

**ANNEX E**

**Questions and Answers**

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## 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.<sup>1</sup> 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,<sup>2</sup> 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.<sup>3</sup> As the panel in *US – Section 301* has stated, the SAA is “an important interpretative element in the construction of the statutory

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<sup>1</sup> See, for example, First Written Submission of the United States paras. 35 and 126.

<sup>2</sup> 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*”).

<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.

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<sup>4</sup>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.

<sup>5</sup> *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).

<sup>6</sup> See Ex. JPN-31.

<sup>7</sup> 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.”<sup>8</sup> 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.<sup>9</sup> 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*<sup>10</sup> 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*,<sup>11</sup> 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;

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<sup>8</sup> See *US – Steel Plate*, WT/DS206/R at 7.22.

<sup>9</sup> See *id.* at 7.23.

<sup>10</sup> *United States-Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/R, at para. 7.123 (31 July 2002).

<sup>11</sup> 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.<sup>12</sup> Previous panels, however, have found that even discretionary instruments would be actionable depending on the nature of the obligations contained in those provisions.<sup>13</sup> The panel in *US – Countervailing Measures* found that the mere appearance of executive discretion alone is insufficient to find a law WTO-consistent.<sup>14</sup> 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.”<sup>15</sup> 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

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<sup>12</sup> 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.”

<sup>13</sup> 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.*

<sup>14</sup> WT/DS212/R, at para. 7.123 (31 July 2002) (Report of the Panel).

<sup>15</sup> *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.<sup>16</sup> 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.

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<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup> 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."<sup>19</sup> 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.<sup>20</sup>

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

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<sup>17</sup> 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).

<sup>18</sup> *Id.*

<sup>19</sup> *US – Export Restraint*, para. 8.111.

<sup>20</sup> 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 ...<sup>21</sup>

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*,<sup>22</sup> 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.”<sup>23</sup>

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<sup>24</sup> – also uses the term “likely.” Yet the panel in *US – DRAMs* still found that USDOC’s regulations to be WTO-inconsistent.<sup>25</sup> 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.”<sup>26</sup>

24. Section 351.222(b), before the amendment in 1999 due to the panel’s determination in *US – DRAMs*,<sup>27</sup> provided:

(1) The Secretary may revoke an antidumping order or terminate a suspended antidumping investigation if the Secretary concludes that:

(i) ....

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<sup>21</sup> 19 C.F.R. § 351.222(i) (**Ex. JPN-3 at 234**).

<sup>22</sup> *Final Results of Full Sunset Review: Brass Sheet and Strip From the Netherlands*, 65 Fed. Reg. 735 (6 January 2000) (**Ex. JPN-251**).

<sup>23</sup> *Id.*, 65 Fed.Reg. at 740.

<sup>24</sup> 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 lead to continuation or recurrence of material injury.”) (emphasis added).

<sup>25</sup> See *US – DRAMs*, WT/DS99/R, at para. 6.46.

<sup>26</sup> See *Amended Regulations Concerning the Revocation of Antidumping and Countervailing Duty Orders: Final Rule*, 64 Fed. Reg. 51236 (22 Sep. 1999) (**Ex. JPN-7**).

<sup>27</sup> 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."<sup>28</sup> 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<sup>29</sup> – 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,<sup>30</sup> "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

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<sup>28</sup> *Id.*, at 51236-27.

<sup>29</sup> *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).

<sup>30</sup> *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."<sup>31</sup> 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."<sup>32</sup> 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?**

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<sup>31</sup> See SAA at 879 (Ex. JPN-2 at 4205) (emphasis added).

<sup>32</sup> 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.<sup>33</sup> 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**

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<sup>33</sup> 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,<sup>34</sup> 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?**

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<sup>34</sup> 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 met, the authorities are then required to decide 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.<sup>35</sup> 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-

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<sup>35</sup> 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*<sup>36</sup> explained, the provisions of Article 2 “govern the determination of dumping by establishing rules for calculation of dumping”<sup>37</sup> and “the calculation of a dumping margin pursuant to Article 2 constitute a determination of dumping.”<sup>38</sup> 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

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<sup>36</sup> *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

<sup>37</sup> *Id.*, at para. 6.128.

<sup>38</sup> *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.”<sup>39</sup>

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***

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<sup>39</sup> Black’s Law Dictionary, 919 (5<sup>th</sup> 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 encompasses 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.<sup>40</sup>**

**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**

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<sup>40</sup>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*.”<sup>41</sup> 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.”<sup>42</sup> 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?**

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<sup>41</sup> 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).

<sup>42</sup> *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<sup>43</sup>. 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.<sup>44</sup> No changes were made to this provision, while other provisions in Article 6 have been added and changed.<sup>45</sup> 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

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<sup>43</sup> 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.

<sup>44</sup> 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).

<sup>45</sup> 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.<sup>46</sup> These methodologies, which were examined in detail in Japan’s first submission,<sup>47</sup> 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*

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<sup>46</sup> 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.

<sup>47</sup> 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.<sup>48</sup> 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.

4<sup>th</sup> Administrative Review: Ex.JPN-14c, 14d, 14.d.1, 14.d.2, 14.d.3, and 32.

