinations in sunset reviews entirely on the instructions in the Sunset Policy Bulletin.

---

[7] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R at para. 148 (28 Nov. 2002) ("We are not persuaded that the conduct of a single sunset review can serve as conclusive evidence of USDOC practice, and thereby, of the meaning of United States law.").

[8] Appellate Body Report, *United States – Countervailing Measures on Certain Products from the European Community*, WT/DS212/AB/R (9 December 2002), at para. 146 (a footnote omitted.)

[9] *See* **Ex. JPN-31**.

III. EVIDENTIARY STANDARDS FOR INITIATION IN SUNSET REVIEWS

JAPAN

83. In connection with Japan's arguments in paras. 10-11 of its oral statement at the second Panel meeting, why does Japan view the reference in footnote 1 of the Anti-dumping Agreement to "Article 5" (and not to Article 11.3) as supportive of its allegations concerning evidentiary standards for initiation? Would Japan agree with the proposition that by referring to investigations (and not to reviews) footnote 1 self-limits its scope of application? If not, please explain why?

Reply

9. Footnote 1 provides the definition of "'initiated' as used in this Agreement" (emphasis added). Footnote 1 does not say "as used in this Agreement in connection with investigations." It is much broader than that. This definition applies whenever the term is used in the Agreement, including the term "initiated" in Article 11.3 sunset reviews. Given the broader language in footnote 1, the word as used in Article 11.3 is defined by footnote 1. Japan notes that the previous language of "as provided in Article 6.6" in the Tokyo Round AD Code (currently Article 12.1) was amended in the Uruguay Round to "as provided in Article 5." This textual change shows that evidentiary procedures under Article 5 apply to a procedural action when "initiated." Considering the above, we can only reasonably interpret that the use of the word "investigation" in footnote 1 is meant to cover at least sunset reviews.

10. It is important to note that Japan's interpretation of footnote 1 is perfectly consistent with a proper reading of Article 12. Article 12.3 explains that the provisions of Article 12 shall apply *mutatis mutandis* to Article 11. Article 12.1 therefore says that the authorities must be satisfied that sufficient evidence exists to justify, pursuant to Article 5, initiation of both investigations and sunset reviews. By defining initiation "as used in this Agreement," which includes Article 11.3, footnote 1 combined with Article 11.3 effectively echoes Articles 12.1 and 12.3 – that is, the same standards apply to both investigations and sunset reviews.

UNITED STATES

84. The Panel notes Japan's argument in paragraph 8 of its oral statement at the second Panel meeting concerning the Appellate Body's statement in US-Carbon Steel that "termination of the countervailing duty is the rule and its continuation is the exception". In light of this, how does the United States reconcile the statutorily-imposed automatic initiation of sunset reviews with the obligation in Article 11.3 of the Anti-dumping Agreement that the authorities initiate a review on their own initiative? In particular, does the operation of the US statute necessarily preclude any possibility for the "rule" in Article 11.3 to have any meaning or application? Does the phrase "on their own initiative" in Article 11.3 require that the authority itself be required to consider the facts of a specific proceeding in order to decide whether or not to initiate? How would the United States respond to the proposition that the use of the phrase "on their own initiative" in Article 11.3 requires that the authorities should or must be given the discretion not to self-initiate a sunset review when the factual circumstances so justify, and that by mandating self-initiation in every case the US law runs counter to that requirement? With reference to paragraph 37 of your responses to the Panel's questions following the first meeting, can the phrase "on their own initiative" merely be used to contrast a self-initiated review with a review initiated on the basis of a request? If so, on what basis?

Reply

11. Japan is answering this question to ensure that the United States has a sufficient opportunity to comment on the following points.

12. The Panel correctly points out that the phrase "on their own initiative" under Article 11.3 allows a Member to give its administrative authorities discretion to initiate a sunset review without a substantiated request by a domestic industry. The USG's automatic initiation in accordance with US legislation does not, however, provide the authorities any discretion when self-initiating a sunset review, and thus does not satisfy the language of Article 11.3.

13. In the context of Article 11.3, the term "their" refers to "the authorities." The phrase is equivalent to "on the {authorities} own initiative." Footnote 3 of the AD Agreement defines "authorities" in the AD Agreement to mean "authorities at an appropriate senior level." This definition clarifies that "the authorities" means a certain level of an administrative agency in a Member's executive branch. Thus, this phrase indicates that the initiation of a sunset review without a request from a domestic industry must be made upon the initiative of the executive branch.

14. The term "own" further supports the interpretation that the "initiative" must be made within the executive branch's discretion. The ordinary meaning of the term means "of or belonging to oneself or itself."[10] Thus, the "initiative" must be an action of the executive branch itself. When the action the executive branch takes is directed by other branches of the government, the executive branch can not be said to have acted on its "own."

15. The term "initiative" means "the action of initiating something or of taking the first step or the lead."[11] Accordingly, the phrase "on their own initiative" requires the administrative agency of the executive branch to initiate a sunset review on its "own" without any instruction from other branches of the government.

16. The idiom of the phrase "on one's own initiative" further strengthens this interpretation. As an idiom this phrase means "without being prompted by others."[12] Applying this to the context of Article 11.3, the phrase in question indicates that the executive branch's action of initiating a sunset review may not be prompted by others, such as the legislative or judicial branches.

17. Therefore, the USG's automatic initiation of all outstanding anti-dumping duty orders without exception in the operation of the mandatory provisions of the US statute is not consistent with the ordinary meaning of the phrase "on their own initiative" under Article 11.3. The senior levels of USDOC do not have any discretion to decide whether to initiate, as Japan claims. The mandatory US law is thus inconsistent with Article 11.3.

18. We note that the SCM Agreement does not have a corollary definition of "the authorities" as provided in footnote 3 of the AD Agreement. This is an additional factor that distinguishes this case from the ruling by the Appellate Body in *US – Carbon Steel* with respect to the automatic initiation of CVD sunset reviews.

86. Is Japan raising an argument addressing this element (discussed in Question 85 above) of Article 11.3 concerning automatic self-initiation (and not relating specifically to evidentiary standards)? If so, where is it to be found in Japan's request for establishment of the Panel?

[10] *The* New *Shorter Oxford English Dictionary, Volume 2*, p. 2059.
[11] *Id.*, at Volume 1, p. 1370.
[12] *Id.*

Reply

19. Yes, Japan believes that the phrase "on their own initiative" in Article 11.3 is not followed when the statute and regulation mandate USDOC to initiate the review. Claim 1 of Japan's panel request clearly asserts that the automatic initiation triggered in this specific case and every other case by section 751(c)(1) and (2) of the statute and section 351.218(a) of USDOC's regulations is inconsistent with Article 11.3. Japan's emphasis on USDOC's failure to obtain sufficient evidence prior to initiation is one way in which the statute and regulation are inconsistent with the AD Agreement and GATT 1994 because they do not even permit USDOC the discretion to undertake an analysis of whether a review should be initiated in the first place.

IV. *DE MINIMIS* IN SUNSET REVIEWS

BOTH PARTIES

87. The Panel notes Japan's argument that the decision of the Appellate Body in *US – Carbon Steel* is not relevant for this case regarding the applicability of a *de minimis* standard in sunset reviews, for several reasons. Please respond to the following questions in this respect:

(a) Regarding Japan's argument that the phrase "For the purpose of this paragraph" found in Article 11.9 of the SCM Agreement does not exist in Article 5.8 of the Anti-dumping Agreement makes the latter different from the former in this respect[13], please explain whether in your view the Appellate Body, in *US – Carbon Steel*, based its decision on the cited phrase or rather on its view that investigations and reviews were distinct processes?

Reply

20. The cited phrase demonstrates that the Appellate Body's finding of a distinction between investigations and sunset reviews does not apply to the AD Agreement. In its decision the Appellate Body states that "none of the words in Article 11.9 {of the SCM Agreement} suggests that the *de minimis* standard that it contains is applicable beyond the investigation phase."[14] This is perhaps understandable given the limiting phrase "for purposes of this paragraph" in Article 11.9. The lack of these words in Article 5.8 of the AD Agreement (corollary to Article 11.9 of the SCM Agreement), however, suggests the drafters adopted a broader application of the *de minimis* standard.

21. The Appellate Body may have made its decision regarding the SCM Agreement based on the differences between investigations and reviews. The broader application of the *de minimis* standard, however, was rendered in an anti-dumping context when the Member removed from the AD Agreement the phrase "for the purposes of this paragraph."

(b) With reference to paragraph 82 of the Appellate Body report, does the fact that the Anti-dumping Agreement contains only one *de minimis* standard necessarily render the logic of the Appellate Body's findings in *US-Carbon Steel* non-transferable to this dispute?

Reply

22. It certainly suggests that the construction of the two Agreements was different, and that the assumptions about the textual and contextual meaning in the SCM Agreement cannot be applied to the AD Agreement.

---

[13] Second Written Submission of Japan, at para. 134.
[14] *See US – Carbon Steel*, WT/DS213/AB/R, at para. 68.

(c) With respect to the decision of the Appellate Body in *US – Carbon Steel* and with reference to the *US-DRAMS* panel report, does the use of the term "cases" in Article 5.8 also embrace sunset reviews?

Reply

23. Because the application of Article 5.8 of the AD Agreement is broader than Article 11.9 of the SCM Agreement, the word "case" has added significance. In *US – Carbon Steel*, the Appellate Body did not believe that use of the word "case" expanded Article 11.9's application to other proceedings. The lack of the limiting language "for the purposes of this paragraph," however, illustrates a further broadening of Article 5.8's application. If Article 5.8's *de minimis* standard applied to only "investigations," then the drafters would not have used the word "case." In fact, the panel in *US – DRAMs* also indicated that the term "case" contains a more expansive meaning than "investigations."[15]

24. For these reasons, the Panel should find that the *de minimis* standard in the AD Agreement encompasses a much broader array of proceedings than simply original investigations. Therefore, the Panel should not follow the Appellate Body's reasoning in the *US – Carbon Steel* determination.

V. DETERMINATION OF LIKELIHOOD OF DUMPING/DUMPING MARGINS IN SUNSET REVIEWS

A. NATURE OF SUNSET DETERMINATIONS

JAPAN

88. The Panel notes Japan's argument in paras. 26-28 of its oral statement at the second Panel meeting that Article 11.3 requires the quantification of the probable margin of dumping, and that "Article 2 requires that all dumping margins be based on a quantitative analysis", and the statement in para. 48 that substantive rules for dumping "are set out in Article 2". The Panel also recalls that Japan has argued that a complete re-calculation of the dumping margin is not required in a sunset review. Can Japan please clarify its argument and specify the extent to which the obligations in Article 2 apply to sunset review determinations?

Reply

25. Dumping is defined by Article 2 of the AD Agreement, as Article 2.1 provides "{f}or the purpose of this Agreement." The term "dumping" in Article 11.3, therefore, is defined by Article 2. The concept of "dumping" does not exist in the abstract, but is the result of a calculation, using the standards set forth in Article 2. Any evaluation of "dumping" thus must undertake to discern the specific margin of dumping in accordance with Article 2.

---

[15] *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors* ("*US – DRAMs") Of One Megabit or Above from Korea*, WT/DS99/R, at para. 6.87 (29 January 1999) ("the term 'case' in the first sentence must at least encompass the notions of 'application' and 'investigation.' In our view, it would be meaningless for the term 'case' in the first sentence to also encompass the concept of an Article 9.3 duty assessment procedure.'"). (emphasis added.). The panel went on to state:

> {I}n the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty. *Id*. at para. 690.

26. A sunset review requires further analysis of the "likelihood" of "dumping." It therefore involves evaluation of future dumping margins, based on the calculated dumping margins in accordance with Article 2.

27. Japan stated previously that "USDOC would not need to recalculate past dumping margins in every sunset review in *exactly the same manner* under Article 2 as those in the original investigation." (emphasis added). Japan believes that, if USDOC uses past dumping margins as a basis for its evaluation of future dumping margins, it is required to eliminate the effects of WTO-inconsistent methodologies from these base margins. By doing so, USDOC might not be required to completely recalculate every dumping margin from the outset to comply with requirements under Article 2. For example, the zeroing deficiency may be cured by deducting the total negative margins from the total positive margins in accordance with the previous calculation results. If, however, USDOC is not able to find a way to eliminate the effects of WTO-inconsistent methodologies from a previously calculated dumping margin, USDOC should not use the previously calculated dumping margin as the basis of the likelihood determination in a sunset review.

BOTH PARTIES

91. In your view, do "changed-circumstances" reviews under Article 11.2 and sunset reviews under Article 11.3 of the Agreement require the application of different degrees of rigour by the authorities? If so, why and in what respects?

Reply

28. Japan does not believe that these two types of reviews necessarily require different degrees of rigour, though Article 11.3 reviews must certainly be at least as rigorous as Article 11.2 reviews. This is because these Articles set forth the "likely" determination standard. In addition, Article 11.3 provides that termination of anti-dumping duties after five years is the rule, and their continuation is the exception. The burden on the authority is therefore arguably greater in Article 11.3 reviews than in Article 11.2 reviews.

JAPAN

92. The Panel notes that in its response to Question 48 from the Panel, Japan seems to allege that the DOC's reporting of the original dumping margins to the ITC for the latter's injury determinations is inconsistent with the US obligation to determine the likelihood of continuation or recurrence of injury under Article 11.3 of the Agreement. The Panel also notes Japan's statements in paragraphs 39 and 40 of its oral statement at the second panel meeting relating to this issue. In this connection, is the Panel to understand from this statement that Japan is making a separate allegation regarding the determination of likelihood of continuation or recurrence of injury in this case? If so:

(i) Could Japan explain to the Panel how the DOC's reporting to the ITC of the dumping margins that will prevail if the duty is terminated is a separate element, and the legal basis in the Agreement for Japan's allegation?

Reply

29. Japan has made two separate claims concerning USDOC's application of past dumping margins in its sunset reviews. We first claim that the application does not comport with the *likelihood of dumping* analysis that must be conducted under Article 11.3.[16] We claim separately that the

[16] *See* Request for the Establishment of a Panel by Japan (WT/DS244/4) (5 April 2002), at item 2.

application of past dumping margins, usually from original investigations, also violates the *likelihood of injury* analysis required by Article 11.3.[17]

30. We make this claim because, as Japan has previously explained, including in paragraphs 39-40 of its oral statement at the second meeting, that consideration of dumping margins is a required part of the injury analysis. The term "injury" "under the AD Agreement" is defined by Article 3, as provided in footnote 9. The requirements of Articles 3.4 and 3.5, therefore, apply to the injury analysis in Article 11.3 reviews. USDOC's dumping margin analysis is thus a part of the USITC's injury analysis. The reporting of faulty dumping margins to the USITC resulted in a tainted injury determination inconsistent with Article 11.3. Japan presented these arguments to support its claim: in its first submission, at paragraphs 212-213; in its oral statement in the first substantive meeting, at paragraphs 48-49; in its second submission, at paragraphs 146-152; and in its the oral statement at the second substantive meeting, at paragraphs 39-40.

