ANNEX D

Oral Statements, First and Second Panel meetings

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF JAPAN – FIRST MEETING

I. INTRODUCTION

1. Japan believes the US sunset statute, regulations, and "administrative procedures" are inconsistent with the United States' obligations under various provisions of the WTO Agreements, including Article 11.3 of the AD Agreement. Before addressing the details of our claims, however, it is first necessary to discuss three key interpretative issues in this case: (1) basic treaty interpretation; (2) the standard of review; and (3) Japan's general practice arguments.

2. With respect to treaty interpretation, the parties disagree about what the interpretive principles within Article 31 of the Vienna Convention mean. The United States argues that, absent a specific clarification either within the provision itself or through an explicit cross-reference to some other provision, the authorities are free to interpret the provision any way they wish. Japan believes, however, that proper treaty interpretation requires that each provision of the AD Agreement be viewed in the context of the entire Agreement, taking into account the object and purpose of the Agreement as well. As previous panels have found, silence is not dispositive. The text of the provision is only the beginning of the analysis. Article 11 does not provide detailed substantive or procedural rules anywhere within the article. Therefore, one must look to the rest of the AD Agreement to find these requirements.

3. The parties also have divergent views with regard to the proper standard of review. The text of Article 17.6(i) of the AD Agreement is clear. The Panel is required to examine whether: (1) the "establishment of the facts was proper;" (2) the evaluation was unbiased; and (3) the evaluation was objective. There is no deference with respect to the establishment of the three factors themselves. Any factual conclusions by the United States in this case must be viewed from this perspective.

4. Lastly, the United States asserts that Japan's general practice claims regarding the Sunset Policy Bulletin are inappropriate and that the Panel's decision should not deviate from the narrow facts of this case. Japan disagrees. Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement explicitly require each WTO Member to conform its statute, regulations, and "administrative procedures" to its WTO obligations. Japan believes that review by this Panel should extend to "administrative procedures" that ignore relevant WTO obligations. "Administrative procedures" that are followed, without exception are de facto "binding." USDOC's Sunset Policy Bulletin establishes a rigid "administrative procedure" for evaluating sunset reviews and is strictly followed by USDOC in case-after-case, including this one. These facts distinguish the administrative procedures in this case from other discretionary laws and practices considered in previous panel determinations.

A. DETAILED ARGUMENTS ABOUT CLAIMS

5. The proper interpretation of Article 11.3 requires that "termination shall occur." After this basic obligation to terminate, the text provides for a possible exception to the basic rule – continuation only if a sunset review reveals that injurious dumping is likely to occur in the future. The grammatical relationship between these two concepts confirms that one phrase is the rule, the other phrase is the exception. When interpreting Article 11.3, it is therefore critical that the exception not be allowed to swallow the basic rule.

1. Automatic Initiation of Sunset Reviews

6. The first sentence of Article 11.3 sets forth the rule that a finding of injurious dumping in the original investigation is effective for only five years. After five years, the original finding has lost its factual and legal relevance, and the order shall be terminated. The automatic initiation, which is made because the original affirmative finding is still effective, permits a Member to completely rewrite the rule of the 5-year effective period to a longer period. Such an unreasonable result does not reflect a proper interpretation.

7. Proper treaty interpretation dictates one must examine the textual links from other provisions to Article 11.3 and the broader context in which Article 11.3 operates. Japan believes that it is simply not possible to interpret Article 11.3 correctly without reading the obligations explicitly provided for in Article 12. Articles 12.1 and 12.3 make no sense unless the "sufficient evidence" standard also applies to sunset reviews.

8. The United States attempts to hide from this obligation by misinterpreting the mutatis mutandis language in Article 12. The ordinary meaning of the term is "with necessary changes having been made." The proper interpretation would simply replace "investigation" with "review" in Article 12.1, and all remaining words would apply equally to Article 11.3.

9. In addition, footnote 1 provides a further textual link from Article 5.6 to Article 11.3. The footnote defines the term "initiated" to mean the procedures a Member employs pursuant to Article 5 to commence an action. Article 11.3 then provides that a sunset review is "a review initiated." Consequently, the use of the term "initiated" in Article 11.3 demonstrates that the AD Agreement contemplates that a sunset review must be initiated in accordance with the procedural requirements under Article 5, including the sufficient evidence requirement in Article 5.6.

10. It is also necessary to examine the object and purpose of Article 11.3. The presumption of termination discussed above, coupled with the general requirement in Article 11.1 – that the AD duty may remain in force only as long as necessary – contemplates that some AD duties will terminate without any sunset review. When there is no threshold evidence showing the need for the review, the review should not go forward. Therefore, Article 11.3 first requires that the authorities make a threshold decision as to whether to begin a sunset review.

2. "Likelihood" of Continuation or Recurrence of Dumping

11. USDOC's regulations and Sunset Policy Bulletin create a myriad of WTO-inconsistencies by preventing any sort of prospective analysis. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence. Yet USDOC's regulations explicitly mandate application of a "not likely" standard, which was already found to be WTO-inconsistent by the panel in DRAMs. Even though the United States accepted the DRAMs panel decision, the United States did not amend its regulations with respect to sunset reviews under Article 11.3. The US argument that because the statute uses the word "likely" there is no WTO-inconsistency is specious. Simple recitation of WTO-consistent language in the statute does not mean the US regulations comply with its WTO obligations. Moreover, the US assertion that the provision is ministerial in nature is completely contradicted by its own publication, which states that "{t}hese revisions are intended to clarify the circumstances under which the Department will revoke an order."

12. This WTO-inconsistent standard is also reflected in the Sunset Policy Bulletin. The Sunset Policy Bulletin establishes four scenarios to determine whether dumping is likely, or unlikely, to continue or recur. All of these factual scenarios, however, only examine historical dumping margins and import volumes. Of these four scenarios, there is only one in which respondents may be deemed "not likely" to dump in the future. This single scenario, however, is virtually impossible to satisfy. In

228 sunset reviews, where the domestic industry participated, USDOC found one of the other three "likely" scenarios to be applicable in every single case.

13. If a respondent satisfies one of the three "likely" scenarios, USDOC's regulations and the Sunset Policy Bulletin make it virtually impossible to rebut the presumption of "likely" future dumping through the "good cause" requirement. USDOC hardly ever finds "good cause" to examine other evidence that may rebut this presumption. Consequently, the Sunset Policy Bulletin constrains USDOC by forcing it to make a mechanical examination of only historical facts, while shutting down the collection and analysis of other positive prospective evidence. The United States does not address the fact that USDOC uses the "good cause" standard to shut down any sort of prospective analysis.

14. The panel's decision in US – CVD Sunset (DS213) supports Japan's argument. In that case the panel found that historical import volumes and subsidization rates are only part of the analysis. It is also appropriate to examine changes in the subsidy programme as well as socio-economic and political changes. In this case, however, USDOC rigidly applied the Sunset Policy Bulletin and only reviewed historical import volumes and dumping margins and then refused to consider other evidence submitted.

15. The United States' claim that Japan had "sufficient opportunity" to gather information and present its argument and supporting information, including its "good cause" arguments, is irrelevant. Respondents should not have to go through the time and expense of preparing such argumentation, when it is unclear whether the domestic industry will even participate. In fact, Japanese respondents only had 15 days after they knew the domestic industry would participate in which to file their substantive response. Moreover, Japanese respondents cannot be faulted for not providing information establishing "good cause" because USDOC's regulations and Sunset Policy Bulletin failed to indicate the type of information necessary to establish "good cause."

3. Use of WTO-Inconsistent Dumping Margins and Reporting Those Margins to the USITC for Purposes of Its Injury Analysis

16. The United States first determines whether dumping is "likely" to occur in the future without quantifying at what rate. USDOC then chooses a dumping margin from the results of previous proceedings, usually the original investigation. USDOC then reports this dumping margin to the USITC for purposes of its injury determination in accordance with the Sunset Policy Bulletin. USDOC never reports probable future dumping margins to the USITC.

17. USDOC's policy completely ignores the current conditions of the market. The United States argues that the current reality of the market is irrelevant in predicting future levels of dumping. The current reality of the market, however, has a greater impact on the future evolution of the market – and, in turn, whether respondents will be likely to dump in the future – than a five-year old dumping margin that reflects only historical market conditions.

18. The margins USDOC used were an inappropriate basis for these determinations in the first place. All dumping margins calculated before passage of the Uruguay Round Agreements Act ("URAA"), as in this case, were calculated pursuant to WTO-inconsistent methodologies. Nonetheless, in accordance with the Sunset Policy Bulletin, USDOC bases its likelihood determination and the magnitude of dumping reported to the USITC on these historical WTO-inconsistent dumping margins.

19. Article 18.3 is more than just a timing provision. All sunset reviews are "reviews of existing measures" under Article 18.3. The sunset review determination thus must be in accordance with the current Agreement. An old dumping margin from a pre-WTO proceeding is an inappropriate basis for

making a determination, and its use is inconsistent with the United States' obligations under the AD Agreement.

20. In addition, USDOC's general practice of calculating dumping margins in original investigations and subsequent reviews by zeroing negative dumping margins is WTO-inconsistent. The Appellate Body in EC – Bed Linens found that the zeroing of negative dumping margins does not make a "fair comparison" under Article 2.4. Indeed, both anti-dumping investigations and sunset reviews determine whether a product under consideration as a whole is, or is likely to be, dumped. Zeroing, which disregard certain sales of a product to create an artificially high margin, may not be used irrespective of the dumping margin calculation methodologies. This obligation, therefore, applies to all determinations of dumping, not just original investigations.

21. USDOC also applies the wrong de minimis standard to sunset reviews. Article 5.8 applies to sunset reviews under Article 11.3. The use of the terms "dumping" and "injury" in Article 11.3 incorporates the concepts and rules of Articles 2 and 3 as part of Article 11.3. When read together, these provisions confirm that the authorities may not determine "dumping" or "injury" where the dumping margin is found to be de minimis. Therefore, the US effort to interpret Article 11.3 without considering Articles 2 and 3 is simply wrong. In fact, the text of Article 5.8 itself indicates that the de minimis standard applies to "cases" and is not just limited to "investigations," as the United States believes.

4. USDOC's Order-Wide Basis Dumping Determination

22. The Sunset Policy Bulletin explicitly states that USDOC will make its likelihood determination on an order-wide basis. As a result, USDOC always makes its determination on an order-wide basis, including in this case. This approach is inconsistent with the company-specific evaluation of facts required by Article 6.10. Articles 9.2 and 11.1 also provide Article 11.3 with contextual support. The US attempt to distinguish between procedural and substantive applications of the obligations of Article 6 is disingenuous. All of the provisions of Article 6 establish different types of procedural requirements to some degree. The mere fact that those procedural requirements, when applied to other provisions, have substantive implications does not foreclose their effect. Therefore, Article 11.4's inclusion of the evidentiary and procedural requirements of Article 6 to sunset reviews does not change this analysis.