5<sup>th</sup> 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.<sup>49</sup> 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. . . ."<sup>50</sup> 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.<sup>51</sup>

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<sup>48</sup> See *id.* at para. 181 and **Ex. JPN-27a-i and 28a and b**.

<sup>49</sup> *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**).

<sup>50</sup> *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**).

<sup>51</sup> 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 h**). 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.<sup>52</sup> USDOC's margin calculation memoranda also shows that the basis of dumping margins in the final determination are only positive dumping margins.<sup>53</sup> 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.<sup>54</sup>

(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:

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multiplied by the US sale's quantity. Zeroing occurs when USDOC includes positive PUDD (US price less than normal value) but excludes negative PUDD.

<sup>52</sup> 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-15d2.).

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.).

<sup>53</sup> 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-14d2).

<sup>54</sup> 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 calculate 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.”<sup>55</sup> This was a standard USDOC practice at the time, but was not expressly codified in its regulations.<sup>56</sup> 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.<sup>57</sup> New Section 777A(d) allows USDOC to use an average-to-transaction method for measuring dumping only where targeted dumping is found.<sup>58</sup> 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.<sup>59</sup> 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

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<sup>55</sup> See SAA, at 842 (Ex.JPN-2, at 4177).

<sup>56</sup> 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.).

<sup>57</sup> See URAA, sec. 229, 108 Stat. 4889-90 (Ex. JPN-1a).

<sup>58</sup> See *id.* (Ex. JPN-1a); see also SAA, at 842-43 (Ex. JPN-2 at 4177-78).

<sup>59</sup> 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.).

repealed the previous 90 per cent test that permitted rejection of all sales when the 90 per cent 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.<sup>60</sup>

(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.<sup>61</sup> 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.<sup>62</sup>

Actual Application to this Sunset Review

93. As discussed, USDOC stated that it applied the 10/90 test to this case.<sup>63</sup> The SAS programme code also shows USDOC's actual application of the 10/90 per cent test in this case.<sup>64</sup> 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

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<sup>60</sup> 19 USC. § 1677b(b)(2)(c)(i).

<sup>61</sup> See Tariff Act, sec. 773(b) (before enactment of the URAA). (Ex. JPN-1a)

<sup>62</sup> See *Original Final Determination*, at 37155-56 (Ex. JPN-12d).

<sup>63</sup> See *id.*

<sup>64</sup> See SAS Computer Printout from the Original Investigations (9 September 1993), at lines 312-31 (SAS Programme Log) (Ex. JPN-12f.1.)

administrative reviews.<sup>65</sup> 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.<sup>66</sup> 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."<sup>67</sup>

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.<sup>68</sup> The USDOC's *Concurrence Memorandum* then specifically stated that USDOC applied 8 per cent minimum of profit for NSC's constructed value calculation.<sup>69</sup> 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.<sup>70</sup> 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.

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<sup>65</sup> See Tariff Act, sec. 773(b) and 773(e)(1)(B)(ii) (before enactment of the URAA).

<sup>66</sup> See Tariff Act, sec. 773(b) and 773(e)(1)(B)(ii) (before enactment of the URAA).

<sup>67</sup> See *Original Final Determination*, at 37156 (Ex. JPN-12 d).

<sup>68</sup> See *Original Final Determination*, at 37156 (Ex. JPN-12 d).

<sup>69</sup> 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.

<sup>70</sup> 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.**<sup>71</sup>

Reply

103. As stated in our oral statement, the USG's interpretation of the panel report in US-DRAMs is misplaced.<sup>72</sup> 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."<sup>73</sup> 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.

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<sup>71</sup> 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.

<sup>72</sup> See USG First Submission, at para 138.

<sup>73</sup> 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*<sup>74</sup> obliges authorities to make dumping determinations without “zeroing” negative dumping margins.<sup>75</sup> The Appellate Body determined that Article 2.4 requires the administering authorities to make a “fair comparison” between all comparable export transaction.<sup>76</sup> 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*.”<sup>77</sup> 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.”<sup>78</sup> 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<sup>79</sup> 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,

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<sup>74</sup> See *EC – Bed Linens*, Appellate Body Report, at para. 55.

<sup>75</sup> See Japan First Submission, at para. 176.

<sup>76</sup> 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.”).

<sup>77</sup> *EC – Bed Linens*, at para. 51.

<sup>78</sup> *EC – Bed Linens, Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, at para. 6.128 (29 November 2002).

<sup>79</sup> “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)<sup>80</sup>

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.<sup>81</sup>

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.<sup>82</sup> 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.

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<sup>80</sup> *EC – Bed Linens*, WT/DS141/AB/R at para. 53.

<sup>81</sup> *Id.* at para. 60.

<sup>82</sup> 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”.<sup>83</sup>

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,<sup>84</sup> 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**

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<sup>83</sup> *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).

<sup>84</sup> 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".<sup>85</sup> 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

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<sup>85</sup> 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 the 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.<sup>86</sup> 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.”<sup>87</sup> 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.”<sup>88</sup> 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

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<sup>86</sup> See *Final Sunset Decision Memo*, at 5-6 (Ex. JPN-8e).

<sup>87</sup> *Id.* See also Japan First Submission, at para 140.