31. We have not argued that the USITC has done anything wrong with regard to the injury analysis, but for our cumulation claim. Rather, we argue that the dumping margin calculations performed by USDOC and transferred to the USITC violate Article 2 and, in turn, infect the *likelihood of injury* analysis conducted under Article 11.3. Note, importantly, through USDOC's transmission to the USITC of dumping margins that are likely to continue or recur in the absence of the order, USDOC effectively plays a role in the injury analysis. Although the USITC has responsibility for making the injury determination, USDOC's actions have a substantive impact on that analysis as required by Articles 3.4 and 3.5.

(ii) Is this allegation within the Panel's terms of reference? Where in its request for establishment does Japan believe this aspect of its case has been mentioned?

Reply

32. Item 3 of Japan's panel request[18] details these claims. The chapeau of item 3, for example, claims that dumping margins reported to the ITC "for the purpose of its injury analysis" are inconsistent with the United States' WTO obligations. The following paragraphs of item 3 claims that such reported dumping margins are inconsistent with Article 11.3.

33. Please note that item 2(c) contains similar claims, but Japan was careful to distinguish in these parts of its panel request when it was addressing the likelihood of dumping (item 2(c)) versus the likelihood of injury (item 3).

93. In relation to Japan's claim regarding the "good cause" requirement under US law for the submission of evidence in a sunset review, the Panel notes the following statement on page 3 of Japan's request for establishment of the Panel in DS244/4:

> **Both the Statement of Administrative Action at 890 and the Sunset Policy Bulletin at Section II.A.3 set an irrefutable presumption that dumping is likely to continue where the import volume has declined or where dumping margins remain after issuance of the order. The "good cause" requirement in the DOC regulation 19 C.F.R. § 351.218(d) does not mitigate this defect because it impermissibly narrows the administering authorities' ability to examine other evidences.**

[17] *See id*., at item 3.
[18] See *id*.

Could Japan clarify to the Panel, in conjunction with the summary table at the beginning of its first written submission, what legal instruments under US law Japan challenges in respect of its claim regarding the good cause requirement under US law as such? In particular, is Japan directly challenging the DOC regulation in this context?

Reply

34. Japan is challenging the "good cause" requirement as set forth in the Sunset Policy Bulletin in conjunction with its likelihood standards. Japan is not challenging the existence of the "good cause" standard independently from the likelihood standards.[19] The Sunset Policy Bulletin does not allow USDOC to conduct a rigorous prospective analysis. The Bulletin forces USDOC to simply rely on historical dumping margins and import volumes, rather than consider current market situations, and then uses the "good cause" standard to foreclose any sort of prospective analysis. Further, USDOC applied the Sunset Policy Bulletin to the specific case of corrosion-resistant carbon steel flat products from Japan.

35. Japan is not challenging USDOC regulation 19 C.F.R. §351.218(d).

94. The Panel notes that the Final Sunset Determination in the instant sunset review indicates that the additional information submitted by NSC on 11 May 2000 would not change the DOC's ultimate conclusion regarding the likelihood of continuation. The Panel also notes Japan's response to Question 47 and US response to Question 60 from the Panel. In your view:

JAPAN

(c) Does the fact that the DOC's determination was reached in this way affect Japan's challenge as to the consistency of the DOC determination with Article 11.3 and/or Article 6?

Reply

36. The fact that USDOC's sunset determination used the "even if" statement does not cure its Article 11.3 and Article 6 inconsistencies.

37. As discussed throughout this proceeding, Article 11.3 requires the authorities to rigorously evaluate prospective evidence in its likelihood determination. USDOC did not base its determination on any prospective evidence that NSC submitted. It simply dismissed the information without explanation. USDOC then relied solely on historical dumping margins and import volumes to make its determination. This is not a proper evaluation under Article 11.3.

38. Furthermore, the "even if" statement shows that, had NSC filed the information in the initial 30-days, USDOC would have only considered NSC's submitted information in the context of the "good cause" standard, and would not have based its determination on any prospective evidence. In other words, USDOC would have considered only whether NSC's evidence rebutted the presumption under the Sunset Policy Bulletin, section II.A.3. In sum, the statement demonstrates that USDOC would have acted inconsistently with Article 11.3, even if the information had been filed in the initial 30-day period.

39. With respect to Article 6, the "even if" statement confirms that USDOC did not accept NSC's information, and thus acted inconsistently with Articles 6.1 and 6.2. Further, the "even if" statement

[19] Japan does, however, challenge USDOC's application of the "good cause" standard to this specific sunset review to refuse to accept other evidence after the 30-day deadline. Japan asserts that this is inconsistent with the United States' obligations under Article 6 of the AD Agreement.

shows that USDOC did not evaluate NSC's information seriously in its final determination, and instead chose to dismiss the information arbitrarily, and thus acted inconsistently with Article 6.6. Again, if USDOC were to accept the information and weigh the submitted evidence without any prejudice, there should have been a much greater discussion of why that evidence did not rebut USDOC's presumption. USDOC dismissed the evidence in a single sentence without any analysis or explanation as to why. In reality USDOC never truly weighed the evidence. USDOC effectively rejected the prospective evidence, thereby arbitrarily preventing NSC from having a full opportunity to defend its interests. This remains inconsistent with the United States' obligations under Article 6.

40. Absent the restrictive deadline and the "good cause" standard, USDOC would have evaluated the information presented by NSC and other information without assigning any pre-established evidentiary weight to the information. The "even if" excuse offered by USDOC for rejecting the information therefore actually demonstrates USDOC's recognition that no information – of any sort – would have deterred the agency from its appointed mission: to continue the anti-dumping order on corrosion-resistant steel from Japan in accordance with the Sunset Policy Bulletin, as it does in all sunset reviews in which petitioners participate.

BOTH PARTIES

99. The Panel notes Japan's statements in paragraphs 26-28 of its oral statement at the second meeting of the Panel with the parties regarding the quantitative vs. qualitative nature of a determination of likelihood of continuation or recurrence of dumping in a sunset review. In that respect, please explain, how (if at all), and the extent to which, the use of the term "dumping" in Article 11.3 renders the obligations stemming from Article 2 of the Agreement in respect of the calculation of dumping margins applicable in sunset reviews?

Reply

41. Japan believes this question was answered in response to question 88 above.

100. The Panel notes the following statement of the Panel, in *US – Carbon Steel*:

> **In our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidisation. We do not consider, however, that an investigating authority must, in a sunset review, use the same calculation of the rate of subsidisation as in an original investigation. What the investigating authority must do under Article 21.3 is to assess whether subsidisation is likely to continue or recur should the CVD be revoked. This is, obviously, an inherently prospective analysis. Nonetheless, it must itself have an adequate basis in fact.**[20]

In your view, what, if any, are the implications of that finding to the present proceedings, particularly regarding the quantitative vs. qualitative nature of the likelihood determinations under Article 11.3 and the issue of whether or not Article 11.3 requires the establishment of the likely margin of dumping (or, at least, an evaluation of whether export prices are likely to be lower than normal values in the foreseeable future)?

Reply

42. As stated in response to question 88, Japan believes that quantification must be performed in order to – in the words of the panel in *US – Carbon Steel* – "have an adequate basis" to reach a determination as to whether export prices are likely to be lower than normal values in the foreseeable

[20] Panel Report, *US – Carbon Steel*, at para. 8.96.

future. Doing so requires that the calculation methodologies set forth in Article 2 must be performed properly. It is, therefore, an inherently quantitative analysis.

B. "ORDER-WIDE BASIS"

BOTH PARTIES

101. How, if at all, is Article 9.4 relevant to the issue of order-wide vs. company specific determinations in sunset reviews? Are there any (other) contextual elements in the Agreement that shed light on this issue?

Reply

43. While Japan claims that USDOC must determine whether dumping is likely to continue or recur on a company-specific basis, the exception of Article 6.10 and Article 6.10.2 continues to apply to sunset reviews through Article 11.4. These Articles provide exceptions to the company-specific determination requirement. This does not mean, however, that USDOC may conduct an order-wide determination in a sunset review. USDOC must perform a company-specific determination for those companies that have been reviewed – or, at the very least, companies that seek to participate in the sunset review.

44. A legitimate question may arise in this connection as to how dumping should be determined with respect to unexamined producers in a sunset review, though this question is not within the scope of Japan's claims in this dispute. Japan is of the view that the authorities must make its dumping determination with respect to unexamined producers based on a "statistically valid" method within the meaning of Article 6.10, not on the methods set forth in Article 9.4.[21] We note that the United States argued previously that the provisions of Article 9.4 would be a good basis to determine dumping for purposes of the injury analysis with respect to unexamined producers.[22]

102. How do you respond to the following reading of Articles 11.3 and 6.10 by virtue of the cross-reference in Article 11.4 to "the provisions of Article 6 regarding evidence and procedure"?

> **Article 11.3 requires that an investigating authority in a sunset review make a determination of likelihood of continuation or recurrence of dumping. An investigating authority may also proceed to establish the margin of dumping likely to prevail if a duty is terminated. The obligation in Article 6.10 that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation" applies where the investigating authority proceeds to establish the margin of dumping likely to prevail.**

Reply

45. While it is correct that Article 6.10 applies to determinations of the margin of dumping likely to prevail, the above language does not fully reflect the application of Article 6.10 to Article 11.3. Article 6.10 also applies to the determination of "dumping" under Article 11.3. As discussed in Japan's answers to prior questions above and in our prior submissions, provisions of Article 2 set forth the substantive rules on determinations of dumping under Article 11.3. Article 6.10 then

[21] *See* the panel report in *European Community – Anti-Dumping Duties on Imports of Cotton-type Bed Lines from India; Recourse to Article 21.5 of the DSU by India* (WT/DS141/RW) (29 November 2002), at para. 6.123.

[22] *See id*., at para. 6.124.

provides evidentiary and procedural rules that such "dumping" determinations must be on a company-specific basis. The panel in *EC – Bed Linens* supports this interpretation.[23]

C. "AMPLE OPPORTUNITY"

BOTH PARTIES

104. In your view, does the 30-day "good cause" requirement for the submission of information in a sunset review conform to the requirement of Article 6.1 of the Agreement that the interested parties be given ample opportunity to submit in writing all evidence that they deem relevant? Why or why not?

Reply

47. No. The 30-day period does not provide a respondent ample opportunity to defend its interests. As discussed in our prior submissions, 30-days is the minimum period that must be provided for responding to the initial questionnaires under Article 6.1.1. It does not, however, set forth the proper length of time for which the record should remain open for additional information. Indeed, if all information must be submitted within the first 30-day period – as it must in USDOC's sunset reviews – this makes a mockery of the Article 6.1 requirement to give an ample opportunity to defend one's interest. Moreover, the excessively restrictive requirements for submitting evidence in sunset reviews illustrates USDOC's complete refusal to make a rigorous prospective likelihood determination.

JAPAN

105. As part of its claim under Article 6 of the Agreement, does Japan argue that the DOC acted inconsistently with that article because the amount of time provided for under US law for the submission of that information (i.e. 30 days) was not reasonable and/or inconsistent with Article 6, or because the Japanese exporter was requested to show good cause for that information to be considered by the DOC, or both? Please cite the relevant portions of the record.

Reply

47. Japan claims that USDOC's application of section 351.218(d)(3)(iv)(A)[24] of its regulations to this specific case, requiring a respondent prepare evidence and argumentation to satisfy the "good cause" standard in the first 30-days after initiation, is inconsistent with the United States' obligations under Article 6.1 and 6.2.[25] USDOC stated in its final determination "{b}ecause NSC did not submit the additional information in their substantive response, we do not find good cause to examine other factors in this review."[26] This time frame to present this type of evidence limited NSC's ability to

[23] *See id*., at paras. 6.132 - 6.133. *See also* Japan Second Submission, at para 161.

[24] 19 C.F.R. § 351.218(d)(3)(iv)(A) provides: "An interested party may submit information or evidence to show good cause for the Secretary to consider other factors under Section 752(b)(c) (CVD) or section 752(c)(2) (AD) of the Act and paragraph (e)(2)(ii) of this section. Such information or evidence must be submitted in the party's substantive response to the notice of initiation under paragraph (d)(3) of this section." **(Ex. JPN-3 at 224-25)**.

[25] *See Request for the Establishment of a Panel by Japan*, WT/DS244/4, 5 April 2002, at item 2(e). *See also* Japan First Submission, at para. 146-154.

[26] *Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results* (2 August 2000), at page 6 (**Ex. JPN 8e**). This decision memo is incorporated into the notice of the final determination. *See Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order*, 65 Fed. Reg. 34380, 47381 (2 August 2000) (**Ex. JPN 8d**).

effectively defend its interests. Further, USDOC's refusal to accept NSC's information is inconsistent with Article 6.6. For analysis of USDOC's "even if" statement,[27] please see the answer to question 94(c) above.

48. The "good cause" requirement itself may also be inconsistent with Article 6, as it unreasonably restricts a respondent's ability to defend itself by improperly restricting the presentation of prospective information, and unreasonably restricted USDOC's ability to examine NSC's submitted information. But, Japan did not include this claim in its panel request.

106. Is seven months following a deadline for submission of information a "reasonable period of time"?

Reply

49. The issue here is whether USDOC provided NSC an ample and full opportunity to present evidence to defend its interests in this case, in accordance with Articles 6.1 and 6.2. In other words, the point of the Panel's reviews should be whether the 30-day deadline, as applied by USDOC in this case, was consistent with Articles 6.1 and 6.2. Whether a seven-month deadline is reasonable for submitting evidence is not the issue.

50. NSC's submission of information in its case brief is reasonable, warranted, and practical under Articles 6.1 and 6.2. The authorities must provide respondents "ample opportunity to present in writing all evidence" under Article 6.1. In sunset reviews, USDOC's practice in *Mechanical Transfer Presses* illustrates that consideration of information received in a party's case brief does not impede its ability to complete the sunset review as scheduled.[28] Further, the authorities must provide parties "a full opportunity for the defence of their interests" under Article 6.2. This "full opportunity" requirement must be understood in the context of Article 6.9. Article 6.9 requires that the authorities disclose to respondents essential facts on which the authorities will base their final determination in order to allow parties to defend their interests. In the present sunset review, the case brief was the first and the only opportunity for NSC to present its defence after learning what facts USDOC would rely on in its final determination.[29] Further, the volume of the submitted information was moderate.[30] The submitted information was verified by USDOC in previous administrative reviews,[31] and thus it was not necessary for USDOC to make any extra effort to authenticate the information. Moreover, the submitted information was relevant to USDOC's prospective analysis. Rejection by USDOC of the information also seriously prejudiced NSC's interests. Consequently, Articles 6.1 and 6.2 require USDOC to accept and consider the information submitted in NSC's case brief. [32]

51. Therefore the 30-day limitation, applied by USDOC in this case based on its regulations and the "good cause" requirement under the Sunset Policy Bulletin is far from reasonable and is inconsistent with Articles 6.1 and 6.2.

---

[27] *See id*. (**Ex. JPN 8e)**

[28] *See Preliminary Results of Full Sunset Review: Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 753, 758-759 (6 January 2000) (**Ex. JPN-34**); *Final Results of Full Sunset Review: Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 25705, Decisional Memorandum, at cmt. 1 (3 May 2000) (**Ex. JPN-35**).

[29] As demonstrated in Japan's First Submission, USDOC disclosed for the first and last time in its preliminary results the essential facts on which it based its final determination. *See* Japan First Submission, at para. 151, footnote 198, and Ex. JPN-8b through 8e.