5. The USITC's Cumulative Assessment of Negligible Imports

23. The US statute grants the USITC discretion to determine whether to cumulate respondent countries' imports when determining injury in a sunset review. The USITC exercised this discretion in this case when it decided to cumulate imports. Nowhere in the USITC's determination, however, did the USITC ever consider the negligibility of imports, or import volume, in deciding whether to cumulate imports from Japan with other imports.

24. This is inconsistent with the United States' obligations under Articles 3.3, 5.8, and 11.3. The United States believes that Article 3.3 is limited by its terms only to investigations. One must consider, however, the interplay of Article 2 and Article 3, which identifies "dumped imports" from a single country for the injury determination. The only exception to this rule is the narrowly defined circumstances in Article 3.3. These obligations are then incorporated into Article 11.3 through the term "injury."

25. Any provision of the AD Agreement, which requires the authorities to evaluate injury, must refer to the obligations under Article 3, including the negligibility standards for cumulation under Article 3.3. The US argument, therefore, that no quantitative analysis is required for injury determinations is wrong. Article 3.4 specifically requires the authorities to consider "the magnitude

of dumping" to determine injury. Article 3.5 also requires the authorities to consider whether the "effects of dumping" have caused injury. Consequently, these Articles require quantification of import volume to assess the cumulative effects of "dumping" to determine injury.

6. The United States is Not Conducting Sunset Reviews in a Uniform, Impartial, and Reasonable Manner

26. For the reasons discussed below, the United States, as a general practice and in this case, does not conduct its sunset reviews in a uniform, impartial, and reasonable manner in violation of Article X:3(a) of GATT 1994. By requiring USDOC to automatically initiate sunset reviews, the United States administers its sunset reviews in favor of the domestic industry. Such administration is not impartial. The automatic initiation of sunset reviews without any grounds is also an "unreasonable" administration of its substantive sunset review laws.

27. Further, the administration of USDOC's 30-day submission rule is both unreasonable and biased. The administration of the 30-day rule places a greater burden on respondents to report much more-in-depth and detailed information in the same period of time as the domestic industry.

28. Finally, USDOC treats revocation reviews under Article 11.2 and sunset reviews under Article 11.3 differently. Yet, both types of proceedings share the same "likely" standard to determine if future dumping will occur. Therefore, by maintaining two different standards for revocation proceedings under Article 11.2 and sunset reviews under Article 11.3, USDOC fails to administer these two proceedings in a uniform manner as required by Article X:3(a) of GATT 1994.

II. CONCLUSION

29. For these reasons, Japan respectfully request that the Panel: (1) find that the United States specific statutory provisions, regulations, and determinations are inconsistent with the various enumerated provisions of the AD Agreement, GATT 1994 and the WTO Agreement; (2) recommend that the Dispute Settlement Body request that the United States amend its sunset statute, regulations and the Sunset Policy Bulletin to conform with its obligations; and (3) find that compliance with its WTO obligations requires that the United States terminate the anti-dumping duty order on the subject product from Japan.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES – FIRST MEETING

1. This proceeding presents essentially six basic questions. First, did the United States act inconsistently with Article 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") by self-initiating a sunset review without regard to the evidentiary provisions of Article 5.6 of the AD Agreement? Second, did the United States act inconsistently by not applying the Article 5.8 *de minimis* standard in sunset reviews? Third, did the United States apply a "not likely" standard in its determination of likelihood of continuation or recurrence of dumping? Fourth, did the United States act inconsistently with Article 11.3 in its use of dumping margins calculated prior to the WTO agreements? Fifth, did the United States act inconsistently with Article 11.3 by making its likelihood determination on an "order-wide" basis? Finally, did the United States act inconsistently with Article 11.3 by not applying a quantitative negligibility analysis before it cumulated imports in making its likelihood of injury determination? The answer to all six of these questions is "no." There is no support in the AD Agreement for any of these claims for a simple, yet fundamental reason – it is impossible to act inconsistently with obligations that do not exist.

2. First, however, we address generally Japan's claims with respect to the US Department of Commerce's ("Commerce") final sunset determination and whether Commerce's determination was based on an appropriately conducted review of all relevant and properly submitted facts. An "objective assessment" of Commerce's findings and actions supports an answer in the affirmative.

3. Article 11.3 of the AD Agreement defines the point in time at which the authorities must take stock of or terminate a duty – that is every five years. Article 11.3 also defines the circumstances under which maintaining a duty may be considered "necessary" – that is when continuation or recurrence of dumping and injury is likely. An authority's decision to maintain a duty must be supported by evidence of these requisite circumstances.

4. What does it mean to determine likelihood of continuation or recurrence of dumping and injury? First, consider the words establishing the circumstances under which maintaining a duty may be considered necessary. The word "continuation" expresses a temporal relationship between past and future; something that is happening may continue in the future. The word "recurrence" also expresses a temporal relationship between past and future; something that happened in the past may happen again in the future.

5. Considered together then, these words indicate that in making a determination of the likelihood of continuation or recurrence of dumping and injury, the administering authority must determine what are the prospects of dumping and injury in the future. Without the discipline of the duty, are dumping and injury likely to continue or recur? The analysis required in a sunset review, therefore, is necessarily prospective in nature.

6. In Commerce's final sunset determination, Commerce found likelihood based on two unrefuted facts. The first fact is the continued existence of dumping by the Japanese producers despite the imposition of the discipline. The second fact is the significantly reduced import levels of the Japanese producers evident after the imposition of the discipline. Based on these facts, Commerce determined that dumping was likely to continue if the duty were revoked.

7. Japan also argues that there are a number of substantive and procedural flaws in Commerce's sunset determination. Japan's main procedural claim concerns whether the Japanese producer, NSC, was afforded "ample opportunity" to participate in the underlying sunset review.

8. Rather than demonstrating that Commerce's findings or procedural actions were inconsistent with the AD Agreement, Japan essentially presents a story that is not supported by the record. Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 17.6 of the AD Agreement, however, direct panels to make an "objective assessment" of the facts of the case and of the applicability and conformity with relevant agreements. This "objective assessment" must necessarily focus on the consistency of the sunset review with the requirements of Article 11.3 and Article 6 of the AD Agreement.

9. Japan has not demonstrated how Commerce's actions in this regard are inconsistent with any of the evidentiary and procedural requirements of Article 6. NSC was on notice of the relevant information requirements and options, as well as the applicable deadlines, at least 15 months prior to the initiation date for the sunset review. Fifteen months provides "ample opportunity" to gather and present any evidence NSC considered pertinent to Commerce's sunset determination. Also, fifteen months is longer than the normal deadline in Article 11.4 for the conduct and completion of sunset reviews. That NSC failed to avail itself of the opportunity to present evidence cannot be blamed on Commerce's actions in this case.

10. Next, with respect to each of the six legal issues in this dispute, Japan's arguments run afoul of the fundamental proposition that the customary rules of treaty interpretation neither require nor condone the imputation into a treaty of words that are not there.

11. With respect to the self-initiation issue and the *de minimis* issue, Japan's argument places the legitimate expectations of the Members as a whole, as expressed in the agreed text of the treaty, at risk. According to Japan, the requirements of Article 5 of the AD Agreement are made applicable to Article 11.3 sunset reviews by virtue of the fact that Article 12.1 mentions Article 5, and Article 12.3 applies to reviews under Article 11. Apparently, according to Japan, the mere mention of Article 5 in Article 12 creates an obligation to apply Article 5 in Article 11.3 sunset reviews. Treaty interpretation does not and cannot work that way. Rather, the basis for interpreting a treaty is the ordinary meaning of the words of the treaty.

12. In the AD Agreement, the drafters cross-referenced particular provisions to make them applicable in the context of Article 11 reviews. If the Members had actually agreed that various provisions of Article 5 should apply in sunset reviews carried out under Article 11, the text would reflect that agreement, just as it does with respect to the application of Article 6 in Article 11 reviews. The Article 5.6 evidentiary prerequisite simply does not apply to Article 11.3 sunset reviews, and neither does the Article 5.8 *de minimis* standard. For this reason, Japan's claims concerning self-initiation and *de minimis* must fail.

13. With respect to the likelihood standard in Article 11.3, Japan has raised a number of issues about the manner in which the United States determines whether dumping is likely to continue or recur. In this regard, Japan claims that Commerce's regulations do not provide for a determination consistent with the obligations of Article 11.3, and effectively create a "not likely" standard for sunset reviews. Japan is wrong. The applicable US law, on its face, requires that Commerce determine whether there is a likelihood that dumping will continue or recur in sunset reviews. In this case, Commerce affirmatively found that dumping was likely to continue, were the duty to be revoked, based on the undisputed fact that the Japanese producers continued to dump even with the duty in place.

14. With respect to Commerce's treatment of antidumping margins in the sunset review, the likelihood analysis required by Article 11.3 of the AD Agreement is a qualitative analysis, not a quantitative analysis. Article 11.3 requires an administering authority to determine likelihood of continuation or recurrence of dumping. Article 11.3 does not require the calculation of dumping margins.

15. Moreover, the United States determines likelihood of dumping on an order-wide basis, which is consistent with Article 11.3. Article 11.3 provides for the review of the "definitive" duty. The definitive duty is imposed on a product-wide (that is, order-wide) basis, not on a company-specific basis. This is made clear by the reference in Article 9.2 to "any product." In addition, there is no basis in Article 11.3 for distinguishing between the required specificity of the likelihood of injury determination and the required specificity of the likelihood of dumping determination. Thus, because likelihood of injury is determined, by necessity, on an order-wide basis, it follows that likelihood of dumping should be determined on the same basis. The fact that Article 11.4, makes the evidentiary and procedural provisions of Article 6 applicable to sunset reviews under Article 11.3 does not create a substantive obligation to determine likelihood on a company-specific basis.

16. Finally, with regard to the injury determination made in this sunset review, consideration of the text of Articles 11.3, 3.3 and 5.8 of the AD Agreement, as well as the structure of the AD Agreement as a whole, shows that the AD Agreement does not require any quantitative negligibility analysis in a sunset review. Like the AD Agreement, US law does not require the application of a quantitative negligibility test in sunset reviews.

17. By its plain language, Article 11.3 does not contain a negligibility test nor does it incorporate negligibility concepts from Article 5.8 and Article 3.3. On its face, Article 3.3 of the AD Agreement applies to investigations. Moreover, Article 3.3 refers to present events, whereas Article 11 refers to future or likely events. Article 3.3 does not refer in any manner to Article 11.3 reviews. Similarly, the plain language of Article 5.8 indicates that it applies only to investigations.

18. Japan's reliance on footnote 9 to Article 3 to show that Article 3 requirements are somehow applicable to sunset reviews does not advance Japan's argument. That footnote simply provides that any reference in the AD Agreement to the term "injury" incorporates the definition of injury in Article 3. The fact that "injury" should be interpreted in accordance with Article 3 does not automatically mean that all provisions of Article 3 are applicable to Article 11. Furthermore, the text of the AD Agreement provides no support for the view that the provision to terminate an investigation when imports are negligible was based on the notion that negligible imports are non-injurious.