<sup>88</sup> *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.”<sup>89</sup> 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.”<sup>90</sup> 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.<sup>91</sup>

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.

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<sup>89</sup> See The New Shorter Oxford English Dictionary, at 651 (Ex. JPN-23).

<sup>90</sup> 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).

<sup>91</sup> 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.<sup>92</sup> 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.’”<sup>93</sup> It has also stated “mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient.”<sup>94</sup>

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.<sup>95</sup>

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**

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<sup>92</sup> *See id.*

<sup>93</sup> *Id.*, at para. 88.

<sup>94</sup> *Id.*, at para. 88.

<sup>95</sup> *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 irrefutable 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.”<sup>96</sup>

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

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<sup>96</sup> *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.”<sup>97</sup> 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.<sup>98</sup>

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.<sup>99</sup> 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?**

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<sup>97</sup> *Id.*, at para. 6.128.

<sup>98</sup> 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).

<sup>99</sup> *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.<sup>100</sup> 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.<sup>101</sup>

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<sup>100</sup> See **Ex. JPN-33** (submitted at the first Panel meeting).

<sup>101</sup> 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. parts 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,”<sup>102</sup> 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 in 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.<sup>103</sup>

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.**

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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>.

<sup>102</sup> See Japan Oral Statement, at para. 44-45 and Japan’s Second Submission, at paras. 78 for further discussion on this issue.

<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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<sup>104</sup> *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).

<sup>105</sup> 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.”<sup>106</sup> USDOC’s rejection of NSC’s information was based on the 30-day rule in its regulations.<sup>107</sup>

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?**

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<sup>106</sup> SAA, at 879 (emphasis added) (Ex. JPN-2 at 4205).

<sup>107</sup> 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.<sup>1</sup>