[30] *See* Ex**. JPN-19c**.

[31] *See* Japan First Submission, paras. 142-144, and Ex.JPN-14c and 19c.

[32] *See Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R at 8.119 (24 Oct. 2000). *See also* Japan Oral Statement at the Second Substantive Meeting, at para. 31.

52. We would like to note that the appropriate extension of time for responding to USDOC's initial questionnaire is not relevant in the context of Articles 6.1 and 6.2 as discussed above. The Appellate Body in *US – Hot-Rolled Steel*[33] discussed the "reasonable period of time" in the context of responses by an interested party to the authorities' questionnaire under Article 6.1.1 and the application of facts available under Article 6.8[34] and paragraph 1 of Annex II[35] of the AD Agreement. While there are no questionnaires issued in a sunset review, USDOC's regulations detailing precisely what information is required of the parties effectively functions as a questionnaire. The information that NSC submitted in its case brief, however, was not specifically requested in USDOC's regulations. Because NSC was not asked to submit the information within a specific timeframe, NSC's submission of the information in its case brief is beyond the scope of the rules applicable to questionnaire responses.[36] Thus, the Appellate Body discussion of a "reasonable period of time" to respond to the initial questionnaire does not apply to the question of the consistency of USDOC's application of the 30-day deadline in this case with Articles 6.1 and 6.2.[37]

107. Does Japan concede that the information in question was in NSC's possession at the time of the 30-day deadline for the submission of the substantive response in this case? If so, why did

---

[33] *United States – Anti-dumping Measures on Certain Hot Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001), at para 83. We note that Japan mentioned this Appellate Body decision in its *Rebuttal to US Answers to the Panel's Questions* (18 Decenber2002), at para 22 and footnote 44 for the purpose of illustrating USDOC's unreasonable application of the 30-day deadline in this sunset review even in light of USDOC's own practice in other proceedings. While this Appellate Body's decision is relevant to consider whether the 30-day deadline is reasonable under Articles 6.1.1, Japan's claim on this issue is not limited to Article 6.1.1, but is in the broader context of Articles 6.1, 6.2, and 6.6.

[34] Article 6.8 of *the* AD Agreement provides:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information *within a reasonable period* or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph. (emphasis added.)

[35] Paragraph 1 of Annex II provides:

> As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied *within a reasonable time*, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry. (emphasis added.)

[36] See the panel report in *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R (28 September 2001), at para. 6.54 ("Article 6.1 of the AD Agreement thus requires that interested parties be given notice of the information which the authorities require. In our view, it follows that, independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.") *See* also Japan's Oral Statement in the First Substantive Meeting, at para 43. Further, as noted above, paragraph 1 of Annex II provides "{a}s soon as possible after the initiation of the investigation, the investigating authorities should *specify in detail the information* required from any interested party, and the manner in which that information should be structured by the interested party in its response." (emphasis added.)

[37] Even if the Panel disagrees with this argument that NSC's information is outside of USDOC's requested information in its initial questionnaire, USDOC's application of the 30-day deadline is still unreasonable, and thus inconsistent with, Article 6.1.1 in light of the Appellate Body's decision in *US – Hot-Rolled Steel*, *supra* note 35.

NSC not submit it on that date? What further opportunities does Japan contend should reasonably have been granted by the United States for the submission of this information?

Reply

53. While NSC maintained possession of the information, nowhere in USDOC's Sunset Regulations or in the notice of initiation does USDOC explain the type of information necessary to establish "good cause." Because USDOC's regulations are not specific enough with respect to information that must be submitted, NSC may not be faulted for its submission of the information after the 30-day period, as the panel in *Argentina – Ceramic Floor Tiles* stated.[38]

54. In USDOC's preliminary determination, USDOC had not considered any of the information related to NSC's joint venture, even though USDOC was aware of this information.[39] This information was in USDOC's files from its administrative reviews involving corrosion-resistant steel from Japan. As a result, NSC's case brief was the first opportunity to present information and argumentation after NSC learned what facts USDOC intended to consider in its final determination.

55. As argued in our previous submissions, the authorities must consider the information submitted as long as the information was provided within a sufficient amount of time for the authorities to examine the information. USDOC's practice in *Mechanical Transfer Presses* illustrates that receipt of this information in a party's case brief provides USDOC with ample opportunity to consider the information.[40] The fact that USDOC agreed to accept information submitted in the parties' case briefs in *Mechanical Transfer Presses* shows that the 30-day deadline is arbitrary. The deadline is simply used to prevent parties from being able to adequately defend their interests.

[38] *See Argentina* - Ceramic *Floor Tiles*, WT/05189/R, at para. 6.54.

[39] *See* Japan First Submission, paras. 142-144, and Ex.JPN-14c and 19c.

[40] *See Preliminary* Results *of Full Sunset Review: Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 753, 758-759 (6 January 2000) (**Ex. JPN-34**); *Final Results of Full Sunset Review: Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 25705, Decisional Memorandum, at cmt. 1 (3 May 2000) (**Ex. JPN-35**).

ANNEX E-10

REPLIES OF THE UNITED STATES TO QUESTIONS FROM THE PANEL – SECOND MEETING

I. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS/"PRACTICE"

BOTH PARTIES

79. The Panel notes the following statement by the Appellate Body, in *US – Carbon Steel*:

> **Thus, a responding Member's law will be treated as WTO-*consistent* until proven otherwise. The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.**[1]

The Panel further notes that the Appellate Body, in *US – Countervailing Measures on Certain EC Products*, reviewed that panel's finding regarding the consistency with the US' WTO obligations of a certain method (referred to as an "administrative practice"), as such, used by the DOC in CVD investigations.[2] **In the same report, the Appellate Body stated that it was not, "by implication, precluding the possibility that a Member could violate its WTO obligations by enacting legislation granting discretion to its authorities to act in violation of its WTO obligation."**[3]

In your view:

> **(a) What, if any, are the implications of these Appellate Body findings regarding the issue of whether "practice" *as such* can be challenged under the WTO Agreement?**

Reply

1. The Appellate Body's finding from the *US – Carbon Steel* report emphasizes that the burden lies with the complaining party to produce evidence as to the scope and meaning of a challenged measure which demonstrates that it is inconsistent with an agreement obligation. That scope and meaning must be determined by reference to the challenged Member's municipal law. An indirect implication of the *US – Carbon Steel* finding is that US administrative practice cannot be considered a

---

[1] Appellate Body Report on *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr. 1, adopted 19 December 2002, para. 157.

[2] Appellate Body Report on *United States - Countervailing Measures Concerning Certain Products from the European Communities* ("*US – Countervailing Measures on Certain EC Products*"), WT/DS212/AB/R, adopted 8 January 2003, paras. 129 and 146.

[3] *Id.*, note 334.

measure, and cannot be challenged as such. Further, as discussed below, the cited Appellate Body statement from *US – Countervailing Measures on Certain EC Products* has no implications for the Panel 's question, because the issue of whether US practice can, as such, be a measure, and whether it can mandate a violation, was not before the Appellate Body.

2. Commerce administrative practice is neither a "measure" within the meaning of the relevant WTO agreements, nor a "mandatory" measure within the meaning of the mandatory/discretionary distinction. A "measure" – which can give rise to an independent violation of WTO obligations – must "constitute an instrument with a functional life of its own"– *i.e.*, it must "*do* something concrete, independently of any other instruments."[4] The "practice" identified by Japan in this case consists of nothing more than individual applications of the US AD law in the context of sunset reviews. While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its past precedent, "practice" has neither a "functional life of its own" nor operates "independently of any other instruments" because the term only refers to individual applications of the US statute and regulations.[5] In contrast to the US statute and regulations, which clearly function as "measures", no general, *a priori* conclusions about the conduct of sunset reviews under US law can be drawn from an examination of "practice". The "practice" that Japan claims is a measure simply consists of specific determinations in specific sunset proceedings; Japan has failed to identify how such "practice" constitutes an instrument with a functional life of its own.

3. Moreover, even if "practice" could be considered a measure (and the United States' position is that it cannot), in order for any measure, as such, to be found WTO-inconsistent, the measure must be "mandatory", *i.e.*, it must require WTO-inconsistent action or preclude WTO-consistent action.[6] The Appellate Body and several panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.[7] In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that the challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.[8] As we have explained in our submissions, the "practice" Japan alleges is a measure is *not* binding on Commerce, and, under US administrative law, Commerce may depart from its precedent in any particular case, so long as it explains the reasons for doing so. Therefore, this "practice" does not mandate WTO-inconsistent action or preclude WTO-consistent action. Japan also has failed to even identify, much less demonstrate, how the alleged "measure" does either as a matter of US municipal law.

4. Neither of the Appellate Body findings quoted above otherwise implicates the United States' position that the "practice" as such alleged by Japan cannot be challenged under the WTO Agreement. In *US – Carbon Steel*, the EC had argued that the US law at issue was not "genuinely discretionary."[9]

---

[4] Panel Report, *United States – Measures Treating Export Restraints as Subsidies ("US - Export Restraints")*, WT/DS194/R, adopted 23 August 2001, para. 8.85.

[5] Japan's definition of "practice" does not comport with its status in US law. Japan describes practice as "administrative procedures", which it defines as "a detailed guideline that the administrating [sic] authority follows when implementing certain statutes and regulations." Japan First Submission, para. 8. We define "administrative procedures" and "guidelines" in our answer to Question 82.

[6] *US - Export Restraints*, paras. 8.126-32.

[7] Appellate Body Report, *US - Carbon Steel*, para. 162; *United States - Anti-Dumping Act of 1916* ("*1916 Act*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 88-9; Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 February 2002, para. 259; *see also US - Export Restraints*, paras. 8.77-9; Panel Report, *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002, para. 6.22.

[8] Panel Report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, adopted 23 August 2001, para. 5.50.

[9] *US – Carbon Steel*, para. 155.

The Appellate Body disagreed and upheld the Panel's finding that US law as such is not inconsistent with respect to the obligation under Article 21.3 of the SCM Agreement to determine likelihood of continuation or recurrence of subsidization in a sunset review.[10] In the above-quoted paragraph, the Appellate Body discussed the type of evidence that a party challenging the WTO-consistency of another Member's law might introduce to substantiate its assertion. In that paragraph, and elsewhere in its findings,[11] the Appellate Body did suggest that it could consider the agency's "consistent application" or "consistent practice" – but only *as evidence of the meaning of the challenged law* – not, as Japan advocates, as the challengeable measure itself. In any event, while consistent application of a law might provide evidence of its meaning, that meaning ultimately must be determined based on its meaning under municipal law. Under US municipal law, administrative precedent, regardless of how often repeated, has no functional life of its own, and mandates nothing – an agency may disregard it so long as it explains why.

5. In *US – Countervailing Measures on Certain EC Products*, the panel's characterization of its findings as relating to Commerce's "method" was not appealed, and the Appellate Body did no more than accept the panel's characterization. Moreover, at the panel stage, this issue was also not disputed; the EC was challenging two Commerce privatization methodologies applied in twelve specific countervailing duty investigations, and the United States focused its argumentation on the substantive issues. That the panel referred to these methodologies in this manner, and the Appellate Body thereafter, thus provides no guidance as to how either a panel or the Appellate Body would answer the question of whether non-binding administrative precedent, or practice, can be independently challenged as a measure, and could mandate a breach of a particular obligation. To the contrary, when panels have been faced with this question, they have uniformly concluded that US administrative practice cannot as such, be challenged,[12] and the Appellate Body has consistently applied the mandatory/discretionary distinction to find that measures which do not mandate a breach of an obligation do not breach that obligation. The Appellate Body's statement in note 334 of the *US – Countervailing Measures on Certain EC Products* report reflects no more than the truism that Members could, if they chose in the language of the WTO Agreement, impose an obligation prohibiting legislation providing discretion to act in a certain manner. There has been no suggestion that the obligations at issue in this dispute operate in this manner.

6. Thus, the findings in *US – Countervailing Measures on Certain EC Products*, as discussed above, do not vitiate the United States' position that the "practice" as alleged by Japan cannot be challenged under the WTO Agreement. Japan has not identified a Commerce "practice" that is challengeable as a measure, much less demonstrated that such a "measure" violates a specific WTO obligation.

(b) What relevance, if any, do these findings, and your response to (a), have for the present proceedings?

Reply

7. As discussed above, neither of the Appellate Body findings quoted above alter the conclusion that "practice" as such cannot be challenged under the WTO Agreement.

8. Japan has argued in various submissions that the SAA and/or the Sunset Policy Bulletin represent fixed and binding Commerce practice that amounts to WTO-inconsistent "measures". The finding in *US – Carbon Steel* correctly states that the burden is on Japan to prove both the scope and

[10] *Id.*, paras. 162-63.

[11] *Id.*, paras. 147-48.

[12] *E.g.*, Panel Report on *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, adopted 29 July 2002, paras 7.22-7.24; *US – Export Restraints*, paras. 8.126, 8.129-8.130.

nature and the inconsistency of such a "measure". Japan has failed to meet its burden. Neither the SAA nor the Sunset Policy Bulletin can be considered measures giving rise to an independent violation of WTO obligations, and even if they could be, neither prescribes a particular methodology or practice which mandates WTO-inconsistent action or precludes WTO-consistent action.

9. As the United States has previously demonstrated, the SAA is a type of legislative history which, under US law, provides authoritative interpretative guidance in respect of the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the US antidumping statute, and cannot be independently challenged as WTO-inconsistent.

10. Nor can the Sunset Policy Bulletin be challenged independently as a violation of WTO obligations. Under US law, the Sunset Policy Bulletin is a non-binding statement, providing evidence of Commerce's understanding of sunset-related issues not explicitly addressed by the statute and regulations.[13] In this regard, the Sunset Policy Bulletin has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so. The Sunset Policy Bulletin does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case, and in conjunction with US sunset laws and regulations, the Sunset Policy Bulletin does not "do something concrete" for which it could be subject to independent legal challenge under the WTO Agreements.

UNITED STATES

80. How do you respond to Japan's argument that the Sunset Policy Bulletin is an "administrative procedure" within the meaning of Article 18.4 of the Anti-Dumping Agreement?

Reply

11. The Sunset Policy Bulletin is not an "administrative procedure" within the meaning of Article 18.4. It is a statement of policy and provides a framework for Commerce's conduct of sunset reviews.

12. Japan's argument that the Sunset Policy Bulletin is an "administrative procedure" is based on its erroneous assertion that an administrative "practice" can evolve into an administrative "procedure" (or a "measure") simply based on the fact Commerce has issued a particular number of affirmative sunset determinations all in which it considered guidance set forth in the Sunset Policy Bulletin. The panel in *US – Steel Plate from India* addressed this very issue, finding that the number of times a certain result is repeated does not turn the repeated pattern, or "practice", into a "measure":

> The practice India has challenged is not, on its face, within the scope of the measures that may be challenged under Article 18.4 of the AD Agreement. In particular, we do not agree with the notion that the practice is an "administrative procedure" in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations. Rather, ... a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC.... India argues that at some point, repetition turns the practice into a "procedure", and hence into a measure. We do not agree. That a particular response to a particular set

[13] Sunset Policy Bulletin, 63 Fed. Reg. at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (emphasis added) (Exhibit JPN-6).