19. The negligibility requirements of Article 5.8 do not apply in sunset reviews for good reason: the focus of a review under Article 11.3 is decidedly different from that of an original investigation under Article 3. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports, and must examine whether the volume, price effects, and impact of such imports are indicative of present injury or threat to the domestic industry. In contrast, in a sunset review, in deciding whether to remove the order, the investigating authorities examine the likely volume of imports in the future, after these imports have been restrained for five years by an antidumping duty order, and their likely impact in the future on a domestic industry that has been operating with the order in place. Accordingly, Japan has failed to show that the United States International Trade Commission ("USITC") acted in a manner inconsistent with the AD Agreement when it decided to cumulate imports from various countries in this sunset review.

20. Another way of looking at the arguments raised by Japan and the third parties in this dispute is in terms of four general theories that run through their arguments. The first theory is that Article 11.3 of the AD Agreement creates a presumption of termination of antidumping duties after

five years and that any extension is an exception to the agreement. This theory finds no support in the applicable provisions of the AD Agreement properly interpreted in accordance with customary rules of treaty interpretation.

21. As mentioned earlier, there is no temporal limitation on the remedial relief from unfairly trade imports afforded by the antidumping duty provisions of the AD Agreement. Rather, under Article 11.3, there is a conditional limitation on the application of antidumping measures, and Article 11.3 plainly gives authorities the option of either automatically terminating the definitive antidumping duty, or taking stock of the situation by conducting a review to determine whether continuation or recurrence of dumping and injury is likely. Nothing in Article 11.3 or elsewhere in the AD Agreement suggests a presumption as to how long antidumping duties may continue to be necessary or as to the final outcome of a sunset review.

22. Moreover, characterizing a sunset review or extension of an antidumping duty order beyond five years as some sort of "exception" does not alter the analysis of the AD Agreement provision at issue here. On its face, Article 11.3 establishes that sunset reviews are part of the overall balance of rights and obligations negotiated during the Uruguay Round.

23. The second theory advanced by Japan's arguments is essentially that any provision of the AD Agreement is potentially applicable mutatis mutandis to any other provision of the AD Agreement. This is a teleological approach to treaty interpretation which suffers from several fatal flaws. First, it violates the principle of effectiveness by rendering the various cross-references and scope language of the AD Agreement redundant. Second, this approach to treaty interpretation turns a customary rule of treaty interpretation, found in Article 31(1) of the Vienna Convention, on its head. As noted earlier, where the Members wished to have obligations set forth in one provision of the AD Agreement apply in another context, they did so expressly. If accepted, Japan's approach would nullify the Members' expectations as explicitly expressed in the AD Agreement.

24. The third theory is that the concept of *de minimis* or negligible import volumes is equivalent to "non-injurious". This is simply wrong. Dumping and injury are separate concepts defined by the Agreement. In particular, whether in fact dumped imports are causing injury must be ascertained in light of the applicable provisions on determination of injury set forth in Article 3 of the AD Agreement.

25. The fourth and final theory is that Japan and the third parties' flawed approach to treaty interpretation does not just nullify Members' expectations, it confounds those expectations. The fact is the United States amended its antidumping duty statute in 1995 to include - for the first time - provisions for the conduct of sunset reviews of antidumping duty measures; the United States agreed to these new provisions subject to the conditions that were clear from the text that the new *de minimis* standard would be limited to investigations and that sunset reviews could be automatically self-initiated by authorities. Japan and the third parties are trying to undo this deal seven years after the fact.

26. Finally, despite Japan's claims during its oral presentation to the contrary, the United States has in fact revoked 139 antidumping orders of the sunset reviews conducted to date, nearly one-half of the AD orders subject to the sunset reviews.

27. For the reasons discussed in our oral presentation at the first substantive meeting of the Panel and in our first written submission, we ask that the Panel reject each of Japan's claims in this dispute.

ANNEX D-3

THIRD PARTY ORAL STATEMENT OF BRAZIL

I. INTRODUCTION

1. I would like to thank the Panel for the opportunity to present Brazil's views as a third party in these proceedings. This morning, I would like to highlight certain aspects of the issues discussed in detail in our written submission dated 14 October 2002.

2. Brazil concurs with the arguments raised by Japan and share its concerns that the US law and practice involving sunset reviews is in violation of the obligations under the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement") and Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement").

3. Brazil is particularly concerned that the US practice, as it pertains to the administrative reviews underlying Japan's sunset review claims, reaches far more than just the US government's sunset reviews. Indeed, it impacts adversely virtually all antidumping duty proceedings conducted by the United States, thus negatively affecting all of US trading partners within the WTO. Specifically, the *de minimis* margin standard of 0.5 per cent and the use of the "zeroing" methodology by the United States affect not only US sunset reviews but also reviews in which the revocation of the order by the United States is under consideration, as part of an annual review, for example. Brazil considers that, in maintaining a *de minimis* margin of 0.5 per cent and applying a zeroing methodology to the dumping calculations, the United States violates Articles 2.4, 2.4.2, 5.8, 11 and 18.3 of the Anti-Dumping Agreement.

II. THE *DE MINIMIS* STANDARD

4. In both revocation review and sunset review proceedings, the United States applies a *de minimis* threshold of 0.5 per cent, despite Article 5.8 of the Anti-Dumping Agreement that explicitly defines the *de minimis* margin as less than two percent. The fact that the provisions that relate to administrative review and sunset review proceedings are contained in a different section of the Agreement does not affect this definition.

5. All provisions of the Agreement are threaded by the basic principles and obligations concerning all aspects of an antidumping measure. This means that one provision of the Antidumping Agreement cannot be read in a vacuum.

6. As we mentioned, Article 5.8 states that "[t]he margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price." Read in its plain language, the definition is not confined to any situation or to *investigations*. There is no other definition of "*de minimis*" contained anywhere else in the Anti-Dumping Agreement. Because this sentence is clear in its ordinary meaning, it does not require a contextual analysis and is not subject to various interpretations.

7. The Panel should consider that the argument presented in this case is different from the dispute in *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors*

(DRAMS) of One Megabit or Above From Korea ("DRAMS").[1] In DRAMS, the Panel rejected Korea's claim that the United States violated Article 5.8 by applying a 0.5 per cent *de minimis* standard in the context of Article 9.3 duty assessment procedures.

8. The Panel in the DRAMS case focused its analysis to interpreting the obligation imposed by the second sentence of Article 5.8, *vis-à-vis* Article 9.3, rather than on the Anti-Dumping Agreement's definition of "*de minimis*." The DRAMS Panel found the application of the *de minimis* provision to Article 9.3 duty assessment reviews would conflict with note 22 of the Agreement, to the extent that note 22 provides that a finding of no duty in the Article 9.3 duty assessment procedures "shall not" require a termination of the duty.[2] Based on this context, the Panel concluded that "Article 5.8, *second sentence*, [requiring termination of the "case"] does not apply in the context of Article 9.3 duty assessment procedures."[3]

9. The Panel's reasoning shows that its decision was narrow and limited. It only decided that the termination of the case required by the second sentence of Article 5.8 would not apply to Article 9.3 duty assessment proceedings. The parties in DRAMS did not argue, and the Panel did not consider, the applicability of the definition of the term "*de minimis*", contained in the third sentence of Article 5.8, to contexts other than investigations and duty assessment proceedings. As discussed earlier, the plain meaning of Article 5.8 does not limit the definition of *de minimis* to any particular context. However, even if it did, DRAMS would only veto its applicability to duty assessment proceedings, that are different from sunset reviews or revocation reviews, which result in the termination of the order.

10. The Antidumping Agreement does contemplate other proceedings that are distinct and separate from the Article 9.3 duty assessment procedure, considered in DRAMS. In this regard, the types of reviews provided in Article 11 have for purpose to determine the continued necessity of the duty. The antidumping duty order can be removed, in whole or in part, following an Article 11 review, while an Article 9.3 assessment would not lead to the same result. Moreover, the continued imposition of duties under Article 11 requires "dumping which is causing injury," while a single Article 9 duty assessment does not, by itself, address the injury issue. In this regard, an Article 11 review bears a close connection to Article 5 in that both Articles are concerned with whether an order should apply at all and both Articles require tests for dumping ***and*** injury.

11. To apply the principle of Article 11.1 that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury," one must first determine the meaning of the term "dumping which is causing injury." Although Article 11 does not refer to Article 5.8 specifically, the terms "dumping which is causing injury" are only addressed and defined in that Article. Accordingly, Article 11 must be read in conjunction with Article 5 to be given its full meaning, because the terms "dumping which is causing injury" in Article 11 cannot have a different meaning than they do in Article 5. The fact that Article 11 does not explicitly reference Article 5.8 cannot mean that that Article 11 is independent from the principles of the Antidumping Agreement. As we mentioned earlier, the provisions of the Antidumping Agreement cannot be read in a vacuum. For example, the parties must turn to Article 2 for the definition of "dumping," despite the fact that Article 11 does not explicitly reference Article 2 for such definitions. The parties cannot have intended that each Article was to entail a different definition of the terms commonly used.

12. Article 5.8 requires an "immediate termination" of cases where the dumping margin is less than 2 per cent. Thus, by definition, a *de minimis* margin of less than 2 per cent cannot cause injury.

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[1] WT/DS99/R (19 January 1999).
[2] *Id*.
[3] *Id*. (emphasis added).

A dumping margin that does not cause injury cannot justify the imposition of antidumping measures and also does not support the continued imposition of such measures.

13. An interpretation to the contrary leads to illogical results. It makes no sense to mandate termination of an investigation where the margin of dumping is less than 2 per cent, but simultaneously allow duties to continue on the basis of an even lesser amount. To illustrate, consider an example of two exporters: Exporter A earns a margin of 1.9 per cent during the investigation while Exporter B receives a margin of 2.2 per cent during the investigation. By operation of the US law, Exporter A is excluded from the dumping order while Exporter B becomes subject to continued dumping duties. In the ensuing reviews, Exporter B receives a dumping margin of 1.0 per cent, is assessed duties in the same amount and cannot become eligible for the termination of the duty. During the same time, Exporter A remains free to sell its products to the US market at a dumping margin of 1.9 per cent. The current US practice essentially allows Exporter A to continue selling its products at even *lower prices* than those exporters that are subject to the dumping order. This result could not possibly have been intended by the parties, and contradicts the ordinary meaning interpretation of the terms.

14. Pursuant to section 351.106(c) of the US regulations and by practice, the United States equates no dumping as less than 0.5 per cent margin of dumping, the threshold that it applies to all "reviews" of the antidumping duty order, irrespective of the purpose of the review. Thus, the United States equates "dumping which is causing injury" as less than 0.5 per cent margin when determining the continued necessity of the antidumping measures and maintains antidumping duties even when there is no dumping which is causing injury. Accordingly, Section 351.106 of the US regulations, on its face and as applied to sunset reviews and other types of reviews, such as the revocation reviews mentioned earlier, violates Article 5.8 and Article 11 of the Anti-Dumping Agreement.