5. The actual zeroing of negative margins is implemented at lines 999-1002, as follows:

---

<sup>1</sup> 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<sup>2</sup> 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;
```

---

<sup>2</sup> “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) COPTTEST (IN=B);
314 BY CONNUMH;
315 IF A;
316
317 IF PCTQABOV GT 90 OR ((10 LE PCTQABOV LE 90) AND
COPTTEST='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 COPTTEST='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 COPTTEST 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, COPTTEST 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 COPTTEST 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 COPTTEST 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.<sup>3</sup> 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;

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<sup>3</sup> 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.<sup>4</sup> 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).

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<sup>4</sup> 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.<sup>1</sup>

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.<sup>2</sup> 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.

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<sup>1</sup> *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.

<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

### (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.<sup>6</sup>

### (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.<sup>7</sup> 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.<sup>8</sup> 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

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<sup>3</sup> 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.

<sup>4</sup> See *supra* note 1.

<sup>5</sup> *US Export Restraints*, paras. 8.98 - 8.100.

<sup>6</sup> *US Export Restraints*, paras. 8.108 - 8.113.

<sup>7</sup> 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.

<sup>8</sup> 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”).<sup>9</sup>

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 Governing 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<sup>10</sup>, and US “practice” therefore does not have “independent operational status” that can independently give rise to a WTO violation.<sup>11</sup>

10. The Appellate Body expressed similar views in *Wool Shirts*<sup>12</sup> and *US Import Measures*<sup>13</sup> 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*<sup>14</sup>, “[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”.<sup>15</sup>

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<sup>9</sup> Japan First Submission, paras. 118 *et seq.*

<sup>10</sup> *US Export Restraints*, para. 8.126.

<sup>11</sup> *See id.*

<sup>12</sup> *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.

<sup>13</sup> *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.

<sup>14</sup> *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.

<sup>15</sup> 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.<sup>16</sup>

- (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**

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<sup>16</sup> 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."<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

**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.<sup>21</sup>

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<sup>17</sup> *Procedures for Conduction ("Sunset") Reviews of Anti-Dumping and Countervailing Duty Orders*, 54 Fed. Reg. 13516 (20 March 1998).

<sup>18</sup> *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.

<sup>19</sup> *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.

<sup>20</sup> *US 301*, para. 7.19.

<sup>21</sup> 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*

**(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.<sup>22</sup>

**(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?**

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from Japan , 65 Fed. Reg. 753, 759 (January 6, 2000)(Commerce requested submission of factual information in case briefs).

<sup>22</sup> 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).

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 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."<sup>23</sup>

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".**

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<sup>23</sup> *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).

- (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?**

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.<sup>24</sup>

- (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.<sup>25</sup>

- (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".<sup>26</sup> 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**

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<sup>24</sup> See *German Steel*, para. 116.

<sup>25</sup> See *German Steel*, para. 116.

<sup>26</sup> *German Steel*, para. 116, and discussion at paras. 114-115.

**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).**

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.<sup>27</sup> 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

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<sup>27</sup> See *German Steel*, para. 137.

differences may also explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.<sup>28</sup>

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.<sup>29</sup>

**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.

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<sup>28</sup> *German Steel*, para. 89.

<sup>29</sup> *See id.*

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.

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").<sup>30</sup> Under that methodology, no dumping duty – positive or negative – was computed for US sales made at non-dumped prices.<sup>31</sup> The anti-dumping investigation in this case was initiated on the basis of a petition filed prior to the effective date of the URAA<sup>32</sup>, *i.e.*, prior to 1 January 1995 (which was also

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<sup>30</sup> *See* 19 C.F.R. 353.44 (1994).

<sup>31</sup> 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.

<sup>32</sup> *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).

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 export prices) of individual transactions to the weighted average price of sales of the foreign like product..."<sup>33</sup> Consequently, the margins determined in the two completed administrative reviews in this case were based on average-to-transaction comparisons.<sup>34</sup>

**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?**

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<sup>33</sup> 19 U.S.C. § 1677f-1.

<sup>34</sup> 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).

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 "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<sup>35</sup>, the English term "probable" may have a connotation of a degree of mathematical certainty<sup>36</sup>, 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?**

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<sup>35</sup> Webster's II New Riverside University Dictionary (1994).

<sup>36</sup> See *id.*

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 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.<sup>37</sup> 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.<sup>38</sup> 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

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<sup>37</sup> *German Steel*, para. 92.

<sup>38</sup> *See German Steel*, para. 70.

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.

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.<sup>39</sup> 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

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<sup>39</sup> *Sunset Initiation Schedule*, 63 FR 29372. Exhibit JPN-18.



parties must submit their substantive submissions on day 30 after initiation in accordance with section 351.218(d)(3)(i) of Commerce's regulations.

**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.<sup>40</sup>

**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

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<sup>40</sup> See section 351.302 of Commerce's regulations.

interested party. Whether Commerce will consider an issue or information is dependent on the facts in each case.

**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.<sup>41</sup>

**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.

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<sup>41</sup> See section 351.302 of Commerce's regulations.

95. For example, in *Sugar & Syrups from Canada*<sup>42</sup>, 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 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*<sup>43</sup>, 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