> of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.[14]

13. Commerce issued the Sunset Policy Bulletin in an attempt to be as transparent as possible with respect to Commerce's approach to sunset reviews. In an area in which both the AD Agreement and the US statute provide authorities with extremely broad discretion, the United States considered it valuable to provide interested parties with guidance as to the approach Commerce likely would take under given circumstances. The alternative and clearly less desirable approach would be a less transparent system wherein the parties in a sunset review would have little or no idea how the administering authority would address issues raised in sunset reviews.

UNITED STATES

81. How do you respond to Japan's reference (in paras. 15-16 of Japan's oral statement at the second Panel meeting) to the statement in the Appellate Body report in *US – Carbon Steel* concerning the possible establishment of practice in connection with the Sunset Policy Bulletin through reference to the number of instances that certain conduct has occurred in US sunset reviews? Are the figures presented by Japan in this connection accurate?

Reply

14. As discussed in response to Question 80 above, the number of times a certain conduct occurs in sunset reviews does not turn the conduct into a "measure ". Contrary to Japan's assertion, language in the *US – Carbon Steel* Appellate Body report supports the proposition that numbers alone do not reveal anything about whether precedent, or "practice," should be considered a measure. The burden is on Japan to establish that, as a matter of US municipal law, the number of times that conduct occurs has some legal significance. It does not. As already explained, Commerce remains free to depart from past precedent, or from the Sunset Policy Bulletin, so long as it explains why. This is an incontrovertible fact under US law, and it would be a mischaracterization of US law to suggest otherwise. Further, in rejecting the EC's argument concerning "practice" in *US – Carbon Steel*, the Appellate Body did no more than conclude that the EC had not even provided evidence of repeated conduct, let alone demonstrate that, were there such evidence, it would have legal significance. Again, the scope and nature of a purported measure must be determined by reference to the municipal law of the Member. While repeated conduct might provide evidence of the meaning of a statute or regulation – a point made in paragraph 148 of *US – Carbon Steel* – it would not result in the repeated conduct having a functional legal status of its own. Repetition does not support a conclusion that Commerce "practice" is a measure that mandates WTO-inconsistent action or precludes WTO-consistent action.

15. Whether Japan's figures are accurate is not the issue. The fact is that, under US law, they are irrelevant. In any event, Japan's numbers are incomplete and misleading, we believe, because they do not reflect completed sunset reviews (*i.e.*, where both Commerce and the USITC have made their final likelihood determinations). The United States provides the more complete picture below.

---

[14] Panel Report on *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India ("US - Steel Plate from India")*, WT/DS206/R, adopted 29 July 2002, para 7.22 (citation omitted).

16. In May 1998, Commerce published a schedule for the sunset review of the 321 antidumping and countervailing duty orders and suspension agreements in place as of January 1, 1995, the effective date of the United States' implementation of the Uruguay Round Agreements.[15] This schedule includes the antidumping duty order on corrosion-resistant carbon steel flat products from Japan at issue in this case.[16] Those sunset reviews were initiated between July 1998 and December 1999 and have all been completed. Out of the total number of sunset reviews conducted and completed,[17] almost one half were revoked. The breakdown of the numbers is as follows:

- 150 orders were revoked as a result of sunset review
  - 78 were revoked based on no domestic interest
  - 1 (CVD order) was revoked based on Commerce's negative likelihood determination
  - 71 were revoked based on the USITC's negative likelihood determination
- 163 orders were continued as a result of sunset review based on affirmative likelihood determinations by both Commerce and the USITC
- 1 sunset review was terminated because the order was revoked based on a changed circumstances review conducted by Commerce
- 7 orders were rescinded prior to the scheduled initiation of sunset reviews (so no sunset reviews were initiated) based on the USITC's redetermination of its original injury determination in the investigation

UNITED STATES

82. Please explain your view of the distinctions, if any, between an administrative procedure, an administrative practice, a "method" and a guideline, and provide the rationale and criteria underlying such distinctions.

Reply

17. "Administrative procedures" are the procedures by which an agency administers the law and its own regulations. In the United States, such procedures generally are set forth in an agency's regulations.

18. Administrative agencies in the United States use the term "practice" to refer collectively to their past precedent. That precedent is *not* binding. The US Court of International Trade has held, "As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve." *Rhodia, Inc. v. United States*, Consol. Court No. 00-08-00407, Slip. Op. 2000-109 (CIT September 9, 2002) at 15; *see also, Zenith Electronics Corp. v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996).

19. The term "method" or "methodology", as used by Commerce, refers typically to the particular analysis of specific item, *i.e.* calculating a sum. A method might be set forth in a statute or regulation, or be determined on a case-by-case basis.

20. "Guideline", as used by Commerce, refers typically to a statement of policy.

[15] 63 Fed. Reg. 26779 (May 14, 1998).

[16] The schedule also includes the countervailing duty order at issue in *US – Carbon Steel*.

[17] Note that, out of the sunset reviews conducted and completed, 116 were expedited because the foreign respondents chose either not to participate or not to participate fully in the Commerce portion of the sunset review.

II. EVIDENTIARY STANDARDS FOR INITIATION OF SUNSET REVIEWS

UNITED STATES

84. The Panel notes Japan's argument in paragraph 8 of its oral statement at the second Panel meeting concerning the Appellate Body's statement in *US – Carbon Steel* that "termination of the countervailing duty is the rule and its continuation is the exception". In light of this, how does the United States reconcile the statutorily-imposed automatic initiation of sunset reviews with the obligation in Article 11.3 of the Anti-Dumping Agreement that the authorities initiate a review *on their own initiative*? In particular, does the operation of the US statute necessarily preclude any possibility for the "rule" in Article 11.3 to have any meaning or application? Does the phrase "on their own initiative" in Article 11.3 require that the authority *itself* be required to consider the facts of a specific proceeding in order to decide whether or not to initiate? How would the United States respond to the proposition that the use of the phrase "on their own initiative" in Article 11.3 requires that the authorities should or must be given the discretion *not* to self-initiate a sunset review when the factual circumstances so justify, and that by mandating self-initiation in every case the US law runs counter to that requirement? With reference to paragraph 37 of your responses to the Panel's questions following the first meeting, can the phrase "on their own initiative" merely be used to contrast a self-initiated review with a review initiated on the basis of a request? If so, on what basis?

Reply

21. In *US – Carbon Steel*, the Appellate Body considered the requirement under US law for the automatic self-initiation of all sunset reviews and found US law to be WTO-consistent.[18] The Appellate Body also found that no evidentiary standard is prescribed for the self-initiation of a sunset review.[19] The Appellate Body made these findings in conjunction with its finding that:

> This is not to say that authorities may continue the countervailing duties after five years in the absence of evidence that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. Article 21.3 prohibits the continuation of countervailing duties unless a review is undertaken and the prescribed determination, based on adequate evidence, is made.[20]

In other words, the Appellate Body had no problem reconciling the United States' automatic self-initiation and conduct of sunset reviews with the concept that termination is the rule and continuation is the exception.

22. The United States believes that the Appellate Body's finding in *US – Carbon Steel* should inform the Panel's decision in this case on this issue. The phrase "on their own initiative" does not require the authority to consider the facts of a specific proceeding in order to decide whether or not to initiate – that would suggest some sort of evidentiary prerequisite, a requirement which the Appellate Body rejected in *US – Carbon Steel*. The Appellate Body's reasoning in that case is equally valid here. On the same basis, the United States also does not consider that the phrase requires that authorities be given the discretion not to initiate. (This is not to say that Commerce would ignore a specific expression of no-interest on the part of the domestic industry; as previously explained, under those circumstances, Commerce would revoke an order and not initiate a sunset review.)

---

[18] *US – Carbon Steel*, para. 116.

[19] *Id*. ("Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3.")

[20] *Id*., para. 117.

85. Considering Question 10 the Panel posed earlier to the United States and the US response thereto, on what legal basis and under what precise circumstances would the DOC *not* "automatically" self-initiate an investigation? Has this ever, in fact, occurred? Please cite any relevant examples. For example, if the DOC is approached by the single producer constituting the domestic industry in advance of the time set for initiation of a particular sunset review and the domestic industry informs the DOC that it has no interest in the order being continued, would the DOC decide *not* to self-initiate a sunset review (*i.e.* notwithstanding the explicit obligation to automatically self-initiate)? If so, under what power would the DOC so act?

Reply

23. Pursuant to section 751(c)(1) of the Act, Commerce automatically self-initiates sunset reviews in every case, unless the US domestic industry provides Commerce with written notice that the industry no longer had an interest in the maintenance of a particular antidumping duty order. In that instance, Commerce would not initiate a sunset review and would revoke the order pursuant to section 751(b) of the Act.

24. In at least three instances, Commerce has either not initiated a sunset review or terminated a sunset review based upon the domestic industry's expression of no interest in the order being continued. In *AFBs from Singapore* and *Ball Bearings from Thailand*, Commerce conducted changed circumstances reviews based on expressions of no interest in the orders from portions of the domestic industry. Commerce determined to revoke those orders, even though there was some opposition from other domestic industry members.[21] In *Kiwifruit from New Zealand*, Commerce initiated a sunset review, but subsequently terminated it after Commerce revoked the order in response to the domestic industry's indication that it was no longer interested in maintaining the order.[22] We also note the situation in which Commerce rescinded 7 orders prior to the scheduled initiation of sunset reviews (and so no sunset reviews were initiated) based on the USITC's redetermination of its original injury determination in the investigation.[23] Although in this instance Commerce's reason for not initiating scheduled sunset reviews was not based on an indication of no domestic interest, it does demonstrate that Commerce has the authority to not automatically self-initiate sunset reviews where appropriate.

86. Is Japan raising an argument addressing this element (discussed in Question 85 above) of Article 11.3 concerning automatic self-initiation (and not relating specifically to evidentiary standards)? If so, where is it to be found in Japan's request for establishment of the Panel?

Reply

25. No. Japan's claim in this regard is limited to those provisions of US law and regulations that "mandate the DOC to automatically self-initiate without sufficient evidence."[24]

---

[21] *See Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From Singapore; Final Results of Changed Circumstances Countervailing Duty Reviews and Revocation of Countervailing Duty Orders*, 61 Fed. Reg. 20796 (May 8, 1996), and *Ball Bearings From Thailand; Final Results of Changed Circumstances Countervailing Duty Review and Revocation of Countervailing Duty Order*, 61 Fed. Reg. 20799 (May 8, 1996). These changed circumstances reviews were requested after the statutory requirement for sunset reviews was enacted and prior to Commerce's issuance of the transition order schedule.

[22] *See August 1999 Sunset Reviews: Termination of Reviews, Final Results of Reviews and Revocation and Termination*, 64 Fed. Reg. 59737 (Nov. 3, 1999); and *Fresh Kiwifruit from New Zealand: Final Results of Changed Circumstances Review: Revocation of Order*, 64 Fed. Reg. 50486 (Sept. 17, 1999).

[23] *See Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 51097 (Sept. 21, 1999).

[24] Japan Request for the Establishment of a Panel, 4 April 2002, para. 1.

III. *DE MINIMIS* STANDARD IN SUNSET REVIEWS

BOTH PARTIES

87. The Panel notes Japan's argument that the decision of the Appellate Body in *US – Carbon Steel* is not relevant for this case regarding the applicability of a *de minimis* standard in sunset reviews, for several reasons. Please respond to the following questions in this respect:

Regarding Japan's argument that the phrase "For the purpose of this paragraph" found in Article 11.9 of the SCM Agreement does not exist in Article 5.8 of the Anti-Dumping Agreement makes the latter different from the former in this respect[25], please explain whether in your view the Appellate Body, in *US - Carbon Steel*, based its decision on the cited phrase or rather on its view that investigations and reviews were distinct processes?

Reply

26. The inclusion of the phrase "For the purpose of this paragraph" in Article 11.9 of the SCM Agreement is not relevant to the analysis under the AD Agreement. Article 5 is entitled "Initiation and Subsequent Investigation" and the *de minimis* standard for investigations is found in Article 5.8. There is no *de minimis* standard in Article 11 of the AD Agreement generally, and there is no *de minimis* standard in Article 11.3 of the AD Agreement specifically.

27. The Appellate Body in *US – Carbon Steel* did not base its finding concerning the *de minimis* standard for sunset reviews on the phrase "for the purpose of this paragraph". The Appellate Body, in discussing Article 21.3 found, inter alia, that – (1) the plain text of Article 21.3 does not contain a *de minimis* standard and that such silence must have meaning (para. 64); (2) Article 11 is entitled "*Initiation and Subsequent Investigation*" and does not contain language extending the obligations found there beyond investigations (para. 67); (3) there is no cross-reference to Article 11.9's *de minimis* standard despite the frequent use of cross-references elsewhere in the SCM Agreement (para. 69); and (4) there is an express reference to Article 12, but not Article 11 (although both provisions contain rules related to investigations), in Article 21.4. The Appellate Body concluded that "original investigations and sunset reviews are distinct processes with different purposes" and that the qualitative differences between investigations and reviews may serve to explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review (para. 87).

(a) With reference to paragraph 82 of the Appellate Body report, does the fact that the Anti-Dumping Agreement contains only one *de minimis* standard necessarily render the logic of the Appellate Body's findings in *US - Carbon Steel* non-transferable to this dispute?

Reply

28. No; as discussed above, the Appellate Body in *US – Carbon Steel* did not base its finding that there is no *de minimis* standard in Article 21.3 solely or principally on the existence of the additional *de minimis* thresholds for developing countries found in the SCM Agreement. The Appellate Body's finding of no *de minimis* standard for sunset reviews under Article 21.3 of the SCM Agreement was based on an analysis of the text, context, object and purpose of Article 21.3 in particular and the SCM Agreement as a whole.

(b) With respect to the decision of the Appellate Body in *US - Carbon Steel* and with reference to the *US - DRAMS* panel report, does the use of the term "cases" in Article 5.8 also embrace sunset reviews?

[25] Japan Second Written Submission, para. 134.

Reply

29. No; the term "cases" in Article 5.8 does not embrace sunset reviews. The Appellate Body in *US – Carbon Steel*, addressing Article 11.9, the parallel provision in the SCM Agreement, stated:

> We do not subscribe to the view, expressed by Japan, that the use of the word "cases" (rather than the word "investigation") in the second sentence of Article 11.9 means that the application of the *de minimis* standard set forth in that provision must be applied in *all* phases of countervailing duty proceedings – not only in investigations. The use of the word "cases" does not alter the fact that the terms of Article 11.9 apply the *de minimis* standard only to the investigation phase. We note further that the panel in US - DRAMS rejected a similar argument with respect to the meaning of the word "cases" in Article 5.8 of the Anti-Dumping Agreement, a provision almost identical to Article 11.9 of the SCM Agreement.[26]

The Appellate Body's reasoning, not to mention the reasoning of the *US – DRAMs* panel, is equally valid in this proceeding.

IV. DETERMINATION OF LIKELIHOOD OF DUMPING/DUMPING MARGINS IN SUNSET REVIEW

A. NATURE OF SUNSET DETERMINATIONS

UNITED STATES

89. How do you respond to Japan's reference in para. 28 of its oral statement at the second Panel meeting to the recent *EC – Bed-Linen 21.5* panel report and the Appellate Body decision in *US - Carbon Steel* as supportive of Japan's argument that "quantification" of the probable margin of dumping "is a must"?