15. We note that the Panel in the *United States – Countervailing Duties on Corrosion-Resistant Steel from Germany*[4] had to deal with the same issue as in this case in the context of the analogous provisions of the Subsidies Agreement, namely, whether the *de minimis* definition contained in Article 11.9 of that Agreement (the counterpart to Article 5.8 of the Antidumping Agreement) applied to sunset reviews of Article 21.3 (the counterpart to Article 11.3 of the Antidumping Agreement). The Panel agreed that the *de minimis* standard contained in Article 11.9 was implied in Article 21.3, based on the object and purpose of Article 11.9, even though no specific reference was made in Article 21.3 to the *de minimis* definition of Article 11.9 (para. 8.61). The Antidumping Agreement must be interpreted likewise, and all the more so in light of the fact that, whereas Article 11.9 of the Subsidies Agreement defines a *de minimis* percentage "*[f]or the purpose of this paragraph*", there is no such condition in Article 5.8 of the AD Agreement. The otherwise closely matching wording of the two provisions leads to the conclusion that the omission of the phrase in the AD Agreement is a further demonstration that the third sentence of Article 5.8 is a general definition, not restricted to investigations.

16. Further support for Brazil's position is provided by Article 18.3 of the Antidumping Agreement. Article 18.3 states:

> Subject to sub-paragraphs 1 and 2, the provisions of this Agreement shall apply to *investigations, and reviews of existing measures,* initiated pursuant to applications which have been made on or after the date of entry into force for a Member of WTO Agreement.

17. The plain language of this paragraph does not distinguish which "provisions" are applicable to reviews or investigations. The lack of differentiation indicates the Agreement was not intended to

[4] WT/DS213/R (3 July 2002).

set up different rules for reviews and investigations. Therefore, Article 18.3 further supports the conclusion that the *de minimis* standard defined in Article 5.8 is applicable to all segments of an antidumping proceeding.

III. ZEROING

18. Turning now to the issue of the zeroing methodology, the United States continues to maintain the methodology of zeroing negative margins in all its proceedings, despite the decision of the Panel and the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India* ("Bed Linen") which found such practice to violate Article 2.4.2 of the Anti-Dumping Agreement.[5]

19. In Bed Linen, the Appellate Body concluded that by disregarding the margin comparisons that yield a negative margin, the European Communities failed to determine dumping on the basis of a comparison of the normal value with "all comparable export transactions," as required under Article 2.4.2. It also found that the zeroing practice, by failing to take fully into account the prices of all comparable export transactions, violates Article 2.4 which require a "fair comparison" between export price and normal value.[6]

20. The United States employs the identical practice of "zeroing" when determining the margin of dumping in both investigations and reviews, and has asserted that "zeroing" is required by the US law. Like the European Communities, the United States, in an investigation, compares the weighted-average export price of each "model" of the product under investigation with the weighted-average normal value for similar model, and then disregarding those comparisons that does not yield in a positive margin.

21. In an administrative review, the comparison methodology is similar, with a slight difference. Instead of comparing the weighted average normal value with the weighted average export price, the margin of dumping in a review, in general, is determined by comparing the price of individual export transactions with weighted-average normal value. This difference in the comparison methodology, however, does not exempt the United States from the obligations imposed by Article 2.

22. To the extent that the US law requires zeroing of negative margins, the statute leads to an overall dumping margin that is not based on "all comparable transactions" as required by Article 2.4.2 of the Anti-Dumping Agreement, nor based on a "fair comparison" between export price and normal value, as required by Article 2.4. Thus, the US law, on its face and as applied to all antidumping proceedings, violates Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement, as determined by the Appellate Body.

23. Brazil submits that the principles affirmed in the *Bed Linen* decision apply equally to investigation and reviews, such as sunset, revocation or administrative reviews, notwithstanding the slight difference in the comparison methodology used by the United States. The principle of "fair comparison" established under Article 2.4 does not distinguish whether the comparison is made on an average of all transactions or on a transaction-to-transaction basis. Therefore, this principle applies equally to a review as well as to an investigation, no matter what comparison methodology is used.

24. In a review, the US government compares individual export transactions with normal value and aggregates the results of these multiple comparisons to determine the weighted-average dumping margin. In doing so, the US government disregards those export transactions that yield a negative margin. In effect, the US government assigns to those transactions a value equal to normal value

[5] WT/DS141/AB/R (1st March 2001).
[6] *Id*.

despite the fact that, in reality, such transactions have a value higher than normal value. This methodology is identical to that used by the European Communities which the Appellate Body found to violate Article 2.4 in the Bed Linen decision. Accordingly, the US methodology of "zeroing," whether it involves an average of all transactions or transaction-to-transaction comparison basis in the context of an administrative review, violates Article 2.4 of the Agreement. If the application of zeroing during the investigative phase impermissibly inflates the dumping margin, it is also impermissible to inflate the dumping margin in such a manner during the subsequent review phases.

IV. CONCLUSION

25. The effects of WTO-inconsistent methodologies maintained by the United States adversely affects all antidumping cases brought by the United States against all of its trading partners, including Brazil. Brazil respectfully requests the Panel to find the United States in violation of its obligations under the WTO Agreement and the Anti-Dumping Agreement. Thank you very much.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF CHILE

1. Let me begin by thanking you and the members of the Panel for giving us this opportunity to express our views in this important dispute. We already presented a written submission with some elements that we think the Panel should take into consideration when resolving this matter. In this opportunity we do not want to repeat those arguments but make some general comments on the US submission.

2. Article 17.6 of the Antidumping Agreement ("ADA") establishes the standard of review for Panels when examining Antidumping disputes. While we do not contest the scope and significance of that provision we would like to highlight the obligation of the investigating authorities to evaluate the facts before it on an unbiased and objective way. Unfortunately the US authorities do not act in such an unbiased and objective way during sunset reviews as Japan has shown in this particular case and as the history of the USDOC/USITC determinations prove.

3. The US disagrees with Japan – and by extension with Chile – that sunset reviews are analogous to the original investigation and asserts that it is a procedure that stands on its own. We do not find basis for such a proposition since the effects of both administrative acts could be the same, meaning the application of an anti-dumping measure. Even if we were to agree with that approach, it is not an excuse to adopt legislation and regulations or act in ways that are not provided for by the ADA – the US recognises that Article 11.3 contains minimal guidance – and inconsistent with the spirit and fundamentals of such Agreement.

4. We are struck by the length of the US arguments regarding the way Japan used the principles of treaty interpretation to show that Article 11.3 of the ADA should not be read in isolation from the rest of the provisions of the ADA. Indeed, some of those provisions as well as the requirements throughout the ADA do apply to sunset reviews. If the US did not like that rationale it should have provided the Panel with an interpretation of Article 11.3 that justifies the regulations and conduct for sunset reviews in the US. The US not only did not do that but it considers that it has the right to apply disciplines that are different – and in most cases inconsistent - to the ones provided in the ADA for investigations and other reviews.

5. US laws, regulations and practice are based on the understanding that paragraph 3 of Article 11 gives authorities an option between terminating the AD measure or not doing so in some specific cases. There is no option in Article 11 but to terminate the measure within five years. It expressly provides that an AD duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury (paragraph 1) and if it is no longer necessary it shall be terminated on a date not later than five years from its imposition (paragraph 3). If the authority determines that dumping and injury will continue or recur it may decide not to terminate the measure.

6. If paragraph 1 prevails ("notwithstanding the provisions of paragraph 1 and 2") then what is the reason to provide for an exception in paragraph 3 if the AD duty shall remain in force as long as it is necessary to counteract dumping? Clearly what paragraph 3 stipulates is that even though dumping may still exist, the measure shall be terminated not later than 5 years unless the authority determines that the expiration of the duty will lead to <u>continuation</u> of dumping (it goes back to the general rule of paragraph 1).

7. On the other hand, if there is no more dumping and injury and the measure should have been terminated by application of paragraph 1 and certainly by paragraph 3, then why can the measure be maintained after a sunset review? Because the authority may decide that considering the evidence, dumping and injury may recur.

8. What does these all mean? That the authority cannot exclusively rely on the facts, evidence and conclusions of the original investigation as the USDOC/USITC does. The provisions of the ADA are clear regarding the conditions under which an AD measure shall terminate. As the US states in its submission, a sunset review deals with likely future behaviour[1], and we agree. That is why we do not agree with the conclusion that the authority can use historical evidence of dumping, especially when that evidence or the investigation may be flawed with WTO inconsistencies or is at least 5 years old. Commerce's determination of future behaviour based on remote past behaviour has no basis in the ADA nor in logic.

9. Let me give you some examples.

10. The USDOC relies on the original margins based on the fact that they better represent the behaviour of the exporter without a discipline. It may be true for past behaviour but certainly a presumption for future behaviour since the USDOC assumes that absent the AD duty the exporter will recur to dumping. An irrefutable presumption even though the same USDOC may have calculated a different margin in a subsequent administrative review. The presumption may only be rebutted if the decline of dumping margins is accompanied by stable or growing imports. While we could agree with the US that historical dumping with a discipline can be highly probative of the behaviour of exporters without the discipline[2], there is no possibility, as the history has shown us, for the exporter to demonstrate the contrary.

11. The USDOC may report a lower, more recently calculated margin if dumping margins declined or dumping was eliminated after the issuance of the order and import volumes remained steady or increased. This provision of the Sunset Policy Bulletin would never pass a test of impartiality or lack of bias since that is exactly the only case when the USDOC has to determine that there is no likelihood that dumping will recur, and the measure has to be terminated. So then, why should the USDOC transmit those margins to the USITC? Is that a recognition that even though a measure should be terminated, it will never be done because there will always be grounds to come to a determination of likelihood?

12. Use of "other factors". As shown in our written submission, the US authorities only accept considering "other factors" in order to avoid the termination of an AD order that otherwise would have terminated when applying the US regulations. The *Sugar and Syrups from Canada* case is the best example. Although the USDOC originally concluded that there was no dumping, it examined other factors to conclude that dumping had not been eliminated and therefore the AD measure should be maintained; despite the fact that in its first submission the US argues that "current reality of the market" is not the issue in a sunset review.

13. This attitude of the US authorities is perfectly clear in paragraph 53 of the US submission. Even if the USDOC would have considered NSC "other factors" – something that it did not – its final sunset determination would not have changed in light of the existing dumping margins. Plainly, while there are dumping margins, the USDOC will not consider "other factors". Is that an unbiased and impartial authority? We admit that we are not familiar with the Canadian sugar case, but the result of the USDOC determination was the perpetuation of the AD order despite the absence of dumping.

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[1] US First written submission, Footnote 124
[2] US First written submission, Par. 119

This was based on some analysis that indicated that the producers could not export sugar profitably even though we assume they were doing so since no dumping existed.

14. If you allow me Mr. chairman, I would like to ask the US through you the following question. If the USDOC in the absence of dumping determines that there is likelihood of recurrence of dumping if the measure is revoked – for example because imports have fallen – it will nevertheless transmit to the USITC the original margins? A concrete example, in the Canadian Sugar case where no dumping was found, what margins did the USDOC transmit to the USITC?