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<sup>42</sup> 64 Fed. Reg. 48362 (September 3, 1999). Exhibit JPN 25(m).

<sup>43</sup> 65 Fed. Reg. 735 (January 6, 2000). Exhibit JPN-25(l).

reasoned consideration of the likelihood issue, then “good cause” will have been shown and the information will be considered.

**(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.<sup>44</sup> 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

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<sup>44</sup> See section 351.302 of Commerce’s Regulations.

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.

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.<sup>45</sup> A anti-dumping duty proceeding consists of one or more “segments”.<sup>46</sup> 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.<sup>47</sup>

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.

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<sup>45</sup> 19 CFR 351.102 (definition of “proceeding”).

<sup>46</sup> 19 CFR 351.102 (definition of “segment of proceeding”).

<sup>47</sup> *See* 19 CFR 351.102 (definition of “segment of proceeding”, examples under para. 2).

**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 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".<sup>48</sup> 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.<sup>49</sup> 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.

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<sup>48</sup> 19 U.S.C. § 1677(35)(C)(iv).

<sup>49</sup> 19 U.S.C. § 1675a(a)(6) (emphasis added).

**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 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).<sup>50</sup> 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

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<sup>50</sup> See Articles 3.2 and 3.4 of the AD Agreement.

were during the original investigation, when they were entering the market unencumbered by any additional duties.

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.<sup>51</sup> Article X:3(a) requires uniformity of treatment with respect to persons similarly situated.<sup>52</sup> 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<sup>53</sup>, 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.

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<sup>51</sup> *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.

<sup>52</sup> *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).

<sup>53</sup> 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.”<sup>4</sup> USDOC has followed the precepts of the Sunset Policy Bulletin in all 228 sunset review determinations where the domestic industry participated.<sup>5</sup> 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.<sup>6</sup> As fully explained in our second

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<sup>1</sup> See USG Answers to the Panel’s Questions, at para. 6 (11 Dec. 2002) (answering question 1).

<sup>2</sup> See *id.* at para. 6 and 31 (answering Panel questions 1 and 9).

<sup>3</sup> See Japan Second Submission, at paras. 7 – 15 (11 Dec. 2002).

<sup>4</sup> See *id.* at n. 17 (citing *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1021 (D.C. Cir. 2000)).

<sup>5</sup> See Ex. JPN-31.

<sup>6</sup> See USG Answers to the Panel’s Questions, at paras. 7-11 (answering question 2).

submission,<sup>7</sup> 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.<sup>8</sup> Instead, the USG claims that the 228 applications of the Sunset Policy Bulletin are "nothing more than individual applications of the US AD law."<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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."<sup>12</sup> This statement seems quite odd, as Japan fully discussed in its second written submission.<sup>13</sup> 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.<sup>14</sup>

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<sup>7</sup> See Japan Second Submission, at paras. at 8-14.

<sup>8</sup> See USG Answers to the Panel's Questions, at paras. 28-29 (answering question 9(b)).

<sup>9</sup> See *id.* at para. 7.

<sup>10</sup> See *id.* at para. 28.

<sup>11</sup> 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>.

<sup>12</sup> USG Answers to the Panel's Questions, at para. 20 (answering question 8(c)).

<sup>13</sup> See Japan Second Submission, at paras. at 43-53.

<sup>14</sup> 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.<sup>15</sup> The deference the Panel should afford is not unlimited. As the Appellate Body in *India – Patent Protection*<sup>16</sup> found, a Panel's deference ends once a Member establishes a *prima facie* case.<sup>17</sup> 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).<sup>18</sup> 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*<sup>19</sup> 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.<sup>20</sup>

### 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<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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

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<sup>15</sup> See USG Answers to the Panel's Questions, at para. 25 (answering question 8(d)).

<sup>16</sup> 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*").

<sup>17</sup> See *id.*

<sup>18</sup> See Japan First Submission, at paras. 95-101; see also Japan Second Submission, at paras. 43-53.

<sup>19</sup> See Report of the Panel, *United States – Anti-Dumping Act of 1916*, WT/DS136/R at para. 6.51 (31 March 2000).

<sup>20</sup> *Id.*

<sup>21</sup> See USG Answers to the Panel's Questions, at para 35 (answering question 11).

<sup>22</sup> See *id.*, at para. 2 (answering question 1).

<sup>23</sup> See Japan First Submission, at para. 15.

<sup>24</sup> See USG Answers to the Panel's Questions, at para. 34 (answering question 10).

review.<sup>25</sup> 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.”<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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

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<sup>25</sup> See *id.*, at para. 35 (answering question 11).

<sup>26</sup> USG *id.*, at para. 68 (answering question 35(d)).

<sup>27</sup> 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).

<sup>28</sup> 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).

<sup>29</sup> See USG Answers to the Panel’s Questions, at para. 76.

<sup>30</sup> 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.<sup>31</sup>

**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.<sup>32</sup> 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.<sup>33</sup> The USG continues to miss the point of Japan’s argument.

18. As discussed in our second submission,<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> The section provides:

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<sup>31</sup> See Japan Second Submission, at paras. 54-61 (discussing further USDOC’s WTO-inconsistent retrospective likelihood analysis).

<sup>32</sup> See USG Answers to the Panel’s Questions, at para 84 (answering question 51).

<sup>33</sup> See *id.*

<sup>34</sup> See Japan Second Submission, at paras. 74-76.

<sup>35</sup> See *id.*

<sup>36</sup> See USG Answers to the Panel’s Questions, at paras. 84 and 88 (answering questions 51 and 54)

<sup>37</sup> See *id.*, at paras. 113-114 (answering question 62).

<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> 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).<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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"<sup>47</sup> is without any reasonable grounds.

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<sup>39</sup> 19 C.F.R. § 351.301(b)(1).

<sup>40</sup> See 19 C.F.R. § 351.218(d)(3)(iii).

<sup>41</sup> See USG Answers to the Panel's Questions, at para. 117-123 (answering question 64).

<sup>42</sup> See 19 C.F.R. Pt.351, Annex III.

<sup>43</sup> 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.

<sup>44</sup> 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").

<sup>45</sup> See *Mechanical Transfer Presses from Japan*, 65. Fed. Reg. at 757. See also *supra* footnote 11.

<sup>46</sup> See the Sunset Policy Bulletin, section II.A.4.

<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> USDOC had initially found that petitioner did not establish "good cause" based on its sales volume argument,<sup>51</sup> and therefore rejected the petitioner's "other evidence" that respondent was likely to continue dumping.<sup>52</sup> In the preliminary results, USDOC ignored the respondent's cost information submitted with its rebuttal response.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> The USG further asserts that

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<sup>48</sup> See *id.*, at para. 123 (answering question 64).

<sup>49</sup> See *id.*, at para. 95 (answering question 58(b)).

<sup>50</sup> 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-251).

<sup>51</sup> 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).