Reply

30. The report issued by the Article 21.5 panel in *EC – Bed Linen* cited by Japan does not address sunset reviews under Article 11.3 of the AD Agreement.[27] Rather, it concerns quantification of dumping margins *in antidumping investigations*. The United States does not dispute that quantification of dumping margins is required in antidumping investigations. However, quantification of likely future dumping margins is not required in sunset reviews under Article 11.3 of the AD Agreement.

31. The Appellate Body's findings in *US – Carbon Steel* in fact support the United States' position that quantification is not required in sunset reviews. Japan's argument that quantification is required is based on the panel's finding in *US – Carbon Steel* that "in our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization."[28] Japan neglects to mention, however, that the panel's finding on quantification is tied inextricably to its (erroneous) finding on *de minimis*. Specifically, the panel stated:

---

[26] *US - Carbon Steel*, note 58 (emphasis in original; citation omitted).

[27] Panel Report on *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/RW, 29 November 2002 (unadopted), para. 6.128.

[28] Panel Report on *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany ("US - Carbon Steel Panel Report")*, WT/DS213/R, adopted 19 December 2002, para. 8.96.

> Nor are we persuaded by the US argument that, as there is no obligation to quantify subsidization in sunset reviews, there can be no obligation to apply a de minimis standard. We consider that, *because there is an obligation to apply a de minimis standard*, and this cannot be done unless subsidization is quantified, there is a consequential obligation to quantify the likely future rate of subsidization.[29]

32. In other words, the panel's finding that quantification is required follows directly from its finding that there is an obligation to apply a *de minimis* standard. The Appellate Body in *US - Carbon Steel* overturned the panel's finding on *de minimis* and found that there is no *de minimis* standard applicable to sunset reviews under Article 21.3 of the SCM Agreement.[30] The Appellate Body's reasoning on this issue is equally applicable in this case. Because there is no obligation to apply a *de minimis* standard, the premise for the *US – Carbon Steel* panel's analysis is missing and therefore its conclusion does not follow. In any event, there would be no rationale for requiring quantification of a likely future amount of dumping in the absence of a *de minimis* standard.

90. How, if at all, does the United States conduct a "rigorous"[31], "prospective"[32] analysis in sunset reviews? In the view of the United States, what constitutes an adequate factual basis for a sunset review? What consideration, if any, is given under US law to likely changes in export prices and normal values? Considering the fact that anti-dumping proceedings concern individual exporting companies' pricing policies, does the United States take into account changes in such policies in its sunset determinations? If so, how? Please cite the relevant portions of the record.

Reply

33. The purpose of a sunset review is to determine, based on a predictive analysis, whether the conditions necessary for the continued imposition of an antidumping duty exist. Thus, the focus of a sunset review under Article 11.3 is likely future behaviour if the remedial measure were removed, not whether or to what extent dumping currently exists or has existed in the past. Thus, consideration of factors which serve to advance this predictive analysis may be relevant to the inquiry. Commerce considers the past behaviour of the exporters and any information submitted by the interested parties relevant to the likelihood inquiry. In addition, other factors which may be considered are cost, price, market or economic data, provided that Commerce deems this information relevant to the likelihood inquiry. Interested parties may also submit any information they deem relevant to the issue of likelihood.

34. In this context, the outcome in each case is determined on the facts of that particular case and must be supported by sufficient evidence on the record of the sunset review at issue. Once a sunset review is initiated, an administering authority is required by Article 11.3 to determine whether dumping is likely to continue or recur if the order is revoked. The record in a sunset review must contain sufficient evidence to support the conclusion that there is a likelihood of dumping in the future. The United States considers that, when exporters have continued to dump in the period following the imposition of the duty and prior to the sunset review (*i.e.* with the discipline of the order in place), this evidence is sufficient to support an affirmative likelihood determination absent information demonstrating that the dumping will cease.

35. With respect to price and cost information, as stated above and in our earlier submissions, parties may submit any additional information that they deem relevant and wish Commerce to

---

[29] *Id.*, para. 8.72.
[30] *US – Carbon Steel*, para. 92 (emphasis added).
[31] *Id.*, para. 71.
[32] *US – Carbon Steel Panel Report*, para. 8.96.

consider. Section 351.218 of the regulations provides that a party may submit any information it deems relevant and which it wishes Commerce to consider in making the sunset determination. Commerce may consider and has considered[33] export price and normal value information, as well as other factors[34] in making its likelihood determination in a sunset review.

36. After Commerce issues its final determination of likely dumping, pursuant to Section 751(c) of the Act, the USITC conducts a review to determine whether revocation of the order or termination of the suspended investigation would likely lead to the continuation or recurrence of material injury.[35] In determining whether injury would be likely, the USITC considers "the likely volume, price effect and impact of the subject merchandise on the industry."[36] The USITC takes into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, whether the industry is vulnerable to material injury if the order is revoked, and any findings by Commerce regarding duty absorption under section 1675(a)(4) of the Act.[37]

37. Thus, only after Commerce finds that dumping is likely to continue or recur *and* the USITC finds that injury is likely to continue or recur will the antidumping duty order be continued.

BOTH PARTIES

91. In your view, do "changed-circumstances" reviews under Article 11.2 and sunset reviews under Article 11.3 of the Agreement require the application of different degrees of rigour by the authorities? If so, why and in what respects?

Reply

38. We are unclear as to what the Panel means by the application of "degrees of rigour" with respect to reviews under Articles 11.2 and 11.3. However, the Appellate Body has explained that "the determination made in a review under Article 21.2 must be a meaningful one...."[38] The Appellate Body also has stated that,

> [O]n the basis of its assessment of the information presented to it by interested parties, as well as of other evidence before it relating to the period of review, the investigating authority must determine whether there is a continuing need for the application of countervailing duties. The investigating authority is not free to ignore such information. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose.[39]

39. The United States considers that reviews under both Article 11.2 and 11.3 also should be "meaningful" and should be based on assessment of the information presented and other evidence relating to the period of review. This does not mean that the analysis and the issues are identical, as evidenced by the differences in the language between Article 11.2 and Article 11.3. The determination as to whether there is a continuing need for the application of duties must be considered in light of the specific requirements of each Article.

---

[33] *See Sugar & Syrups from Canada*, 65 Fed. Reg. 735 (Jan. 6, 2000) (Exhibit JPN-25(l)).

[34] *See Brass Sheet & Strip from the Netherlands*, 64 Fed. Reg. 48362 (Sept. 3, 1999) (Exhibit JPN-25(m)).

[35] Section 751(c) (Exhibit JPN-1(e)).

[36] 19 USC. § 1675a(a)(1); USITC Pub. 3364 at 17.

[37] 19 USC. § 1675a(a)(1).

[38] *US – Carbon Steel*, para. 71.

[39] Appellate Body Report on *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Flat Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, para. 61.

UNITED STATES

94. The Panel notes that the Final Sunset Determination in the instant sunset review indicates that the additional information submitted by NSC on 11 May 2000 would not change the DOC's ultimate conclusion regarding the likelihood of continuation. The Panel also notes Japan's response to Question 47 and US response to Question 60 from the Panel. In your view:

(a) Would the United States have been more vulnerable to an allegation of acting inconsistently with the Agreement had the DOC's final determination not followed this line of reasoning?

Reply

40. No. Commerce's determination was that dumping is likely to continue or recur if the antidumping duty were revoked because the record evidence demonstrated that the Japanese exporters continued to dump during the five-year period preceding the sunset review. Thus, Commerce reasonably concluded, absent any explanation or evidence to the contrary, that Japanese exporters of corrosion-resistant steel would continue to dump were the order revoked.

(b) If your answer to (a) is in the affirmative, do you think the inclusion of that phrase cured that inconsistency? If so, in what way(s)?

Reply

41. *See* US answer to Question 94(a).

95. With reference to the US response to Panel Question 64 following the first meeting, would the United States explain why the "good cause" standard is applicable only in sunset reviews under US law (and not to investigations and other types of reviews)?

Reply

42. The statute at section 752(c)(2) requires "good cause" be shown before Commerce is *required* to consider "other factors" information in making the likelihood determination in a sunset review. Generally, under US administrative law, an agency is required to explain its determinations and to address each argument and piece of information submitted by the interested parties to the proceeding in its final determination. The "good cause" provision is an evidentiary threshold requirement under which the submitting party must demonstrate that the "other factors" information is relevant to an analysis of the likelihood issue before consideration by Commerce is *required* in sunset review.

96. What is the legal relationship between Articles 11.1 and 11.3? Does the inclusion of the phrase "to the extent necessary" in Article 11.1 of the Agreement suggest that the investigating authorities in sunset reviews are required to quantify the likely margin of dumping, or is an authority free to act without limitation?

Reply

43. In *US - Carbon Steel*, the Appellate Body explained the relationship between Articles 21.1 and 21.3 of the SCM Agreement:

> The first paragraph of Article 21 stipulates that a countervailing duty "shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury". We see this as a general rule that, after the imposition of a

> countervailing duty, the continued application of that duty is subject to certain disciplines. These disciplines relate to the *duration* of the countervailing duty..., its *magnitude*..., and its *purpose*.... Thus, the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews. This does not, however, assist us in determining whether a specific *de minimis* standard is intended to be applied in an Article 21.3 review.[40]

44. The language of Article 11.1 of the AD Agreement is parallel to the language of Article 21.1 of the SCM Agreement. Consequently, Article 11.1 of the AD Agreement simply contains a "general rule" that, after the imposition of an antidumping duty, the continued application of that duty is subject to certain disciplines. Moreover, just as such a general rule does not assist one in determining whether a specific *de minimis* standard is required in sunset reviews, it does not assist one in determining whether quantification of likely future margins is required in sunset review.

45. The United States notes that Article 11.1 of the AD Agreement does not, in any way, reference the quantification of dumping margins in *sunset reviews*. Furthermore, there is simply no reason for Commerce to quantify dumping margins for purposes of the likelihood of dumping determination in sunset reviews; Commerce quantifies dumping margins in annual administrative reviews and *only assesses dumping duties to the extent that dumping is found in such reviews*. Neither Article 11.1 nor Article 11.3 of the AD Agreement (1) obligates an administering authority to quantify, or determine the magnitude of, dumping margins for purposes of sunset reviews or (2) includes any specifications regarding the methodology or methodologies that must be employed in such reviews. Commerce reports the margin likely to prevail in the event of revocation to the USITC purely as a matter of US domestic law.

97. Does a determination of likelihood of continuation or recurrence of dumping require a comparison with a certain historical point of reference when "dumping" was determined to exist? If so, how does the United States respond to the proposition that certain potential flaws in that historical reference point for "dumping" – that is, that the existence of dumping may originally have been established through the use of WTO-inconsistent methodologies - render the sunset likelihood of dumping determination also inconsistent with Article 11.3?

Reply

46. As explained in detail in our previous submissions, Commerce's determination of the likelihood of continuation or recurrence of dumping is qualitative, not quantitative. Moreover, the magnitude of dumping found in the original investigation played no role whatsoever in Commerce's analysis of the likelihood issue. Japan itself has acknowledged this fact.[41] Consequently, even if the Panel were to determine that "the existence of dumping may originally have been established through the use of WTO-inconsistent methodologies," such a determination would have no bearing on the validity of the likelihood of dumping determination in question.

47. Furthermore, in the instant case, Commerce found in post-URAA annual administrative reviews, *i.e.*, reviews subject to the requirements of the WTO Agreement, that dumping continued to occur in the five years preceding the sunset review. These findings formed the basis of Commerce's determination that dumping was likely to continue or recur if the order were revoked. If the respondents in the annual administrative reviews believed that Commerce's dumping calculations were inaccurate or otherwise contrary to US law, they could have filed judicial challenges to those calculations. If Japan believed that Commerce's dumping calculations in the annual administrative reviews were contrary to the WTO Agreement, Japan could have filed WTO challenges to those

[40] *US - Carbon Steel*, para. 70.

[41] *See, e.g.*, Japan Second Submission, para. 83.

calculations. Neither the respondents nor Japan took advantage of the opportunities at their disposal to challenge the results of the annual administrative reviews.

98. How does the United States ensure fulfilment of the obligation in Article 11.1? Why, and for what purpose, did the DOC in fact quantify the likely dumping margin in this sunset review?

Reply

48. The United States fulfils the obligation in Article 11.1 of the AD Agreement by subjecting the continued application of antidumping duties to certain disciplines, including "changed circumstances" reviews as appropriate under Article 11.2, and the sunset review discipline under Article 11.3 of the AD Agreement. In this review, as in all full sunset reviews, Commerce, in accordance with the requirement in US law (but not under the AD Agreement), reported the margin of dumping likely to prevail in the event of revocation to the USITC. The reported margin plays no role whatsoever in Commerce's analysis of the likelihood of continuation or recurrence of dumping. That analysis, qualitative in nature, is focused on the determination of a *likelihood* of future dumping, not a *magnitude* of future dumping.

BOTH PARTIES

99. The Panel notes Japan's statements in paragraphs 26-28 of its oral statement at the second meeting of the Panel with the parties regarding the quantitative vs. qualitative nature of a determination of likelihood of continuation or recurrence of dumping in a sunset review. In that respect, please explain, how (if at all), and the extent to which, the use of the term "dumping" in Article 11.3 renders the obligations stemming from Article 2 of the Agreement in respect of the calculation of dumping margins applicable in sunset reviews?

Reply

49. As explained in detail in our previous submissions, Article 11.3 of the AD Agreement does not require that current or future dumping be quantified in sunset reviews. Consequently, the obligations stemming from Article 2 of the AD Agreement in respect of the calculation of dumping margins are not applicable in the context of sunset reviews.

50. Furthermore, as noted above, Commerce quantifies current dumping margins in annual administrative reviews, not sunset reviews. If Japan's argument here is intended to require administering authorities to quantify *current* dumping margins, that purported requirement is satisfied by Commerce's conduct of annual administrative reviews. If, on the other hand, Japan's argument here is intended to require that administering authorities speculate as to future pricing behaviour, Japan should be required to explain in detail how such speculation can, and why it should, be undertaken.

100. The Panel notes the following statement of the Panel, in *US - Carbon Steel*:

> **In our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidisation. We do not consider, however, that an investigating authority must, in a sunset review, use the same calculation of the rate of subsidisation as in an original investigation. What the investigating authority must do under Article 21.3 is to assess whether subsidisation is likely to continue or recur should the CVD be revoked. This is,**

> **obviously, an inherently prospective analysis. Nonetheless, it must itself have an adequate basis in fact.**[42]

In your view, what, if any, are the implications of that finding to the present proceedings, particularly regarding the quantitative vs. qualitative nature of the likelihood determinations under Article 11.3 and the issue of whether or not Article 11.3 requires the establishment of the likely margin of dumping (or, at least, an evaluation of whether export prices are likely to be lower than normal values in the foreseeable future)?

Reply

51. *See* answer to Question 89 (above). In addition, in light of the Appellate Body's finding that there is no *de minimis* standard applicable to countervailing duty sunset reviews, and in light of the parallel nature of the provisions governing antidumping sunset reviews, it is clear that there is no *de minimis* standard applicable to antidumping sunset reviews. Consequently, as pointed out in our second written submission, quantification of likely future dumping margins would have no function in the context of the likelihood of dumping determination. Commerce's analysis, qualitative in nature, is focused on the determination – required by Article 11.3 of the AD Agreement – of a *likelihood* of future dumping, not a *magnitude* of future dumping.