15. Finally, a word on Article 18.3 of the ADA. The US correctly states that the methodologies used and margins resulted from investigations conducted prior to the entry into force of the ADA cannot be challenged. But reviews initiated on or after that date of entry can certainly be subject to challenge. If the authorities have decided – wrongly or not - to use in a review margins based on pre-WTO rules that may be WTO inconsistent, then those margins and methodologies as well as the review may be subject to consistency challenge. Otherwise, it would render the review immune to WTO rules.

16. Mr. Chairman, in concluding, Article 11.3 of the ADA clearly establishes that AD measures must expire not later than five years from their imposition. Investigating authorities may conclude that that termination may likely conduce to a continuation of dumping and injury (while there is dumping and injury a measure shall be in effect) or its recurrence. Such determination is not a simple task but it is not a futurology exercise either. It implies a future behaviour analysis that can not be based solely on historical evidence and determinations, especially when those maybe WTO inconsistent.

17. Japan and the third parties have clearly made their case that the provisions of the ADA do apply when conducting sunset reviews. Article 11.3 of the ADA cannot be read in isolation but in the context provided by other Articles of the Agreement and especially those that require the authorities to be objective and impartial. The US has claimed that nothing in Article 11.3 and by extension in the ADA requires its authorities to conduct sunset reviews in a certain manner. And consequently it has constructed a system to maintain perpetually AD orders despite the fact that Article 11.3 mandates that those orders should have been terminated not later than five years from their imposition.

18. The figures provided by Japan in its first submission show that the way the US has decided to conduct those reviews have in all cases concluded in the extension of the AD order. There has been no single case in which the USDOC has determined that there was no likelihood of recurrence or continuation of dumping and injury. The replacement of absent specific rules that only lead to a single result make the provision of paragraph 3 of Article 11 moot. And in doing so it has substantially modified the balance of rights and obligations that resulted from the Uruguay Round.

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

I. INTRODUCTION

1. The EC has decided to intervene as third party in this case because of its systemic interest in the correct interpretation of the AD Agreement.

2. The EC shares the view of Japan and of the other third parties that US law and practice with regard to sunset reviews are not in accordance with the AD Agreement. There is widespread concern among WTO members that US law and practice regarding sunset reviews have rendered the provisions of the WTO Agreements limiting the duration of defensive trade measures largely ineffective. This concern is illustrated not only by this case, but also by a number of similar cases which have been brought against the US both by the EC and by other parties.

3. In its written submission, the EC has commented on certain of the claims of Japan which are of a particular interest to the EC. These claims are the following:

(a) The evidentiary standards required by Article 5.6 for self-initiation of original investigations apply also to sunset reviews;

(b) The AD Agreement requires a "likely" and not an "unlikely" determination of continuation and recurrence of dumping and injury;

(c) The sunset review determination has to be based on a "prospective" analysis;

(d) The *de minimis* requirement of Article 5.8 also applies in the context of a sunset review;

(e) The requirements of Article 3.3 and 5.8 for the cumulation of exports in an injury determination also apply within the context of a sunset review.

4. The EC will briefly set out its views on each of these issues. For a more detailed reasoning, the EC refers the Panel to its written submission.

A. THE EVIDENTIARY STANDARDS REQUIRED BY ARTICLE 5.6 FOR SELF-INITIATION OF SUNSET REVIEWS APPLY ALSO TO SUNSET REVIEWS (JAPAN'S CLAIM 1)

5. With its first claim, Japan has submitted to the Panel that US law and regulations are inconsistent with the AD Agreement because they mandate that USDOC automatically initiate sunset reviews without any evidence. In this respect, the EC agrees with Japan that the automatic initiation by the US of sunset reviews without any evidence constitutes a violation of Article 11.3 of the AD Agreement. This follows from an interpretation of Article 11.3 in accordance with the customary rules of treaty interpretation, taking into account the text, context, and object and purpose of the provision.

6. It should be recalled that Article 11.3 lays down a fundamental principle, namely that anti-dumping duties are not infinite in duration, but shall be terminated on a date not later than five years

from their imposition. According to the unambiguous wording of Article 11.3, an anti-dumping duty may be continued beyond this date only if the authorities determine, on their own initiative or upon a duly substantiated request on behalf of the domestic industry, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. Accordingly, termination of the duty is the rule, whereas its continuation is the exception.

7. In the view of the EC, the fact that the authorities may initiate a review also on their own initiative does not mean that they may automatically initiate a review in every single case. The EC agrees with Japan that the evidentiary requirements set out in Article 5.6 of the AD Agreement must also apply to the initiation of sunset reviews. The EC considers that, although Article 11.3 does not contain any explicit reference to evidentiary requirements for the initiation of sunset reviews, it mandates domestic authorities to engage in a review to "determine" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury. The verb "to determine" is commonly understood to mean to find out, to ascertain, to establish, or, in more articulated terms, to carry out all those activities necessary to reach a decision, i.e. to investigate and decide. Thus, the very text of Article 11.3 already indicates that the decision to initiate a sunset review is by no means "automatic", but requires a certain evidentiary standard to be met.

8. The EC would like to add that it would also be hard to understand why the AD Agreement would require requests from the domestic industry to be "duly substantiated" for the initiation both of an original investigation and of a sunset review, whereas in the case of self-initiation it would distinguish the two hypotheses: in case of an original investigation, domestic authorities can self-initiate only "in special circumstances" and "if they have sufficient evidence of dumping, injury and causal link"; whilst in case of a sunset review they could exercise a completely arbitrary discretion. Since from the point of view of the exporter, it is irrelevant whether an investigation is initiated at the initiative of the domestic industry or of the authorities, similar evidentiary standards should apply to both cases.

9. A further contextual element that reinforces the comprehensive interpretation put forward by Japan with regard to the evidentiary requirements for self-initiation of sunset review can be found in Article 12 of the AD Agreement. Paragraph 1 of Article 12 requires domestic authorities to notify interested parties and issue a public notice "when there is sufficient evidence to justify the initiation of an anti-dumping investigation". Paragraph 3 of the same Article specifies that this provision "shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11".

10. Finally, Japan rightly points out that sunset reviews and new investigations have the same *effect*, i.e. they result in the imposition of anti-dumping duties for a period of five years. It should also be noted that both new proceedings and sunset reviews involve a large amount of investigation by the domestic authorities with a view to determining whether anti-dumping duties should be put into effect. The automatic termination of anti-dumping orders foreseen in Article 11.3 is meant to protect the exporter from investigations which are not justified on the basis of sufficient evidence. By automatically self-initiating sunset reviews in every case, the US does away with the procedural guarantees established by the AD Agreement.

11. In conclusion, a proper analysis of the text, context, and object and purpose of Article 11.3 reveals that the evidentiary standard of Article 5.6 is applicable to the initiation of sunset reviews. Accordingly, such reviews should not be initiated automatically, but only where there is sufficient evidence to justify them.

B. THE AD AGREEMENT REQUIRES A "LIKELY" AND NOT AN "UNLIKELY" DETERMINATION OF CONTINUATION AND RECURRENCE OF DUMPING AND INJURY (JAPAN'S CLAIM 2)

12. With its second claim, Japan has submitted to the Panel that the Sunset Regulations, and in particular Section 351.222(i)(1)(ii), are not in conformity with Article 11.3 AD Agreement. In particular, Japan has argued that whereas Article 11.3 AD Agreement requires that anti-dumping duties be terminated "unless the authorities determine [...] that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury", the Sunset Regulations require USDOC to revoke an order or terminate a suspended investigation where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of a countervailable subsidy or dumping.

13. The US has attempted to explain this provision by characterising it in its written submission as only "ministerial in nature". However, this is not in accordance with the plain wording of the Sunset Regulation, which purport to lay down a standard to be applied in sunset reviews. As the EC has explained in its written submission, the provision was in fact explicitly intended to clarify the circumstances under which the Department will revoke an order or terminate a suspended investigation.

14. The EC agrees with the view of Japan that the standard laid down by the Sunset Regulations is incompatible with Article 11.3 of the AD Agreement. In the view of the EC, these differences between the "likely" and the "not likely" standards are by no means semantic only. Rather, the Sunset Regulations require USDOC to apply a standard which is patently more demanding than the one prescribed by Article 11.3 AD Agreement. The requirement that continuation or recurrence of dumping or injury must be "likely" for the duty to be terminated implies a higher degree of probability than the requirement that the duty be terminated only "where it is not likely" that this would lead to continuation or recurrence of dumping. In the first case, a higher degree of certainty is required than in the second, where it is necessary only for the continuation or recurrence of dumping not to be "unlikely".

15. That a "likely" standard implies a higher degree of certainty than a "not likely" standard has also been confirmed by the Panel in *US – DRAMs*, as quoted in paragraph 96 of the first written submission of Japan. The EC submits that this reasoning, which the Panel applied in interpreting Article 11.2 AD Agreement, is perfectly transposable to Articles 11.3.

16. For these reasons, the EC considers that a "not likely" standard is incompatible with Article 11.3.

C. THE SUNSET REVIEW DETERMINATION HAS TO BE BASED ON A "PROSPECTIVE" ANALYSIS (JAPAN'S CLAIM 3)

17. With its third claim, Japan has submitted that USDOC in its sunset review practice fails to "determine" whether dumping is "likely" to occur. In particular, Japan has argued that USDOC determinations are not based on a prospective analysis of positive evidence ascertaining that continuation or recurrence will be probable.

18. The EC agrees with Japan's argument that Article 11.3 requires that the "likelihood" of the continuation or recurrence of dumping must be established on a prospective basis. By definition, an assessment of the "likelihood" of continuation or recurrence of dumping requires the authorities to make a judgement about events in the future. The need for a prospective, rather than a retrospective, analysis has been confirmed by the Panel in *US-DRAMs*.

19. The EC also agrees with Japan that a "determination" of the likelihood of continuation or recurrence of dumping and injury must be based on positive evidence. An authority would fail to meet this standard if, in a determination in a sunset review, it based itself purely on the fact that dumping had occurred in the past, without addressing the question of whether dumping is likely to also recur or continue in the future.

20. The EC is of the view that US law and practice, as reflected in the Sunset Policy Bulletin, with respect to likelihood determinations in sunset reviews of anti-dumping orders, falls short of the requirements of Article 11.3 AD Agreement. However, the EC would like to point out that a prospective analysis is already precluded by Section 752 (c) (1) and (2) of the Act, which mandates the US authorities to consider only past dumping margins and import volumes, and allows consideration of other factors only if "good cause" is shown. Therefore, the US Sunset Policy Bulletin, which essentially limits revocation of the order to the unlikely scenario "where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased", is a faithful reflection of the applicable US law.

21. The EC agrees with Japan that US law and practice as reflected in the Sunset Policy Bulletin fall foul of the standard for likelihood determinations in Article 11.3 AD Agreement. The criteria which US DOC applies in likelihood determinations clearly are not adequate to establish such likelihood. The fact that imports of the subject merchandise ceased after issuance of the order or the suspension agreement as such is in no way indicative of whether the producers of the product concerned will again begin dumping after the duty is terminated. Similarly, it is not clear why the fact that dumping was eliminated after the issuance of the order, and import volumes for the subject merchandise declined significantly, as such should indicate that the producers will again start dumping after the duty is removed.