<sup>52</sup> See *id.*, 64 Fed. Reg. at 20255-57.

<sup>53</sup> See *Final Results of Full Sunset Review: Sugar and Syrups from Canada*, 64 Fed. Reg. 48362, 48363 (3 September 1999).

<sup>54</sup> See *id.*, 64 Fed. Reg. at 48363-64.

<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> 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

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<sup>56</sup> See *id.*, at para. 101 and 127 (answering questions 59 and 67).

<sup>57</sup> See Japan Second Submission, at para. 63-65.

continuation or recurrence of dumping.”<sup>58</sup> 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.<sup>59</sup> As discussed in our second submission, the magnitude of dumping is directly relevant to the USITC’s injury analysis.<sup>60</sup>

36. The USG, however, states that the injury obligations contained in Article 3 do not apply to sunset reviews under Article 11.3.<sup>61</sup> The USG believes that only the barest of the injury criteria – volume, price effects, and impact on the domestic industry apply to sunset reviews.<sup>62</sup> 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,<sup>63</sup> 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.<sup>64</sup>

## 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.

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<sup>58</sup> USG Answers to the Panel’s Questions, at para. 139 (answering question 73).

<sup>59</sup> 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.

<sup>60</sup> *See* Japan Second Submission, at paras. 150-152.

<sup>61</sup> *See* USG Answers to the Panel’s Questions, at paras. 140-141.

<sup>62</sup> *See id.* at para. 142.

<sup>63</sup> *See id.*, at para. 142-143.

<sup>64</sup> *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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> *German Steel*, paras. 110-112.

<sup>3</sup> 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").<sup>4</sup> Under that methodology, no dumping duty – positive or negative – is computed for US sales made at non-dumped prices.<sup>5</sup>

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,<sup>6</sup> *i.e.*, prior to 1 January 1995.<sup>7</sup> 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,<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup> 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

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<sup>4</sup> See 19 C.F.R. 353.44 (1994).

<sup>5</sup> 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.

<sup>6</sup> 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).

<sup>7</sup> 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.

<sup>8</sup> 19 USC. 1677f-1.

<sup>9</sup> See the Government of Japan's Responses to the Panel's Questions on 8 November 2002 in connection with the First Substantive Meeting of the Panel, para. 78.

<sup>10</sup> 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.”<sup>11</sup> 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.”<sup>12</sup> 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[.]”<sup>13</sup> 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.”<sup>14</sup>

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.

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<sup>11</sup> *Id.* at 8.

<sup>12</sup> SAA at 890 (220).

<sup>13</sup> Sunset Policy Bulletin, 63 Fed. Reg. at 18873.

<sup>14</sup> *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")<sup>1</sup> 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?**

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<sup>1</sup> 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”),<sup>2</sup> 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.

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<sup>2</sup> 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.<sup>1</sup> 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.

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<sup>1</sup> 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?<sup>2</sup> Whether or not Section 304 violates Article 23 depends, thus, first and foremost on the precise obligations contained in Article 23”<sup>3</sup>

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:

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<sup>2</sup>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?”

<sup>3</sup> 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<sup>4</sup>, 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,<sup>5</sup> 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".**

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<sup>4</sup> "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).

<sup>5</sup> 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".<sup>6</sup> 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".<sup>7</sup>

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.<sup>8</sup> 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".

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<sup>6</sup> The New Shorter Oxford English Dictionary, 1993, Vol. 1, p. 1370.

<sup>7</sup> The word "iniciado" used in the Spanish text seems to correspond closely to the English "initiated".

<sup>8</sup> 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"<sup>9</sup>. 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.<sup>10</sup>

- (c) **Does the word "initiate", as used in Article 11.3, mean the same thing as 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"<sup>11</sup>. They both refer back to an earlier definition or finding, i.e. to the original determination.

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<sup>9</sup> The New Shorter Oxford English Dictionary, Vol. 2, 1993, p. 2363.

<sup>10</sup> See below, responses to questions 9 and 10.

<sup>11</sup> 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.

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**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 at 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<sup>12</sup>, 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*<sup>13</sup> 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**

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<sup>12</sup> Paragraph 10.

<sup>13</sup> 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.<sup>14</sup>

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.

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<sup>14</sup> 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<sup>15</sup>, 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

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<sup>15</sup> 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,<sup>16</sup> 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".<sup>17</sup> 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.

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<sup>16</sup> 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.

<sup>17</sup> 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<sup>1</sup> and that a prolongation of the duty is therefore an *exception*<sup>2</sup>.

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.

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<sup>1</sup> *Notwithstanding* the provisions of paragraphs 1 and 2....

<sup>2</sup> ...*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.<sup>1</sup> Japan also claims that USDOC failed to establish properly the magnitude of dumping for the

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<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

## 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.<sup>4</sup>**

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.<sup>5</sup> 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."<sup>6</sup>

**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

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with the obligations of Article 11.3 of the AD Agreement and Article X:3 of the GATT 1994.") (emphasis added).

<sup>2</sup> See *id.*, at item 3.

<sup>3</sup> See, e.g., Japan's First Submission, at para. 148.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> *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.<sup>7</sup>

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.<sup>8</sup>

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.<sup>9</sup> 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.

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<sup>7</sup> 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.").

<sup>8</sup> 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.)

<sup>9</sup> 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.”<sup>10</sup> 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.”<sup>11</sup> 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.”<sup>12</sup> 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?**

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<sup>10</sup> *The New Shorter Oxford English Dictionary, Volume 2*, p. 2059.

<sup>11</sup> *Id.*, at Volume 1, p. 1370.