B. "ORDER-WIDE BASIS"

BOTH PARTIES

101. How, if at all, is Article 9.4 relevant to the issue of order-wide vs. company specific determinations in sunset reviews? Are there any (other) contextual elements in the Agreement that shed light on this issue?

Reply

52. Article 9.4 of the AD Agreement, consistent with Article 9.2 of the AD Agreement, assumes that the definitive antidumping duty is imposed with respect to a "product," *i.e.*, on an order-wide basis, not with respect to individual companies found to be dumping. This assumption is what enables Article 9.4 to permit antidumping duties to be applied to "imports from exporters or producers not included in the examination" conducted in the context of the antidumping duty investigation. As pointed out in our written submissions, this assumption undermines Japan's claim that the definitive antidumping duty is necessarily reviewed under Article 11.3 of the AD Agreement on a company-specific basis.

53. We have pointed out in our written submissions another relevant contextual element in the AD Agreement: the likelihood of injury determination under Article 11.3 is inherently order-wide in nature, not company-specific. Article 11.3 does not, however, distinguish between the degree of specificity required for likelihood of injury determinations and the degree of specificity required for likelihood of dumping determinations. Consequently, neither of these determinations is required to be made on a company-specific basis.

102. How do you respond to the following reading of Articles 11.3 and 6.10 by virtue of the cross-reference in Article 11.4 to "the provisions of Article 6 regarding evidence and procedure"?

> **Article 11.3 requires that an investigating authority in a sunset review make a determination of likelihood of continuation or recurrence of dumping. An**

[42] *US - Carbon Steel Panel Report*, para. 8.96.

investigating authority may also proceed to establish the margin of dumping likely to prevail if a duty is terminated. The obligation in Article 6.10 that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation" applies where the investigating authority proceeds to establish the margin of dumping likely to prevail.

Reply

54. Japan's claim is not that Commerce failed in the instant sunset review to establish company-specific margins likely to prevail in the event of revocation;[43] Commerce, in fact, found that two Japanese producer/exporters were likely to dump in the event of revocation, and reported to the USITC that the rate of dumping likely to prevail would be 36.41 percent.[44] Rather, Japan claims that Commerce improperly made its likelihood of dumping determination on an order-wide basis. This attempt to require, for purposes of sunset reviews under Article 11.3 of the AD Agreement, a *substantive* application of Article 6.10 of the AD Agreement is precluded by Article 11.4 of the AD Agreement, which provides for the inclusion only of the *procedural* aspects of Article 6.

UNITED STATES

103. In a likelihood of continuation or recurrence of dumping determination in a sunset review, how, if at all, would the United States deal with the situation where the specific circumstances of one exporter from a given exporting Member with multiple exporters would absolutely preclude that exporter from possibly continuing or recurring dumping upon termination of the duty?

Reply

55. As an initial matter, we note that those facts are not present in the instant case. Under US law, it is possible under certain circumstances for companies to request company-specific revocations of antidumping duty orders.[45] Such requests, however, are not addressed in the context of the likelihood of dumping determination in sunset reviews under Article 11.3 of the AD Agreement.

C. "AMPLE OPPORTUNITY"

BOTH PARTIES

104. In your view, does the 30-day "good cause" requirement for the submission of information in a sunset review conform to the requirement of Article 6.1 of the Agreement that the interested parties be given ample opportunity to submit in writing all evidence that they deem relevant? Why or why not?

Reply

56. There is no 30-day "good cause" requirement under US law for the submission of information in a sunset review. The statute and regulations require that "good cause" be shown before Commerce is required to consider "other factors" information in a sunset review. The statute, at section 751(c)(2), leaves the determination of whether "good cause" has been shown to the discretion of Commerce.

---

[43] Japan First Written Submission, paras. 202-06.
[44] Final Results of Sunset Review, 65 Fed. Reg. at 47,381.
[45] 19 C.F.R. § 351.222(b)(2).

57. Article 6.1 provides that parties be given the opportunity to submit any information they deem relevant. Section 351.218(d)(3)(iv)(B) of Commerce's Sunset Regulations provides that a party may submit "any other relevant information or argument that the party would like [Commerce] to consider" in the sunset review.

58. Article 6.1.1 requires that parties be given at least 30 days to respond to a questionnaire. Section 351.218(d)(3)(i) of Commerce's Sunset Regulations provides those 30 days. In addition, interested parties have the opportunity to request extensions – section 351.302(c) provides that a party may request an extension of a specific time limit and section 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. Thus, the statute and regulations provide ample opportunity for interested parties to submit whatever evidence they wish in a sunset review in accordance with the obligations set forth in Article 6.1.

ANNEX E-11

COMMENTS BY JAPAN ON US REPLIES TO PANEL QUESTIONS – SECOND MEETING

I. INTRODUCTION

1. This submission comments on certain responses provided by the United States Government (the "USG") in answer to the Panel's questions raised in connection with the second Panel meeting. Japan will take this opportunity primarily to rebut only those arguments that have not yet been addressed, or those in which the USG did not properly address the Panel's questions, as our answers to the Panel's second set of questions and our previous submissions largely already reflect our rebuttals to the USG's answers to the Panel's questions. Further, in this submission, Japan does not address each of the USG's answers to particular questions. Rather, Japan will address the USG's responses to particular issues raised within the Panel's questioning.

II. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS/"PRACTICE"

2. Japan will not repeat here its previous arguments as to why the Sunset Policy Bulletin is an actionable "administrative procedure" under the AD Agreement. Japan, however, would like to note that the USG misunderstands the Appellate Body report in *US – Carbon Steel*.[1] The Appellate Body discussed the WTO-consistency of the US statute under Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, which requires the USG to ensure the "conformity of its laws, regulations and administrative procedures" with the provisions of those Agreements. The Appellate Body did not discuss "administrative procedures" because the EC appealed the US statute, not "administrative procedures." As Article 18.4 of AD Agreement and Article XVI:4 of the WTO Agreement provide, the Appellate Body's rationale for reviewing a Member's laws applies to regulations and administrative procedures with equal force.

3. The USG, however, conveniently ignores the language "administrative procedures" in Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement, and argues that only the US statute and regulations are within the scope of these provisions. The USG also erroneously argues that the Sunset Policy Bulletin is comparable to that of agency precedent,[2] and "administrative precedent, regardless of how often repeated, has no functional life of its own."[3] As argued throughout this proceeding, the Sunset Policy Bulletin set pre-established administrative procedures for conducting likelihood determinations, illustrating how USDOC would make dumping determinations in anti-dumping sunset reviews. Procedures set forth in the Sunset Policy Bulletin are not a record of individual applications of US laws, but were published before USDOC initiated its first sunset review in the USG's post-Uruguay Round anti-dumping regime. USDOC's faithful adherence to the Sunset Policy Bulletin in all anti-dumping sunset reviews demonstrates the concrete nature of the procedures as set forth in the Bulletin. Therefore, contrary to the USG's assertions, the Bulletin does, in fact, have a "functional life" of its own. The USG's failure to substantiate its rebuttal that the Sunset Policy Bulletin is "non-binding,"[4] in the face of Japan's establishment that USDOC followed the Bulletin in all 227 previous anti-dumping sunset reviews,[5] also demonstrates that USDOC does not

[1] Answers from the United States to Questions from the Panel in connection with the Second Substantive Meeting of the Panel, 22 January 2003 ("USG Answers"), at para. 1.

[2] USG Answers, at para. 10.

[3] USG Answers, at para. 4.

[4] USG Answers, at para. 10.

[5] USG Answers, at para. 14, and Exhibit JPN-31.

have "any effective discretion"[6] to deviate from the Sunset Policy Bulletin. Given the degree to which USDOC adheres to the Bulletin, it has become *de facto* mandatory in nature.

4. In response to question 80, the USG cites the panel's findings in *US – Steel Plate from India* to support its assertion that the frequency with which a certain practice is repeated does not turn that "practice" into an actionable measure.[7] The current case, however, is quite distinct from *US – Steel Plate from India*. In that case, India's "general practice" claim was based entirely on a pattern of repeated behaviour by USDOC. In this case, USDOC's repeated pattern of behaviour is directed by the Sunset Policy Bulletin. As discussed throughout this proceeding, USDOC mechanically applied specific methods as set forth in the Sunset Policy Bulletin to make affirmative determinations in all past anti-dumping sunset reviews in which the petitioners participated.

5. The USG also dodged the Panel's question in its response to question 81 with respect to the accuracy of Japan's submitted past history of USDOC's sunset review determinations, stating "{w}hether Japan's figures are accurate is not the issue."[8] In fact, however, the USG effectively admits that USDOC has never terminated imposition of anti-dumping duties in any anti-dumping sunset reviews in which the domestic industry participated. The single negative USDOC sunset determination the USG cites is a CVD case. As the USG is aware by now, Japan's dispute in this case involves only anti-dumping sunset reviews, not countervailing duty sunset reviews. An entirely different portion of the Sunset Policy Bulletin[9] applies to CVD sunset reviews as compared with anti-dumping reviews. Japan does not claim in this dispute a WTO-inconsistency with regard to any aspect of the USG's CVD sunset reviews.

6. The USG cites the fact that, of the 150 orders that were revoked, 71 of those were based on the USITC's negative likelihood of injury determination. Again, Japan's claim in connection with this issue is about USDOC's WTO-inconsistent likelihood of dumping determinations. The USG cannot absolve USDOC of its responsibility by reference to the USITC's negative likelihood of injury determinations. USDOC also cannot claim credit for the one case that was already revoked based on a changed circumstances review, or the seven cases that were revoked based on judicially mandated USITC re-determinations of original injury investigations. These cases are completely unrelated to USDOC's sunset review determinations.

7. Finally, the discrepancy in total numbers between the USG's and Japan's analyses is because the USG's figures are both under and over-inclusive. They are under inclusive because they include only those reviews completed by December 2000 whereas Japan's list goes through August 2002. They are over inclusive because they include CVD cases, which we excluded.[10] Moreover, the USG

---

[6] *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, at para. 7.123, 31 July 2002. ("we are of the view that the existence of some form of executive discretion alone is not enough for law to be prima facie WTO-consistent, what is important is whether the government has effective discretion to interpret and apply its legislation in a WTO-consistent manner.")

[7] See *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R, at para. 7.22 (29 July 2002) ("*US – Steel Plate from India*").

[8] USG Answers, at para. 15.

[9] *See* section III. of the Sunset Policy Bulletin (Ex. JPN-6).

[10] The USG states that it based its results on the data in the sunset review schedule as published in the Federal Register at 63 Fed. Reg. 26779 (14 May 1998). *See* US Answers, n. 15. The notice shows that 321 sunset reviews were scheduled to be initiated. These cases were concluded by the end of December 2000. Among those, 53 are CVD cases, and the remainder (268) are AD cases. In contrast, Japan's Exhibit JPN-31 shows all past anti-dumping sunset reviews concluded as of 2 August 2002. Japan was not otherwise able to undertake a comprehensive reconciliation as between the USG's numbers and Japan's analysis because the USG did not provide us a case-by-case breakdown like the one provided in Exhibit JPN-31. The fact, however, remains that for all anti-dumping sunset reviews in which petitioners have participated, USDOC has never issued a negative sunset review determination.

has never provided any rebuttal to Exhibit JPN-31, which Japan submitted as an attachment to its First Written Submission. As such, the USG effectively admits that USDOC has never made a negative likelihood determination in an anti-dumping sunset review in which the domestic industry participated.

8. We would also like to note that the USG dodged the Panel's question in its response to question 82 with respect to the meaning of the terms "procedure," "method," and "guideline." The ordinary meaning of "procedure" is the "manner of proceeding" or "conduct" or "behaviour."[11] When coupled with the word administrative, it means the conduct or behaviour of an administrator, in this case the administering authority. The Sunset Policy Bulletin falls squarely within this definition of "administrative procedures" for the conduct of USDOC's sunset reviews.

III. EVIDENTIARY STANDARDS FOR INITIATION OF SUNSET REVIEWS

9. In response to question 85, the USG purports to provide three cases in which USDOC either did not initiate a sunset review or terminated a sunset review based on lack of interest by the domestic industry. None of these cases, however, support the USG's position.

- First, *AFBs from Singapore* and *Ball Bearings from Thailand*[12] are CVD cases, not anti-dumping cases, so they are irrelevant to our analysis. But second, the USG itself admits that USDOC terminated these two countervailing cases as a result of Article 21.2 reviews completed in 1996, well before the scheduled initiation date of their sunset reviews. Because these cases had already disappeared at the scheduled time of initiation of their sunset reviews, no sunset reviews were initiated. The fact that sunset reviews of these cases were not initiated was not based on USDOC discretion, but on the fact that there was no case to review.
- The USG's citation of *Kiwifruit from New Zealand* – which is the only anti-dumping case to which the USG cites for its support – is rather incredible.[13] In fact, USDOC did automatically initiate its sunset review of the case.[14] This case was simply terminated under its Article 11.2 changed circumstances review procedures because the 11.2 review was completed after USDOC automatically initiated the sunset review.[15] This case thus also cannot support the USG's argument.

10. The USG also cites seven anti-dumping and CVD cases that had been rescinded based on judicially mandated re-determinations conducted by the USITC.[16] Again, these sunset reviews were not automatically initiated by USDOC because these cases no longer existed at the time of the scheduled initiation dates of their sunset reviews.

---

[11] The New Shorter Oxford English Dictionary, Volume 2 N-Z, p.2363

[12] See *Antifriction Bearings (Other Than Tapered Roller Bearings) And Parts Thereof From Singapore; Final Results of Changed Circumstances Countervailing Duty Reviews and Revocation of Countervailing Duty Orders*, 61 Fed. Reg. 20796 (May 8, 1996), and Ball Bearings From Thailand; Final Results of Changed Circumstances Countervailing Duty Review and Revocation of Countervailing Duty Order, 61 Fed. Reg. 20799 (May 8, 1996).

[13] See August 1999 Sunset Reviews: Termination of Reviews, Final Results of Reviews and Revocation and Termination, 64 Fed. Reg. 59737 (Nov. 3, 1999); and Fresh Kiwifruit from New Zealand: Final Results of Changed Circumstances Review: Revocation of Order, 64 Fed. Reg. 50486 (Sept. 17, 1999).

[14] *See id. See also* Data Compilation of All Sunset Reviews Conducted by USDOC as of August 2002, at p. 12 (Ex.JPN-31).

[15] See id.

[16] *See* USG Answers, n. 23. The USG's cited notice, *Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela* includes six antidumping cases against these countries (A-351-820, A-834-804, A-821-804, A-823-804, A-307-807, A-570-819) and one CVD case against Venezuela (C-307-808).