22. This inadequacy of the standard applied by USDOC becomes even more obvious in the positive formulation of the same standard. The requirement that "dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased", defies all economic theory. It is clear that if an anti-dumping duty is imposed, this will necessarily have an anti-competitive effect for the products concerned. If, notwithstanding the imposition of an anti-dumping order, imports remain stable or increase and dumping ceases, then this must be due to factors unrelated to dumping.

23. By conditioning the determination concerning the likelihood of continuation or recurrence of dumping on what Japan has rightly referred to as "a commercially impractical scenario", producers are faced with a nearly impossible task for obtaining the lifting of an anti-dumping duty. Accordingly, US law and practice does not appear compatible with the requirements of Article 11.3.

D. THE *DE MINIMIS* REQUIREMENT OF ARTICLE 5.8 ALSO APPLIES IN THE CONTEXT OF A SUNSET REVIEW (JAPAN'S CLAIM 7)

24. With regard to the de minimis obligation, Japan has claimed that the US requirement to treat as de minimis in sunset reviews only those margins that are less than 0.5 per cent is inconsistent with the 2 per cent rule contained in Articles 5.8 and 11.3 AD Agreement.

25. The EC agrees with Japan, as well as all the other third parties which submitted written submissions, that the application of a de minimis standard lower than 2 per cent in sunset reviews is incompatible with the AD Agreement. It would, in fact, be illogical to read Article 11.3 of the AD Agreement in isolation. As other third parties have already pointed out, the text of Article 11.3 refers to the "continuation or recurrence of dumping". This is not "dumping" in the abstract. The notion of "continuation or recurrence of dumping" has a historical context and refers back to an earlier finding,

i.e. to the original investigation. On this textual basis, the de minimis threshold of 2 per cent in Article 5.8, below which "immediate termination" is required, applies equally to a sunset review.

26. The US argument in favour of a 0.5 per cent *de minimis* threshold in a sunset review amounts to saying that dumping which is not injurious in a new investigation suddenly becomes injurious in a sunset review. As the Panel in *US – Corrosion-resistant carbon steel from Germany* found with regard to the parallel provisions concerning sunset reviews for countervailing duties (Para.8.67), "We fail to see why the threshold for injurious subsidization …would become inapplicable simply by virtue of the age of the CVD". Terms such as "dumping" and "injury" mean the same throughout the AD Agreement. When the US looks at "injury" in a sunset review, it is required to determine whether "material injury" would continue or recur, i.e. the same level required in a new investigation. Why, therefore, should it be able to find that dumping at a quarter the level required for a new investigation is sufficient to cause injury in a sunset review?

E. THE REQUIREMENTS OF ARTICLE 3.3 AND 5.8 FOR THE CUMULATION OF EXPORTS IN AN INJURY DETERMINATION ALSO APPLY WITHIN THE CONTEXT OF A SUNSET REVIEW (JAPAN'S CLAIM 10)

27. Finally, in its last claim, Japan has submitted to the Panel that the USITC's decision to cumulate imports from various countries in this sunset review is inconsistent with Article 3.3, 5.8 and 11.3 AD Agreement.

28. The EC agrees with the view expressed by Japan that the requirements of Articles 3.3 and 5.8 for the cumulation of exports in an injury determination also apply within the context of a sunset review under Article 11.3 AD Agreement.

29. Article 11.3 mandates that antidumping duties shall be terminated unless the authorities determine that this would be likely to lead to continuation or recurrence of dumping and injury. The continuation or recurrence of injury is therefore part of the preconditions for the continuation of an antidumping duty.

30. As Japan has submitted, the term injury is defined, for the purposes of the entire Agreement, in Article 3 AD Agreement. Paragraph 3 of Article 3 sets out the conditions under which the effects from imports from more than one country may be cumulatively assessed, and requires, among others, that the volume of imports from each country must not be negligible. The only place where a definition of when the volume of dumped imports shall be considered "negligible" is Article 5.8.

31. Therefore, the Community is of the opinion that in a sunset review, negligible imports must not be included into a cumulative assessment of injury unless the authorities have determined that these imports are likely to become non-negligible upon revocation of the duty.

II. CONCLUSION

32. By way of conclusion, the EC would like to remark that in its various aspects, the present case is an illustration of the general tendency of US law and practice with respect to sunset reviews, which is to perpetuate anti-dumping orders, rather than to terminate them. The statistics quoted by Japan and others regarding the practice of the US authorities in sunset reviews speak for themselves. By perpetuating anti-dumping orders without exception wherever there is an interest expressed by the domestic industry, US authorities are turning the sunset provision of Article 11.3 into the opposite of what it was intended to be. As in the Empire of Charles V, on which the sun never set, the sun never seems to set on antidumping order issued by the US authorities. The EC respectfully submits that this is not in conformity with US obligations under the WTO Agreements.

33. Mr Chairman, Members of the Panel, Thank you for your attention. The EC is ready to answer any questions the Panel might wish to ask.

ANNEX D-6

THIRD PARTY ORAL STATEMENT OF KOREA

I. INTRODUCTION

1. The issue Korea wishes to highlight in this case is whether the US sunset rules are consistent with the AD Agreement. The USDOC has initiated 305 sunset reviews so far. Out of these 305 cases, the USDOC revoked the measure in 73 cases on the ground that the domestic industry did not respond to USDOC's notice of initiation. For all of the remaining 232 cases, the USDOC found that the termination of the measure would be likely to lead to continuation or recurrence of dumping. In other words, the USDOC ruled against revocation of the measure in every single case that was contested by the domestic industry.

2. In Korea's view, this record of the USDOC in these reviews establishes clearly that the US sunset rules are inconsistent with the AD Agreement.

A. AUTOMATIC INITIATION OF SUNSET REVIEW WITHOUT SUFFICIENT EVIDENCE

3. Section 751(c)(1) of the Tariff Act of 1930, as amended, mandates that the US authorities "shall" conduct a sunset review in every instance without requiring any evidentiary finding that the review is justified or necessary. This provision for automatic initiation reverses the presumption contained in Article 11 that anti-dumping measures normally expire after 5 years. Moreover, the practical effects of automatic initiation further undermines this presumption in two ways. First, automatic initiation removes, at least in part, the burden on parties favouring continuation of the measure to show that termination would result in continued dumping and injury by removing the threshold step of showing evidence supporting such a likelihood. Second, automatic initiation increases the burden on parties seeking termination of a measure by forcing them to participate in reviews that might not otherwise be initiated.

4. The text of Article 11.3 provides two different means through which a sunset review can be initiated; first, "on the authorities' own initiative"; second, "upon a duly substantiated request made by or on behalf of the domestic industry." With respect to a review initiated at the authorities' own initiative, Article 11.3 is silent about the threshold of evidence that should be met before a review is initiated. The United States has interpreted this silence to mean that there is no threshold at all.

5. Article 11.3 does not provide that there must be a review in every case. To the contrary, the primary clause of the first sentence of Article 11.3 provides that measures "shall be terminated" after five years "unless" the appropriate finding is made. The correct interpretation of this sentence is that measures will normally terminate, except when an alternative determination is made. Thus, Article 11.3 contemplates that measures may terminate without any review being conducted. By providing for automatic initiation of reviews in every case, US law makes the conduct of a review a sine qua non of termination and precludes the possibility of a measure terminating under the normal operation of the Article 11.3.

6. Moreover, nothing in the text of Article 11.3 supports the US position that a review may be initiated automatically in every case. Contrary to the arbitrary interpretation of the US, the text does not provide that "the authorities shall conduct a review every five years."

7. Article 12.1 of the AD Agreement, through the intermediary of Article 12.3, provides the context for the interpretation of Article 11.3. Article 12.3 stipulates that "the provisions of the Article shall apply *mutatis mutandis* to the initiation of reviews pursuant to Article 11".

8. With respect to the disciplines governing the initiation of reviews, Article 12.1 provides that "when the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members shall be notified and a public notice shall be given." It should be noted here that Article 12.1 does not attempt to differentiate in any way between reviews initiated at the authorities' own initiative or by or on behalf of the domestic industry. Thus, the obligation to have "sufficient evidence" before initiating a review must be construed to apply in either case.

9. The US law on the sunset review is not consistent with Article 12.1 in this respect. Under section 751(c)(1) of the US law it is mandatory for the USDOC to publish in the Federal Register a notice of initiation of a sunset review not later than 30 days before the fifth anniversary of a dumping order. This requirement to publish a notice of initiation without any supporting evidence is clearly inconsistent with Article 12.1, which provides that public notice may only be given, "when the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5."

10. Furthermore, since Article 12.1 applies to the initiation of reviews under Article 11, the absence of a reference to "sufficient evidence" in Article 11.3 itself cannot be interpreted to mean that authorities may automatically initiate the review process without any evidence. Thus, the US law is inconsistent with Article 11.3 as well as Article 12.1.

11. In particular, Article 12.1.1 provides that "a public notice of the initiation of an investigation shall contain adequate information on, inter alia, 'the basis on which dumping is alleged in the application' (Art. 12.1.1(iii)) and 'a summary of the factors on which the allegation of injury is based'" (Art. 12.1.1(iv)). If the authorities were permitted to initiate a sunset review automatically without a prior determination of the sufficiency of the evidence, there would be no reason for the requirement that the authority provide in the public notice adequate information on the basis of the alleged dumping and injury. Again, since Article 12.1.1 applies to the initiation of reviews under Article 11, the absence of a reference to "sufficient evidence" in Article 11.3 cannot be interpreted to mean that authorities can automatically initiate the review process without any evidence.

B. THE 'NOT LIKELY' STANDARD OF THE USDOC

12. The USDOC's regulation 19 C.F.R. 351.222(i)(1)(ii) sets forth a WTO-inconsistent "not likely" standard for sunset reviews. Article 11.3 of the AD Agreement stipulates that except when the authorities determine that the expiry of the duty would be likely to lead to continuation of recurrence of dumping and injury, the AD duty shall be terminated after 5 years. By switching this likely standard in Art. 11.3 to a "not likely" standard, the United States in effect flips the burden of proof on its head and requires the respondent to prove that termination of the measure will not result in continued dumping. The USDOC's use of a not likely standard is biased in favour of the continuation of the dumping order, and accordingly, is inconsistent with the WTO obligations. This unjustified shift of burden is then coupled with the arbitrarily pre-established test provided in the Sunset Policy Bulletin, which imposes an impossibly high threshold.

C. THE USDOC PRESUMES "LIKELIHOOD" THROUGH THE APPLICATION OF ARBITRARILY PRE-DETERMINED SCENARIOS

13. The Sunset Policy Bulletin directs the USDOC to examine whether the facts of the particular sunset review fall into one of four factual scenarios. If facts fall under one of the following three factual scenarios, dumping is "likely" to continue or recur:

- there has been continued dumping at any level above de minimis (i.e., 0.5%) after the imposition of the anti-dumping duty order;
- imports ceased after the imposition of the anti-dumping duty order; or
- dumping ceased thereafter, but import volumes declined significantly from pre-order level.