<sup>12</sup> *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<sup>13</sup>, 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.”<sup>14</sup> 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.

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<sup>13</sup> Second Written Submission of Japan, at para. 134.

<sup>14</sup> 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.”<sup>15</sup>

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.

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<sup>15</sup> *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.<sup>16</sup> We claim separately that the

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<sup>16</sup> 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.<sup>17</sup>

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 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<sup>18</sup> 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.**

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<sup>17</sup> See *id.*, at item 3.

<sup>18</sup> 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.<sup>19</sup> 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

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<sup>19</sup> 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.<sup>20</sup>**

**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

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<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

**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

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<sup>21</sup> 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.

<sup>22</sup> 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.<sup>23</sup>

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)<sup>24</sup> 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.<sup>25</sup> 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.”<sup>26</sup> This time frame to present this type of evidence limited NSC’s ability to

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<sup>23</sup> See *id.*, at paras. 6.132 - 6.133. See also Japan Second Submission, at para 161.

<sup>24</sup> 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).

<sup>25</sup> 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.

<sup>26</sup> *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,<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> Further, the volume of the submitted information was moderate.<sup>30</sup> The submitted information was verified by USDOC in previous administrative reviews,<sup>31</sup> 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.<sup>32</sup>

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.

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<sup>27</sup> See *id.* (Ex. JPN 8e)

<sup>28</sup> 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).

<sup>29</sup> 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.

<sup>30</sup> See Ex. JPN-19c.

<sup>31</sup> See Japan First Submission, paras. 142-144, and Ex. JPN-14c and 19c.

<sup>32</sup> 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*<sup>33</sup> 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<sup>34</sup> and paragraph 1 of Annex II<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

**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**

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<sup>33</sup> *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 December 2002), 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.

<sup>34</sup> 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.)

<sup>35</sup> 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.)

<sup>36</sup> 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.)

<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> 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.

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<sup>38</sup> See *Argentina - Ceramic Floor Tiles*, WT/05189/R, at para. 6.54.

<sup>39</sup> See Japan First Submission, paras. 142-144, and Ex.JPN-14c and 19c.

<sup>40</sup> 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.<sup>1</sup>

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.<sup>2</sup> 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."<sup>3</sup>

#### 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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> *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.”<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.”<sup>9</sup>

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<sup>4</sup> Panel Report, *United States – Measures Treating Export Restraints as Subsidies* (“*US – Export Restraints*”), WT/DS194/R, adopted 23 August 2001, para. 8.85.

<sup>5</sup> 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.

<sup>6</sup> *US – Export Restraints*, paras. 8.126-32.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> *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.<sup>10</sup> 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,<sup>11</sup> 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,<sup>12</sup> 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

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<sup>10</sup> *Id.*, paras. 162-63.

<sup>11</sup> *Id.*, paras. 147-48.

<sup>12</sup> *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.<sup>13</sup> 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

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<sup>13</sup> 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.<sup>14</sup>

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.

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<sup>14</sup> 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.<sup>15</sup> This schedule includes the antidumping duty order on corrosion-resistant carbon steel flat products from Japan at issue in this case.<sup>16</sup> 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,<sup>17</sup> 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.

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<sup>15</sup> 63 Fed. Reg. 26779 (May 14, 1998).

<sup>16</sup> The schedule also includes the countervailing duty order at issue in *US – Carbon Steel*.

<sup>17</sup> 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.<sup>18</sup> The Appellate Body also found that no evidentiary standard is prescribed for the self-initiation of a sunset review.<sup>19</sup> 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.<sup>20</sup>

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.)

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<sup>18</sup> *US – Carbon Steel*, para. 116.

<sup>19</sup> *Id.* ("Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3.")

<sup>20</sup> *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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> 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."<sup>24</sup>

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<sup>21</sup> 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.

<sup>22</sup> 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).

<sup>23</sup> See *Ferrosilicon From Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 51097 (Sept. 21, 1999).

<sup>24</sup> 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<sup>25</sup>, 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?**

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<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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.”<sup>28</sup> 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:

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<sup>26</sup> *US - Carbon Steel*, note 58 (emphasis in original; citation omitted).

<sup>27</sup> 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.

<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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"<sup>31</sup>, "prospective"<sup>32</sup> 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

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<sup>29</sup> *Id.*, para. 8.72.

<sup>30</sup> *US - Carbon Steel*, para. 92 (emphasis added).

<sup>31</sup> *Id.*, para. 71.

<sup>32</sup> *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<sup>33</sup> export price and normal value information, as well as other factors<sup>34</sup> 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.<sup>35</sup> In determining whether injury would be likely, the USITC considers “the likely volume, price effect and impact of the subject merchandise on the industry.”<sup>36</sup> 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.<sup>37</sup>

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....”<sup>38</sup> 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.<sup>39</sup>

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.

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<sup>33</sup> See *Sugar & Syrups from Canada*, 65 Fed. Reg. 735 (Jan. 6, 2000) (Exhibit JPN-25(l)).

<sup>34</sup> See *Brass Sheet & Strip from the Netherlands*, 64 Fed. Reg. 48362 (Sept. 3, 1999) (Exhibit JPN-25(m)).