11. The USG's statement that "Commerce would revoke an order and not initiate a sunset review"[17] is, therefore, inaccurate. In fact, USDOC has no discretion not to initiate in instances where an USDOC's order to impose an anti-dumping duty remains in effect. The USG also argues incorrectly that the phrase "on their own initiate" in Article 11.3 does not require that authorities be given the discretion not to initiate.[18] While we will not repeat our entire argument set forth in our response to question 84, we would like to note that the AD Agreement carefully chooses the term "authorities" and a "Member" throughout its provisions. A "Member" includes all branches of the government of a Member, while the "authorities" include the executive branch only, as footnote 3 defines. The term "their" in the phrase in question indicates "authorities," not a "Member." This distinction thus also clarifies that the phrase requires that the executive branch be given the discretion whether to initiate a sunset review. Japan also notes that, contrary to the USG's argument, this issue is within Japan's claim stating "Section 751(c)(1) and (2) of the Act and the DOC regulation 19 C.F.R. § 351.218(a) and (c)(1) mandate the DOC to automatically self-initiate sunset reviews" without sufficient evidence.[19]

IV. DETERMINATION OF LIKELIHOOD OF DUMPING MARGINS IN SUNSET REVIEWS

A. NATURE OF SUNSET DETERMINATIONS

12. Many of the USG's responses to the questions in this section reflect the USG's incorrect assertion that quantification of a dumping margin in a sunset review is not necessary. The flawed logic in this argument comes from the USG's misinterpretation of the AD Agreement. The USG argues that the text of Article 11.3 does not explicitly provide how to determine "dumping" and, therefore, Article 2 does not apply to Article 11.3. This flawed logic is explicitly stated in the USG's answers to questions 97 and 99.[20] As discussed in our prior submissions,[21] Article 2 applies to the determination of "dumping" throughout the AD Agreement.

13. In response to question 89, the USG asserts that the Appellate Body in *US – Carbon Steel* supports its conclusion that there is no need to quantify the level of future dumping in its likelihood analysis. In that case, however, the Appellate Body indicates that Article 21.1 of the SCM Agreement (the corollary of Article 11.1 of the AD Agreement) requires the authorities to calculate the "magnitude" of dumping in its likelihood analysis.[22] In that case the Appellate Body found:

> The first paragraph of Article 21 stipulates that a countervailing duty "shall remain in force only as long as and to the extent necessary to counteract subsidization which is causing injury". We see this as a general rule that, after the imposition of a countervailing duty, the continued application of that duty is subject to certain disciplines. These disciplines relate to the *duration* of the countervailing duty ("only as long as … necessary"), its *magnitude* ("only … to the extent necessary"), and its *purpose* ("to counteract subsidization which is causing injury"). Thus, the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews.[23]

---

[17] USG Answers, at para. 22.
[18] *Id*.
[19] *See* Japan Request for the Establishment of a Panel, 4 April 2002, para. 1.
[20] USG Answers, at paras. 45, 49.
[21] *See e.g.*, Japan First Submission, at paras. 157-158, and Japan Second Submission, at paras. 86-92.
[22] See *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R at para. 70 (28 Nov. 2002).
[23] *Id*.

14. This indicates that the Appellate Body has recognized the need for an administering authority to evaluate the "magnitude" of dumping to determine if continued imposition of an anti-dumping duty is necessary. By not quantifying the likely level of future dumping there is no means of determining whether continuation is necessary.

15. The panel in *US – Carbon Steel*, also addressed the necessity of an assessment of the likely rate of subsidization in the same context,[24] not as the USG suggests.[25] The panel stated that any "determination" under the SCM Agreement "must be properly substantiated in order for that determination to be legally justified."[26] The panel then further states "a determination of likelihood under Article 21.3 must rest on a sufficient factual basis."[27] In this context, the panel concluded that one element of a sufficient factual basis is "an assessment of the likely rate of subsidization."[28] Consequently, the USG's assertion that simply because a *de minimis* standard may or may not apply to sunset reviews does not obviate a Member's obligation to quantify the likely rate of future dumping for the determination of likelihood of dumping.

16. In its response to question 90, the USG argues that USDOC does consider "other factors" if it deems them relevant. The USG then cited two cases – *Sugar & Syrups from Canada* and *Brass Sheet & Strip from the Netherlands* – in an attempt to support its argument. Even in these cited cases, USDOC did not base its final determinations on factors other than past dumping margins and import volumes.[29] If it were so easy to submit evidence and expect USDOC to conduct a legitimate analysis of the issues beyond the four scenarios in sections II.A. 3 and 4 of the Sunset Policy Bulletin, USDOC would be able to cite to more than these two cases. This alone demonstrates a far too restrictive standard in the Sunset Policy Bulletin to conduct a proper prospective analysis, and the irrebuttable nature of the presumption that the standard set.

17. Moreover, the USG answer to question 91 proves that the USG has no good reason why USDOC can conduct meaningful 11.2 reviews and yet does not conduct meaningful 11.3 sunset reviews. Both of these reviews contain the same "likely" standard, yet only USDOC's Article 11.2 analysis can be considered meaningful.

18. Related to this issue is the USG's answer to question 99. In that question the USG attempts to assert that Japan should explain why USDOC should be required to evaluate future pricing behaviour.[30] This response is disingenuous. As the Appellate Body in *US – Carbon Steel* stated, Article 11.3 requires the authorities to make "a fresh determination based on credible evidence"[31] through a "rigorous" review.[32] In 11.2 reviews USDOC evaluates future pricing behaviour and examines "other factors" that may relate to that behaviour. In fact, in 11.2 reviews USDOC seeks out evidence such as price trends and costs, currency movements, and other market and economic factors without first requiring a party to establish "good cause." It is inconceivable that it is impossible to make a similar prospective "likely" analysis in 11.3 sunset reviews and quantify a likely future dumping margin.

19. In response to question 94, it appears that the USG admits that the "even if" statement in its final results of the sunset review on corrosion-resistant carbon steel flat products from Japan is

---

[24] *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R (3 July 2002).

[25] *See* USG Answers, at paras. 31, and 44.

[26] *US – Carbon Steel*, WT/DS213/R at para. 8.92.

[27] *Id*., at para. 8.94.

[28] *Id*., at para. 8.96.

[29] *See* Japan's Second Written Submission at para 67, Rebuttal by Japan to the USG's Answers to Panel Questions in connection with the First Panel Meeting, at paras. 26-27

[30] USG Answers, at para. 50.

[31] *US – Carbon Steel*, para. 88.

[32] *See id*. at para. 71.

irrelevant to USDOC's final determination. The USG also admits that USDOC did not consider NSC's submitted information or even the arguments in NSC's case brief. The USG's answer also confirmed, as Japan has argued previously, that use of the "even if" statement does not cure USDOC's Article 11.3 and Article 6 inconsistencies. Article 11.3 requires the authorities to rigorously collect and evaluate prospective evidence in its likelihood determination. USDOC did not base its determination on any prospective evidence that NSC submitted. It simply dismissed the information without explanation. USDOC then relied solely on historical dumping margins and import volumes to make its determination. This is not a proper evaluation under Article 11.3. For further explanation on the "even if" statement, see Japan's answer to question 94(c) in connection with the second Panel meeting.[33]

20. With respect to question 95, the USG simply does not comprehend the extent to which the "good cause" standard shifts the burden away from USDOC and to respondents. Under Article 11.3 the burden rests with the authorities to determine whether dumping is "likely" to continue or recur. Through application of the "good cause" standard and the four-scenario test in the Sunset Policy Bulletin, USDOC shifts that burden to the respondents. USDOC forces respondents to prove with "other evidence" that they are "not likely" to dump in the future.

21. The USG never directly responds to question 95, which asked why the Sunset Policy Bulletin shifts the burden of proof to respondents. The USG never explains why its does not similarly shift this burden of persuasion to respondents in other proceedings. Presumably the reason USDOC does not answer this question is because they cannot, as there are no such restrictions in USDOC's other proceedings.

22. In response to question 97,[34] the USG states that the magnitude of dumping found in the original investigation played no role whatsoever in USDOC's likelihood of dumping determination. Apparently, USDOC does not care about the level of dumping in determining the likelihood of dumping in its sunset reviews. No matter how small the magnitude and the trends in the magnitude of dumping since the original investigation, USDOC makes an affirmative sunset ruling.

23. In the same response,[35] however, the USG made the statement that USDOC based its determination on post-URAA annual review margins. This is only half true. As stated in the final determination in the instant case, and also stated in the Sunset Policy Bulletin, USDOC bases its determination on all past margins, including the original investigation margins and margins calculated in administrative reviews – *i.e.*, both pre- and post-WTO margins.[36] The USG's statement that "Japan itself has acknowledged this fact"[37] is incorrect. Indeed, if it were true that administrative reviews are the primary basis for USDOC's analysis, then USDOC would not have sent the originally calculated dumping rates to the USITC for purposes of its injury analysis in 218 out of 227 sunset reviews. [38]

24. Finally, in its response to question 97,[39] the USG still misunderstands an important part of Japan's claim on this point. Japan claims that USDOC's use of the dumping margins calculated in

---

[33] *See also* Japan's Second Submission, at paras. 76-79; and Japan's Answer to the Panel's Questions in connection with the First Panel Meeting, at para 157 (answering question 47).

[34] USG Answers, para. 46.

[35] USG Answers, para. 47.

[36] *See* the Sunset Policy Bulletin, section II.A.1 ("the Department will consider – (a) the weighted-average dumping margins in the investigation and subsequent reviews.") (Ex.JPN-6). *See also* Japan First Submission, paras. 140-141 and 166.

[37] *See* USG Answers, at para. 46.

[38] *See* Ex. JPN-31. In 8 of remaining 9 cases, USDOC reported more recent dumping margins than those in original investigations because the recently calculated margins were higher than those in the original investigations (6 cases) or because dumping margins, which the Department of Treasury calculated, were not usable (2 cases).

[39] *See* USG Answers, at para. 47.

administrative reviews for purposes of its dumping analysis in sunset reviews is inconsistent with the AD Agreement (*e.g.*, when USDOC undertakes its zeroing analysis). Japan does not claim in this dispute that margin calculations for the purpose of administrative reviews are contrary to the AD Agreement or that the calculation is contrary to US law.

25. The USG alleges in its response to question 99 that an annual administrative review satisfies the quantification of current dumping margins.[40] This allegation has two flaws. First, the dumping margins that USDOC calculates in administrative reviews are still inconsistent with the AD Agreement due to USDOC's zeroing practice. These dumping margins, thus, must be adjusted to be WTO-consistent. Second, there are sunset reviews for which a concurrent administrative review is not conducted.[41] In corrosion-resistant carbon steel flat products from Japan, for example, the most recently calculated dumping margins are based on the period ending July 1998.[42] The sunset review was later initiated in September 1999.[43] Thus, there are sunset reviews, including corrosion-resistant carbon steel flat products from Japan, for which no administrative reviews provide "current" dumping margin information.

B. "ORDER-WIDE BASIS"

26. The USG incorrectly argues that Article 9.4 assumes that the definitive anti-dumping duty is imposed on an order-wide basis.[44] To the contrary, Article 9.4 supports our argument that dumping determinations must be made on a company-specific basis. Article 9.4 applies only in exceptional cases where examination of all responding parties is "impracticable."[45] Article 6.10 establishes when it is "impracticable" to examine all responding parties, and how the authorities may select examining parties. In other words, the examination of a limited number of respondents in a case is the exception, and examination of all respondents to determine dumping on a company-specific basis is the rule. Article 9.4 then provides contingent rules on the maximum amount of anti-dumping duties that the authorities may collect from unexamined producers, whose dumping margins could be "the weighted average margin of dumping established with respect to the selected exporters or producers."[46] As such, Article 9.4 supplements the company-specific dumping determination rule in Article 6.10.

27. More importantly, the provisions of Article 9.4 set forth rules with respect to anti-dumping duties which may be collected from unexamined respondents after the authorities find dumping, injury, and causation in accordance with Articles 2, 3, and 6. The present perfect tense in the first phrase of Article 9.4 "{w}hen the authorities *have limited* their examination" (emphasis added) indicates that provisions of Article 9.4 apply only after the limited examination of selected respondents is completed. The following phrase of Article 9.4 then states "any dumping *duty* applied to imports from exporters or producers not included in the examination shall not exceed … ." It further states "the authorities shall apply individual duties … to imports from exporter or producer … who *has provided* the necessary information *during the course of the investigation*" (emphasis added). This language shows that Article 9.4 applies to the stage of anti-dumping duty collection only, not to the determination of dumping and injury. Article 9.4 is irrelevant to either the dumping or injury determinations under the AD Agreement.

[40] *See* USG Answers, para 50.

[41] In fact, there are many sunset reviews, for which no administrative review has ever been conducted since their original investigations.

[42] *See* Japan's First Submission, at para 34, and Ex.JPN-15e.

[43] *See* Ex. JPN-19a.

[44] *See* USG Answer, at para. 52.

[45] Article 6.10 of the AD Agreement.

[46] Article 9.4(i). Article 9.4(ii) is related to Members that have adopted the prospective duty collection system, and thus does not apply to the USG.

28. Indeed, if Article 9.4 were to apply to the dumping and injury determinations, imports from all unexamined producers would then be irrebuttably presumed to be dumping. For example, assume that the authorities investigated 3 out of 10 producers, and found only one producer to be dumping. Even in such a situation, imports of the unexamined seven producers would be regarded as being dumping at the rate of the one individually reviewed producer, which produced positive dumping margins. Such an unreasonable result is not contemplated by the drafters of the AD Agreement.

29. It is Japan's view that the authorities are required to evaluate the evidence with respect to all examined producers to determine the existence of margins of dumping for imports from unexamined producers in an "unbiased and objective" manner.[47]

30. In its response to question 101, the USG appears to confuse the injury analysis with the company-specific dumping analysis. Dumping determinations pursuant to Article 6.10 are always company-specific. In contrast, as Article 3 provides collectively "dumped imports," injury determinations are always based on order-wide evaluations of dumped imports from that particular country.

31. Moreover, the USG's answer to question 102 indicates that the USG does not understand that obligations under the AD Agreement may be evidentiary and procedural in nature, yet have a substantive impact on how that Member conducts its sunset reviews. Article 6.10 establishes evidentiary and procedural rules. It is irrelevant that this procedure has substantive impact.

32. In connection with the USG's answer to question 103, we note that the USG confirmed that it does not make company-specific dumping determination in sunset reviews. Procedures under 19 C.F.R. §351.222(b)(2) that the USG indicated[48] were related to revocation proceedings under Article 11.2 of the AD Agreement, are distinct proceedings from sunset reviews.[49]

C. AMPLE OPPORTUNITY

33. The USG's answer to question 104 does not mention sections 351.218(d)(3)(i) and (iv) of USDOC regulations. Section 351.218(d)(3)(iv) of USDOC's regulations require a party to submit its "good cause" evidence and argumentation in its substantive response. Section 351.218(d)(3)(i) requires that a party's substantive response be filed no later than 30 days after publication of the notice of initiation. Therefore, there is a 30-day good cause requirement. The parties have only 30-days in which to submit their "good cause" evidence and argumentation. USDOC then strictly applied these regulations to the sunset review of corrosion-resistant carbon steel flat products from Japan.