14. As Japan has correctly argued, the commercial reality is that in practice these three scenarios cover every case. The only scenario, under which dumping is presumed to be unlikely, is commercially impractical where dumping was completely eliminated and import volumes remained steady or even increased in terms of relative market share since the imposition of the order. Thus, the Sunset Policy Bulletin invariably leads to an unjustified and effectively irrefutable presumption of the likelihood of dumping.

15. Article 11.3 stipulates that the dumping order shall be terminated, unless the authorities determine that the expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury. This obligation to make this determination lies with the investigating authorities. The authorities cannot fulfil this obligation properly or fairly where they pre-judge the outcome by restricting the circumstances that will be deemed to justify an affirmative determination to arbitrary, pre-determined and commercially implausible scenarios, and by limiting their determination to a narrow analysis of circumscribed facts (i.e., the margin of dumping and the trends in import volumes.)

D. THE "GOOD CAUSE" BARRIER REINFORCES USDOC'S IRREFUTABLE PRESUMPTION

16. More importantly, the USDOC places an arbitrarily high "good cause" barrier upon respondents, making it practically impossible for the respondents to cross the barrier to rebut the presumption.

17. Section II.C of the Sunset Policy Bulletin states that "the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question."

18. Here, the other factors means factors other than the changes in the margin of dumping and the import volume. Given its obligation under Article 11.3 to determine the likelihood of dumping, there is no reason why the USDOC should not consider other relevant factors in its analysis from the beginning. There is no basis in the AD Agreement for the USDOC to limit arbitrarily the scope of its initial consideration of facts. This error is compounded by the fact that the USDOC does not simply accept evidence regarding other factors later in the proceeding, but imposes an additional burden that respondents must make a showing of "good cause" before evidence on these factors will be considered. This additional burden on the respondents is not supported by the text of Art. 11.3.

E. THE DISCIPLINES APPLYING TO AN INITIAL INVESTIGATION AND A SUNSET REVIEW

19. Finally, Korea would like to provide its views on the objective and purpose of the AD Agreement and, in this connection, why the disciplines applying to the initial investigation apply *mutatis mutandis* to the sunset review as well.

20. The AD Agreement contains detailed and complex provisions on the rules applying to various phases of anti-dumping proceedings. The imposition of an anti-dumping measure depends on the proper establishment, and unbiased and objective evaluation, of detailed facts and arguments presented by petitioners and respondents. Given that these facts are highly technical in nature, and are normally presented in an adversarial manner, they must be assessed pursuant to detailed procedural and substantive rules governing the imposition of anti-dumping measures.

21. If these detailed rules are biased in one way or the other, or lack sufficient clarity, it will be difficult to expect the outcome of anti-dumping investigations, whether initial investigations or subsequent reviews, to be fair and consistent. Therefore, it was necessary for the drafters of the AD Agreement to agree on the detailed provisions to prevent and cure any biases in the national rules and to establish multilateral control over the anti-dumping measures.

22. Article 11.3, per se, does not contain detailed substantive provisions governing the conduct of a sunset review. To enable the investigating authorities to assess detailed facts and arguments presented in a sunset review, therefore, either the detailed provisions provided elsewhere in the AD Agreement should be applied to the sunset review, or the investigating authorities of each Member are free to develop their own detailed rules for these reviews. The second option would, of course, lead to a proliferation of different rules governing the sunset review, resulting in a complete loss of multilateral control over these reviews.

23. Korea does not believe that the drafters of the AD Agreement intended the latter scenario. In Korea's view, the detailed substantive provisions provided elsewhere in the AD Agreement should apply to the sunset review under Article 11.3 in the same manner as they do to the initial anti-dumping investigation.

ANNEX D-7

THIRD PARTY ORAL STATEMENT OF NORWAY

I. INTRODUCTION

1. First of all, I would like to thank you for this opportunity to present the Norwegian views in the present case, based on our written third-party submission dated 14 October 2002. My name is Ms. Anniken Enersen. I am a legal adviser at the Ministry of Foreign Affairs, and will be representing the Government of Norway in this case.

2. Norway has addressed three issues of legal interpretation that we find to be the most critical ones in our third-party submission:

- The United States' standard of initiation of sunset reviews;
- The United States' standard of investigation of sunset reviews; and
- The *de minimis* standard applicable to sunset reviews in anti-dumping cases.

3. These issues are all very important to the functioning of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (which I will refer to as the Anti-Dumping Agreement). They are equally important to cases on countervailing duties and safeguards. The series of similar cases brought against the United States shows the great concern of WTO Members in respect of the relevant US laws, regulations and administrative practice on sunset reviews of anti-dumping and countervailing duties, and testifies to the common view, that the way they have been applied violates several provisions of the WTO Agreements. As I am sure all present here today know, the same issues arise in case DS/213 regarding the SCM Agreement which is before the Appellate Body in these days.

4. Mr. Chairman, it is our understanding that Article 11.3 of the Anti-Dumping Agreement concerning reviews of anti-dumping duties, including sunset reviews, must be interpreted in accordance with recognized principles of public international law, as codified in the Vienna Convention on the Law of Treaties.

5. Article 31 of the Vienna Convention requires that treaty provisions should be interpreted *"in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose"*.

6. The United States interprets each provision of the Anti-Dumping Agreement in isolation from the other provisions as long as there is no explicit reference to one of the other provisions of the Agreement. This is not in accordance with the said principle of the Vienna Convention, according to which all the provisions must be read in their textual context, that is to say that explicit cross references are not required.

7. Article 11.3 of the Anti-Dumping Agreement does not set out detailed substantive or procedural rules. For those obligations one must look elsewhere in the Agreement. A proper analysis of the context and purpose of Article 11.3 reveals that no provision of the Anti-Dumping Agreement can be read in isolation. In fact, all the provisions of the Agreement are applicable *mutatis mutandis* to Article 11.3 to the extent that they are relevant to sunset reviews. The Government of Norway believes that this is the case for the "sufficient evidence" standard set forth in Article 5.6 and the *"de minimis"* standard set forth in Article 5.8.

A. THE EVIDENTIARY STANDARDS REQUIRED BY ARTICLE 5.6 FOR SELF-INITIATION OF ORIGINAL INVESTIGATIONS ALSO APPLY TO SUNSET REVIEWS

8. The United States bases its position on the absence of a direct reference to an evidentiary standard in Article 11 itself. The absence of such a reference does not mean that there is no standard to be applied.

1. Object and Purpose of Article 11.3

9. The object and purpose of an anti-dumping duty are set out in Article 11.1: the duty should be maintained only as long as and to the extent necessary to counteract dumping which is causing injury.

10. It follows from Article 11.3 that, as a rule, anti-dumping duties shall be terminated no later than five years from their imposition, the presumption being that dumping is counteracted after such a period. A review is meant to take place only in exceptional cases where there is a clear indication, based on the existing situation at the time of review, that the expiry of the duty would be likely to lead to the continuation or recurrence of both dumping and injury.

11. As I have said, "initiating" a sunset review is an exceptional occurrence. It is thus not simply a matter of analysing whether continuation of the order is necessary, but also of determining whether "initiation" itself is necessary.

12. The presumption that the imposition of an anti-dumping duty will terminate after a period of five years contemplates that some duties will terminate without any review. Therefore, the object and purpose of Article 11.3 require that the administering authority first make a threshold decision as to whether to begin a sunset review at all. Initiation is not an empty or automatic decision.

2. The Context of Article 11.3

13. Furthermore, the textual context of the provision in Article 11.3 clearly mandates what the evidentiary standard is. There is an abundance of textual context that confirms that the "sufficient evidence" standard required by Article 5.6 for self-initiation in original investigations also applies to sunset reviews.

14. There are in particular three textual links that the Government of Norway would like to mention. Firstly, the textual link in Article 12.3 of the mutatis mutandis application of Article 12 to Article 11, secondly the reference to Article 5 in Article 12.1 and thirdly footnote 1 to the Anti-Dumping Agreement. I here refer to our written submission for further elaboration on this matter.

15. In Article 5.6, the authorities do not have a carte blanche to automatically initiate investigations without first having "sufficient evidence". It is illogical to presume that the Anti-Dumping Agreement only limits the administering authorities' ability to self-initiate in some instances but not in others.

16. For these reasons, the proper interpretation of Article 11.3 in accordance with its context, object and purpose requires that a sunset review initiated by the authorities should be based on "sufficient evidence".

17. Therefore, the United States statute and regulations mandating the automatic initiation of sunset reviews without any evidence are inconsistent with the Anti-Dumping Agreement both on their face and as applied in this case.

B. THE ANTI-DUMPING AGREEMENT REQUIRES A LIKELY, NOT AN UNLIKELY DETERMINATION OF CONTINUATION OR RECURRENCE OF DUMPING AND INJURY, AND THE DETERMINATION MUST BE BASED ON A "PROSPECTIVE" ANALYSIS

18. I will now turn to the "likely" standard in Article 11.3. This represents a positive obligation on the domestic authorities to "determine" the "likelihood" of the continuation or recurrence of dumping. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence that there is a probability, not some remote possibility, that dumping will continue or recur in the future.

1. The United States' Regulations

19. A textual comparison of the United States' Sunset regulations with Article 11.3 of the Anti-Dumping Agreement shows that the standard for revocation of an anti-dumping duty is not in conformity with its WTO obligations. An anti-dumping order should be revoked unless it is likely that this would lead to the recurrence or continuation of dumping and injury. By contrast, under United States' regulations, the anti-dumping duty will only be revoked where it is not likely that this would lead to the continuation or recurrence of dumping.

20. This difference is by no means only a semantic one. The "likely" standard implies a higher degree of certainty than the requirement that the duty be revoked "where it is not likely". This is also stated by an earlier Panel in the US-DRAMs-case. The reasoning that the Panel applied in interpreting Article 11.2 is perfectly transposable to Article 11.3. It is not conceivable that a stricter standard for the revocation of duties would apply under a review during the normal lifetime of a duty than in the context of a sunset review under Article 11.3, which unlike Article 11.2, establishes the expiry of the duty as a main rule.

2. The Sunset Policy Bulletin

21. The United States' WTO inconsistency on this issue does not stop at the provisions of the regulations. The Sunset Policy Bulletin impermissibly restricts any genuine factual investigation to determine prospectively whether dumping is likely to continue or recur. The term "likely" in Article 11.3 requires that the authorities undertake a prospective analysis of positive evidence to establish whether dumping is likely to continue or recur. By examining only historical dumping margins and import volumes, the USDOC, as a general practice, looks backwards rather than forward. The Sunset Policy Bulletin thus impermissibly restricts the USDOC's analysis to a retrospective one. This approach creates an irrefutable presumption that dumping will continue or recur.

22. For these reasons, the Government of Norway considers that the USDOC does not take the proper prospective approach to determine whether dumping is likely to continue in a sunset review. Therefore, we consider the United States' regulations and practice to be inconsistent with Article 11.3 both as a general practice and as applied in this case.