<sup>35</sup> Section 751(c) (Exhibit JPN-1(e)).

<sup>36</sup> 19 USC. § 1675a(a)(1); USITC Pub. 3364 at 17.

<sup>37</sup> 19 USC. § 1675a(a)(1).

<sup>38</sup> *US – Carbon Steel*, para. 71.

<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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

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<sup>40</sup> *US - Carbon Steel*, para. 70.

<sup>41</sup> *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.**<sup>42</sup>

**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**

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<sup>42</sup> 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;<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.

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<sup>43</sup> Japan First Written Submission, paras. 202-06.

<sup>44</sup> Final Results of Sunset Review, 65 Fed. Reg. at 47,381.

<sup>45</sup> 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*.<sup>1</sup> 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,<sup>2</sup> and “administrative precedent, regardless of how often repeated, has no functional life of its own.”<sup>3</sup> 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,”<sup>4</sup> in the face of Japan’s establishment that USDOC followed the Bulletin in all 227 previous anti-dumping sunset reviews,<sup>5</sup> also demonstrates that USDOC does not

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<sup>1</sup> 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.

<sup>2</sup> USG Answers, at para. 10.

<sup>3</sup> USG Answers, at para. 4.

<sup>4</sup> USG Answers, at para. 10.

<sup>5</sup> USG Answers, at para. 14, and Exhibit JPN-31.

have “any effective discretion”<sup>6</sup> 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.<sup>7</sup> 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.”<sup>8</sup> 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<sup>9</sup> 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.<sup>10</sup> Moreover, the USG

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<sup>6</sup> *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.”)

<sup>7</sup> 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*”).

<sup>8</sup> USG Answers, at para. 15.

<sup>9</sup> See section III. of the Sunset Policy Bulletin (Ex. JPN-6).

<sup>10</sup> 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."<sup>11</sup> 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*<sup>12</sup> 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.<sup>13</sup> In fact, USDOC did automatically initiate its sunset review of the case.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.

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<sup>11</sup> The New Shorter Oxford English Dictionary, Volume 2 N-Z, p.2363

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> See *id.* See also Data Compilation of All Sunset Reviews Conducted by USDOC as of August 2002, at p. 12 (Ex.JPN-31).

<sup>15</sup> See *id.*

<sup>16</sup> 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"<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

#### 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.<sup>20</sup> As discussed in our prior submissions,<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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<sup>17</sup> USG Answers, at para. 22.

<sup>18</sup> *Id.*

<sup>19</sup> See Japan Request for the Establishment of a Panel, 4 April 2002, para. 1.

<sup>20</sup> USG Answers, at paras. 45, 49.

<sup>21</sup> See *e.g.*, Japan First Submission, at paras. 157-158, and Japan Second Submission, at paras. 86-92.

<sup>22</sup> 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).

<sup>23</sup> *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,<sup>24</sup> not as the USG suggests.<sup>25</sup> The panel stated that any “determination” under the SCM Agreement “must be properly substantiated in order for that determination to be legally justified.”<sup>26</sup> The panel then further states “a determination of likelihood under Article 21.3 must rest on a sufficient factual basis.”<sup>27</sup> In this context, the panel concluded that one element of a sufficient factual basis is “an assessment of the likely rate of subsidization.”<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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”<sup>31</sup> through a “rigorous” review.<sup>32</sup> 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

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<sup>24</sup> *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R (3 July 2002).

<sup>25</sup> See USG Answers, at paras. 31, and 44.

<sup>26</sup> *US – Carbon Steel*, WT/DS213/R at para. 8.92.

<sup>27</sup> *Id.*, at para. 8.94.

<sup>28</sup> *Id.*, at para. 8.96.

<sup>29</sup> 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

<sup>30</sup> USG Answers, at para. 50.

<sup>31</sup> *US – Carbon Steel*, para. 88.

<sup>32</sup> 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.<sup>33</sup>

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 it 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,<sup>34</sup> 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,<sup>35</sup> 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.<sup>36</sup> The USG's statement that "Japan itself has acknowledged this fact"<sup>37</sup> 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.<sup>38</sup>

24. Finally, in its response to question 97,<sup>39</sup> 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

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<sup>33</sup> 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).

<sup>34</sup> USG Answers, para. 46.

<sup>35</sup> USG Answers, para. 47.

<sup>36</sup> 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.

<sup>37</sup> See USG Answers, at para. 46.

<sup>38</sup> 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).

<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup> The sunset review was later initiated in September 1999.<sup>43</sup> 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.<sup>44</sup> 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."<sup>45</sup> 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."<sup>46</sup> 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.

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<sup>40</sup> See USG Answers, para 50.

<sup>41</sup> In fact, there are many sunset reviews, for which no administrative review has ever been conducted since their original investigations.

<sup>42</sup> See Japan's First Submission, at para 34, and Ex.JPN-15e.

<sup>43</sup> See Ex. JPN-19a.

<sup>44</sup> See USG Answer, at para. 52.

<sup>45</sup> Article 6.10 of the AD Agreement.

<sup>46</sup> 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.<sup>47</sup>

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<sup>48</sup> were related to revocation proceedings under Article 11.2 of the AD Agreement, are distinct proceedings from sunset reviews.<sup>49</sup>

### 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

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<sup>47</sup> 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.

<sup>48</sup> See USG Answers, at para. 55 and footnote 45.

<sup>49</sup> 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.<sup>50</sup>

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<sup>50</sup> 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*).<sup>1</sup>

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.*<sup>2</sup>

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.'*"<sup>3</sup> 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.<sup>4</sup>

### **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

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<sup>1</sup> *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).

<sup>2</sup> 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.

<sup>3</sup> *Korea Dairy*, para. 120 (emphasis added).

<sup>4</sup> 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.”<sup>5</sup> 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.”<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.”

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<sup>5</sup> Japan Answers to Questions from Panel (Second Meeting), para. 29.

<sup>6</sup> See Request for the Establishment of a Panel by Japan (WT/DS244/4) (5 April 2002), para. 3.

<sup>7</sup> See Japan First Oral Statement, paras. 47-50; Japan Second Submission, paras. 146-152.

<sup>8</sup> 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*<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup>

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<sup>9</sup> *Final Sunset Decision Memorandum* at 11 (Exhibit JPN-8(e)).

<sup>10</sup> *Preliminary Results of Full Sunset Review; Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 753 (6 Jan. 2000).

<sup>11</sup> *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.

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