34. Furthermore, the USG never addressed the fact that the 30-day period does not provide a respondent ample opportunity to defend its interests. As discussed in our prior submissions, the 30-day period for responding to a questionnaire and the extension of the period are requirements under Article 6.1.1. If all information, including that not specified in the questionnaire, must be submitted within the first 30-day period – as it must in USDOC's sunset reviews – this makes a mockery of the

[47] *See* Article 17.6(i) of the AD Agreement. While this Article is applicable to panels, the obligation of an unbiased and objective evaluation of facts also applies to the administering authorities because the panel reviews the authorities' evaluation in accordance with that standard. With respect to "dumped imports" for injury determinations, the authorities must base its determination on an "objective examination" of "positive evidence" as set forth in Article 3.1.

[48] *See* USG Answers, at para. 55 and footnote 45.

[49] *See* Japan First Submission, at paras. 260-277 for a detailed discussion on the differences between the revocation proceeding and the sunset review.

Article 6.1 requirement to give an ample opportunity to defend one's interest. For a further discussion of this topic please see Japan's answer to this question.[50]

[50] See also Japan's Second Submission, at paras. 73-76 and footnote 98; Japan's Answers to the Panel's Questions in connection with the First Panel Meeting, at paras. 151-152 (answering question 45); Rebuttal by Japan to the USG's Answers to Panel Questions in connection with the First Panel Meeting at para 19; Japan Oral Statement at the Second Panel Meeting, at paras. 29-30; Japan's Answers to the Panel's Questions in connection with the Second Panel Meeting, at para. 52 (answering question 106).

ANNEX E-12

COMMENTS BY THE UNITED STATES ON JAPAN'S REPLIES TO PANEL QUESTIONS – SECOND MEETING

1. The United States will not comment on every answer from Japan to the Panel's questions, particularly where the issues raised have been addressed in prior written submissions of the United States. Instead, the United States will comment briefly on specific responses as warranted.

I. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS/ "PRACTICE"

2. With respect to Japan's answer to Panel Question 79, the United States refers the Panel to the US answers to this and succeeding questions. There, we point out that neither *US – Carbon Steel* nor *US – Countervailing Measures on Certain EC Products* alters the conclusion of panels such as *Export Restraints* and *India – Steel Plate* that non-binding precedent cannot be considered a "measure," and the conclusion of the Appellate Body that measures which do not mandate a breach of a WTO obligation do not do so. The United States further notes that Japan's arguments regarding "practice" entail a mischaracterization of US law. Finally, the United States notes that, even though a repetition of similar responses to a similar set of circumstances does not render the responses a "measure" that can be challenged as such, this in no way deprives Japan of the opportunity to challenge a response in a particular proceeding. Indeed, in this proceeding, Japan has challenged Commerce's "practice" as applied in the sunset review at issue.

II. EVIDENTIARY STANDARDS FOR INITIATION IN SUNSET REVIEWS

3. With respect to Japan's answer to Panel Question 84, nothing in Article 11.3 or elsewhere in the AD Agreement states or implies, explicitly or implicitly, that the Members intended to limit how they would implement the obligations contained in Article 11.3. Had the Members wished to provide in Article 11.3 for a specific means of implementing the self-initiation provision, the Members would have specifically and explicitly done so in Article 11.3 or elsewhere in the AD Agreement.

4. With respect to Japan's answer to Panel Question 86, Japan has failed to demonstrate how or where it made a claim with respect to the meaning and effect of the phrase "on their own initiative." Japan attempts to characterize its claim that Commerce did not have sufficient evidence as merely "one way in which the statute and regulations are inconsistent with the AD Agreement." However, whether sufficient evidence is needed to automatically initiate sunset reviews and whether automatic initiation is synonymous with initiation "on its own initiative" are two different issues.

5. Article 7 of the DSU states clearly that the terms of reference for a panel are contained in the request for establishment of that panel. Moreover, Article 6.2 of the DSU provides, in part:

> The request for establishment of a panel ... shall ... identify the specific measures at issue and *provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly*[.] (Emphasis added.)

6. With respect to the terms of reference of panels, the Appellate Body has clarified:

> Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU ... must be the "matter" identified in the request for establishment of a panel under Article 6.2 of the DSU[.] The "matter referred to the DSB," therefore, consists of two

> elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*).[1]

7. Further, the Appellate Body has stated:

> As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel *very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU*. It is important that a panel request be sufficiently precise for two reasons: *first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint*.[2]

8. In its panel request, Japan is merely complaining that the United States cannot automatically self-initiate sunset reviews without satisfying the alleged obligation under Article 11.3 to have sufficient evidence to initiate such reviews. Japan's panel request does not mention any claim regarding how the automatic self-initiation provision in US law as such violates Article 11.3 because it allegedly *precludes* Commerce, as an executive branch agency, from initiating a sunset review "on their own initiative." As the Appellate Body has cautioned, "[i]t is not enough . . . that 'the legal basis of the complaint' is summarily identified; *the identification must 'present the problem clearly*.'"[3] Making claims in the context of a written submission does not retroactively cure the failure to summarize the legal basis of the complaint.

9. Japan's answers to the Panel's second set of questions are the first instance in which Japan raises this additional challenge to US law. This new claim of "on their own initiative" is not properly before the Panel and should therefore be rejected as outside the Panel's terms of reference. Furthermore, the United States has been prejudiced by Japan's failure to comply with Article 6.2.[4]

III. DETERMINATION OF LIKELIHOOD OF DUMPING/DUMPING MARGINS IN SUNSET REVIEWS

A. NATURE OF SUNSET DETERMINATIONS

10. In its response to Panel Question 92, Japan now maintains that one of the two claims it made concerning "[Commerce's] application of past dumping margins in its sunset review" is "that the

---

[1] *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, Report of the Appellate Body adopted 25 November 1998, para. 72 (emphasis in original).

[2] Appellate Body Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, para. 122 (emphasis in original), citing Appellate Body Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 142.

[3] *Korea Dairy*, para. 120 (emphasis added).

[4] We note that the Appellate Body previously has considered whether the responding Member has been prejudiced by a panel request's imprecision when determining the adequacy of that request under DSU Article 6.2. *See, e.g.*, *Korea Dairy*, para. 131. In this case, however, Japan clearly included certain claims in its request, and clearly failed to include a challenge relating to "on their own initiative." It is therefore not necessary to consider the issue of prejudice before drawing the conclusion that this issue is not within the terms of reference. Nevertheless, it is also clear that the United States has been prejudiced by Japan's failure to comply with Article 6.2 of the DSU. Inasmuch as Japan raised these arguments for the first time in its responses to the Panel's second set of questions, the U.S. submissions to the Panel did not include, and could not have included, any responses. Indeed, the U.S. submissions respond only to Japan's claim regarding the alleged evidentiary requirement for self-initiation of sunset reviews under Article 11.3, a claim Japan did set forth in its panel request. The United States already has made its two written submissions and has had its two meetings with the Panel, and thus its key opportunities for making its case have come and gone. As such, the United States is prejudiced by Japan's failure to comply with Article 6.2 of the DSU.

application of past dumping margins, usually from original investigations, also violates the likelihood of injury analysis required by Article 11.3."[5] However, Japan has never made such a claim in the past. The actual nature of Japan's claim with respect to Commerce's reporting of the original dumping margins to the USITC is evident if one examines paragraph 3 of Japan's request for the establishment of a panel. That request reveals that Japan is only challenging how Commerce determined likely margins and Commerce's use of "pre-WTO Agreement margins."[6] Nowhere does Japan mention the impact of likely margins on the USITC likelihood of injury analysis. Although Japan asserts that the issue that it is now attempting to raise is encompassed within numbered paragraph 3 of its panel request, this is not the case. Paragraph 3 contains three claims, each set forth in a subparagraph. Paragraphs 3(b) and (c), on their face, are limited expressly to the same allegations of legal inconsistency set forth in paragraph 2 of Japan's request, and also are premised on inconsistencies with Article 2 of the AD Agreement. The only remaining subparagraph, 3(a), makes absolutely no mention of a violation of any of the provisions of Article 3 of the AD Agreement. Japan cannot now broaden its request to encompass a claim that was not made in its panel request.

11. In its submissions, Japan's emphasis is not on whether the USITC's injury determination was allegedly tainted, but whether Commerce improperly calculated and reported likely dumping margins.[7] Even now in its answer to Question 92, Japan casts this "claim" as concerning *Commerce's* application of past dumping margins in its sunset reviews, *not* the USITC's alleged application of past dumping margins in its sunset reviews. Thus, Japan's new claim is beyond the Panel's term of reference and should not be addressed by the Panel.

12. Even if this claim were properly before the Panel, however, it has no merit. Japan argues that Commerce's dumping margin analysis is part of the USITC's likelihood of injury analysis in Article 11.3 sunset reviews. It insists that all Article 3 obligations are incorporated into Article 11.3 sunset reviews via footnote 9, which defines the term "injury" for use throughout the AD Agreement. According to Japan, Articles 3.4 and 3.5 require the consideration of dumping margins in an injury analysis. Further, Japan asserts that because Commerce's dumping margin analysis is part of the USITC's injury analysis, USITC's injury analysis is tainted. Apart from the fact that Commerce's likely margins and its procedures for determining likely margins do not violate the AD Agreement, Japan is incorrect that the consideration of dumping margins is a required part of the USITC's likely injury analysis.

13. As the United States has previously explained, footnote 9 to Article 3 does not serve as a basis for the wholesale incorporation of Article 3 obligations into Article 11.3 reviews.[8] Second, while Article 3.4 provides for consideration of the "magnitude of the dumping margin," in an original investigation, nothing in the AD Agreement directs an investigating authority to consider the likely dumping margin in a sunset review. Finally, the focus of Articles 3.4 and 3.5 of the AD Agreement is on dumped imports and their effects, not the margin of dumping. As Article 3.5 provides, "[i]t must be demonstrated that the *dumped imports* are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." (Emphasis added.) Based on the plain text of Article 3.5, it is, thus, the dumped imports that must be shown to be causing injury before an antidumping duty may be imposed. The AD Agreement's focus on the volume and price effects of the dumped imports for the purposes of determining material injury and causal nexus is underlined by Article 3.1 itself, which mandates the determination of injury "shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of dumped imports on the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

---

[5] Japan Answers to Questions from Panel (Second Meeting), para. 29.
[6] *See* Request for the Establishment of a Panel by Japan (WT/DS244/4) (5 April 2002), para. 3.
[7] *See* Japan First Oral Statement, paras. 47-50; Japan Second Submission, paras. 146-152.
[8] United States First Submission, paras. 78-82; United States Second Submission, paras. 39-42.

14. In sunset reviews, US law provides that the USITC *may* consider the magnitude of the dumping margin in assessing whether injury is likely to continue or recur. The focus remains, nonetheless, on the likely volume and likely price effects of the dumped imports. Nothing in the AD Agreement directs the investigating authority to consider the likely dumping margin, much less the size of the margin, in conducting a sunset review.

15. With respect to Japan's answer to Panel Question 94(c), Japan's answer is factually incorrect. Japan states that Commerce "simply dismissed the information without explanation." As Commerce explained in the *Final Sunset Determination*[9] and has explained in prior written submissions to the Panel, NSC's submission of the information in the sunset review of corrosion-resistant carbon steel from Japan was not considered because it was untimely.

B. "AMPLE OPPORTUNITY"

16. With respect to Japan's answer to Panel Question 106, Japan asserts that providing a "seven-month deadline is not the issue." The United States responds that, rather, Japan's seven-month delay in this case is the issue. NSC's case brief was not NSC's first opportunity to submit information and argument on import volumes. All parties subject to a sunset review, including NSC, are aware that Commerce considers import volumes to be an essential element in making its likelihood determination in a sunset review because the importance of import volumes is outlined in the antidumping statute and the Sunset Policy Bulletin. Had NSC wanted to submit information that NSC considered relevant to Commerce's likelihood determination, NSC had the opportunity to do so. Although the United States considers that the volume of the information at issue is not material to the inquiry, if the amount of information was moderate, as asserted by Japan, then it is still more puzzling why NSC did not submit the information in a timely manner.

17. Japan also cites *Mechanical Transfer Presses* for the proposition that Commerce's solicitation of additional factual information in that sunset review "illustrates that consideration of information received in a party's case brief does not impede [Commerce's] ability to complete the sunset review as scheduled." NSC's approach would effectively turn the administrative process of a sunset review over to the interested parties to the proceeding - essentially permitting parties to submit information whenever they wished and imposing a burden on the administering authorities to demonstrate that the late submissions impeded the process. Nothing in Article 6 or elsewhere in the AD Agreement requires such an outcome. In *Mechanical Transfer Presses*, Commerce solicited additional factual information because it could not determine the import volumes of the Japanese exporters who were participating in the sunset review for the five-year period preceding the sunset review, and the participating Japanese exporters had argued *in their substantive submissions* that the decrease in import volumes was due to factors other than the imposition of the antidumping duty order.[10] Thus, Commerce requested the additional information because the Japanese respondents had raised the issue in their substantive responses and the import information was not readily available to Commerce.[11]

---

[9] *Final Sunset Decision Memorandum* at 11 (Exhibit JPN-8(e)).

[10] *Preliminary Results of Full Sunset Review; Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 753 (6 Jan. 2000).

[11] *Mechanical Transfer Presses*, 65 Fed. Reg. at 753 . Commerce initially determined that there was an inadequate response from the Japanese exporters because the export volumes of the participating Japanese exporters did not exceed 50 per cent, as required by section 351.218(e)(1)(ii)(A) of Commerce's Sunset Regulations. Commerce reconsidered this position because the Japanese exporters explained that one Japanese producer of mechanical transfer presses, which had been participating in administrative reviews, was excluded from the antidumping order by Commerce sometime prior to the sunset review. The magnitude of this company's exports after exclusion and prior to the sunset review was undetermined. Therefore, Commerce decided to conduct a full sunset review and requested that the Japanese exporters submit import volume information to facilitate Commerce's analysis of the Japanese exporter's claims that depressed import volumes were not necessarily due to the imposition of the antidumping duty order.

18. With respect to Japan's answer to Panel Question 107, Japan concedes that NSC could have submitted the information in a timely manner, but simply chose not to do so. NSC does not, and cannot, explain why it chose to supply information late. In other words, it was not the "good cause" standard that caused NSC to submit its information late. Whether or not the information would be subject to a "good cause" analysis, Japan could have submitted the information nonetheless. Section 351.218(d)(3)(iv)(B) of Commerce's Sunset Regulations provides that a "substantive response from an interested party ... also may contain any other relevant information or argument that the party would like [Commerce] to consider." In addition, the Sunset Policy Bulletin provides guidance about information that Commerce finds relevant to its likelihood determination in a sunset review, including the importance of information concerning import volumes. In submitting the information in question, NSC neither submitted the information in a timely manner nor made any attempt to establish "good cause" when it did.

19. Finally, Japan asserts that the 30-day deadline is "arbitrary" because Commerce accepted information in the sunset review of the antidumping duty order on *Mechanical Transfer Presses*. As explained above, Commerce requested and accepted information in the *Mechanical Transfer Presses* sunset review because of the unique facts of that case. The deadline is a procedural mechanism for administration of the sunset review proceeding. Commerce's Sunset Regulations provide parties with ample opportunity to submit whatever information they deem relevant. Indeed, in *Mechanical Transfer Presses*, Commerce considered additional information because the Japanese exporters made an argument concerning the depressed import volumes in their substantive submissions; in this case, *no* argument was made regarding the relevance of the untimely information.