3. The *De Minimis* Requirement of Article 5.8 Also Applies in the Context of a Sunset Review

23. As I have already stated, public international law as codified in the Vienna Convention require that treaty provisions be interpreted in accordance with their context, object and purpose. The immediate context of Article 11.3 is Article 11.1, which spells out the object and purpose of an anti-dumping duty. Article 11.1 requires that "an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." The concept of "dumping which is causing injury" is central to all provisions of the Anti-Dumping Agreement. Where dumping does not cause such injury, the Agreement does not permit the imposition of anti-dumping duties.

24. Further, Article 5.8 requires that anti-dumping duties shall be terminated immediately in cases where the margin of dumping is *de minimis*, which is further defined as a margin of less than 2 per cent. It is thus prohibited to impose anti-dumping duties when the dumping margin is below this threshold.

25. There is no reason why the same *de minimis* standard should not apply to sunset reviews. Sunset reviews and the original investigation share the same object and purpose, and all impositions of anti-dumping duties must fulfil the same requirements. Allowing a lower *de minimis* percentage when conducting sunset reviews would be to disregard the very substance of the Anti-Dumping Agreement.

26. As I stated before regarding the question of automatic self-initiation, the silence of Article 11.3 is not in itself conclusive. It simply confirms that one must look elsewhere. It is clear from the overall architecture of the Agreement that the basic concepts are not repeated once they have been defined. Thus, neither "dumping" nor "injury" is defined or cross-referenced in Article 11, as their standards are self-evident from the other articles of the Agreement. This is also the case for the *de minimis* rule, which is defined once, in Article 5.8.

27. The panel report in the *US – German Steel CVD Sunset* case supports this interpretation. The panel found that the same *de minimis* standard under Article 11.9 of the SCM Agreement should apply both to original investigations and to sunset reviews of countervailing duty orders under Article 21.3 of the SCM Agreement. The ruling in the *US-DRAMs* case also supports the application of a *de minimis* standard of 2 per cent to sunset reviews.

28. For these reasons, Norway believes that the 0.5 per cent *de minimis* standard used by the United States in sunset reviews constitutes a clear violation of Article 11.3 read in conjunction with Article 5.8 of the Anti-Dumping Agreement, both as a general practice and as applied in this case.

29. Finally, I would like to underscore the importance of the decision in the present case, which is not only of significance for this specific case, but also for the legislation of the United States as such. As we all know, a number of sunset reviews are being undertaken by the United States in accordance with the same model. This applies not only to sunset reviews on anti-dumping duties, but also to such reviews on countervailing duties and safeguards.

30. Mr. Chairman, when considering the US laws, I would ask you to always bear in mind that the use of these measures is exceptional, and that their use should therefore only be prolonged in extraordinary cases.

31. Thank you for your attention.

ANNEX D-8

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF JAPAN – SECOND MEETING

I. INTRODUCTION

1. It is necessary to first address the proper scope of review under WTO jurisprudence as it relates to Japan's general practice claims. Effectively the United States is arguing that administrative procedures that on their face appear discretionary are exempt from scrutiny. This interpretation makes the obligations contained in Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement meaningless. Measures that appear discretionary on their face but in reality are treated as, and function like, mandatory obligations by the administering authorities are actionable. These *de facto* mandatory administrative procedures are just as WTO-inconsistent as the *de jure* mandatory obligations cited by the United States. The mere appearance of executive discretion alone is insufficient to find the Sunset Policy Bulletin WTO-consistent. The question for this Panel is whether the Sunset Policy Bulletin has a functional life of its own and provides concrete pre-established rules for conducting sunset reviews inconsistent with the AD and WTO Agreements. The answer to this question is yes.

2. Japan has demonstrated that the Sunset Policy Bulletin was published two months before USDOC began conducting sunset reviews. USDOC has followed the precepts of the Bulletin in all 227 sunset reviews, and in all of those reviews USDOC found that dumping was likely to continue. Therefore, Japan has established a "consistent practice" on the part of USDOC in conducting its likelihood analysis.

3. In its answers to the Panel's questions, the United States admits that, "Japan's alleged 'practice' simply consists of specific determinations in specific sunset proceedings." This is precisely what a "general practice" is. In *Mechanical Transfer Presses from Japan*, USDOC requested that parties submit information regarding the overall volume of imports after the 30-day deadline. The only deviation that case represents is from the 30-day substantive response deadline, not from the Sunset Policy Bulletin.

4. The United States went on to note that to satisfy the obligation the "determine" standard in Article 11.3 imposes the determination must merely be supported by sufficient evidence. The sufficient evidence standard, however, is the US judicial standard of review. This is a much lower standard than the standard of review under the AD Agreement and the WTO Agreement.

II. SUBSTANTIVE CLAIMS

5. As the Appellate Body in *US – CVD Sunset* recognized, "{t}ermination of a countervailing duty is the rule and its continuation is the exception. This basic premise should influence how all determinations within a sunset review under Article 11.3 of the AD Agreement are conducted.

A. AUTOMATIC SELF-INITIATION OF SUNSET REVIEWS WITHOUT SUFFICIENT EVIDENCE

6. The basic language of Article 11.3, read in light of the other provisions of the AD Agreement, reveals that there is an evidentiary standard with respect to initiation within the Article. The evidentiary standards in Article 5 are explicitly mentioned in both Article 12 and in footnote 1 of the Agreement. Article 12.1 through the use of the *mutatis mutandis* language in Article 12.3 reflects the

existence of that evidentiary standard in Article 11.3. With respect to footnote 1, it specifically requires an administering authority to follow the evidentiary standards in Article 5 when initiating a proceeding under the Agreement.

7. The Appellate Body's decision in *US – CVD Sunset* is not controlling in this case. The Appellate Body did not have an opportunity to review the explicit cross-reference in footnote 37 to Article 11 and to Article 21.3 of the SCM Agreement, corollary to footnote 1 to Articles 5 and 11.3 of the AD Agreement.

8. In its second submission, the United States appears to agree that footnote 1 defines the term "initiated," but the United States ignored the footnote's broader meaning. The footnote defines the term "initiated" to mean the procedures a Member is required to employ when a Member commences an investigation pursuant to Article 5. More importantly, the footnote provides that the definition of "initiated" applies to the entire AD Agreement. Article 11.3 provides that sunset reviews are "initiated" – the only definition for which appears in footnote 1. Therefore, the evidentiary procedures in Article 5 also apply to the initiation of sunset reviews.

9. In the Uruguay Round, footnote 1 was amended to incorporate the evidentiary standards of Article 5. At the same time Article 11.3 was added. By doing so, the Members ensured that investigations and sunset reviews would be "initiated" according to Article 5.

10. While the Appellate Body was correct in finding that Articles 22.1 and 22.7 of the SCM Agreement provide for public notice, it failed to recognize that the *mutatis mutandis* language of Articles 22.1 and 22.7 of the SCM Agreement (respective corollaries to Article 12.1 and 12.3 of the AD Agreement) reflects the incorporation of the evidentiary standards in Article 11 to Article 21.3 through footnote 37 of the SCM Agreement (corollary to Article 5 to Article11.3 through footnote 1 of the AD Agreement). Otherwise the *mutatis mutandis* language in Article 12 of AD Agreement makes no sense.

B. USDOC'S LIKELIHOOD STANDARD AND DETERMINATION IS WTO-INCONSISTENT

11. The United States attempts to justify its use of WTO-inconsistent language in section 351.222(i)(1)(ii) of its regulations. The United States misconstrues the Appellate Body's determination in *US – CVD Sunset.* In fact, the Appellate Body supports Japan's position. It stated that the conduct of a single sunset review does not evidence USDOC practice. In no way is this an endorsement of USDOC's general practice with respect to its likelihood determination.

12. The Appellate Body went on to state "in the absence of information as to the number of sunset reviews that have been conducted, the methodology employed by USDOC in other reviews, and the overall results of such reviews," it is difficult to find a general practice by the authorities. Japan has established that in all 227 affirmative sunset review determinations, USDOC examined and found that respondents fit into one of the three "likely" to continue dumping scenarios in section II.A.3 of the Bulletin. Consequently, unless the Sunset Policy Bulletin is amended USDOC will continue its blind adherence to those guidelines without exception.

13. In section 351.222(i)(1)(ii), which sets forth the "not likely" standard, the United States could have simply included the identical language it used in the statute in this section of its regulations. Its choice not to do so illustrates the US intent to apply a much more restrictive and WTO-inconsistent "not likely" standard to its sunset reviews.

14. The United States puts the cart before the horse in its likelihood determinations. In its second submission, the United States asserts that if there is evidence that dumping has continued at all over

the past five years, USDOC will conclude that upon revocation of the order dumping is likely to continue. The US position is contrary to the obligations in Article 11.3.

15. A sunset review is a proceeding to "determine" if dumping is likely to "continue." The use of the term "continue" and the phrase "notwithstanding the paragraphs 1 and 2" in Article 11.3 means that the likelihood of dumping must be "determined" in a sunset review even if dumping remains at the time of initiation of the sunset review. The Appellate Body in *US – CVD Sunset* confirmed this interpretation, finding that continuation of CVDs must be based on a properly conducted review and a positive determination. The panel in that same case found that the authorities have an affirmative obligation to collect positive evidence, which may consist of evidence from the original investigation, intervening reviews, and the sunset review itself. The Appellate Body confirmed this notion when it found that Article 21 reviews must be "meaningful" and "rigorous." Nonetheless, the United States claims that any "continuation" of dumping since imposition of the order will result in an affirmative determination. In case after case, USDOC never bases its determination on any type of positive prospective evidence. This type of review is neither meaningful nor rigorous.

16. The United States uses the "good cause" standard to further restrict USDOC ability to make a prospective determination and solidifies the irrebuttable presumption. The United States cited two sunset review cases in its rebuttal. USDOC's final determinations in both cases were, however, based only on past margins and import volumes as required by the Sunset Policy Bulletin sections II.A.3 and 4.

17. If USDOC were to conduct a proper likelihood determination, there would be no "good cause" standard at all. USDOC would simply accept and evaluate all evidence submitted. The Sunset Policy Bulletin section II.C., however, shifts the burden to respondents to rebut the presumption, and restricts USDOC's ability to incorporate other information into its determination.

18. In this case, the United States applied the same result-oriented logic as it does in every case. The United States argues that there was no evidence to support the inference that Japanese producers/exporters would no longer dump upon termination. Yet, in fact, there was such evidence on the record in this case. The United States simply rejected the evidence, and its logical implication.

19. The United States assertion that the likelihood determination is qualitative is false. Article 2 requires that all dumping determinations be based on a quantitative analysis. In fact, the US approach is neither qualitative nor quantitative. It simply relies on the presumption that any amount of dumping over the past five-years is sufficient to continue the imposition of the anti-dumping order.

20. The United States reads the Appellate Body's decision out of context. Contrary to the US assertion, the Appellate Body in *US – CVD Sunset* supports Japan's position, finding that the amount of subsidization is relevant to the injury determination.

21. The panel in *US – CVD Sunset* supports Japan's argument, stating "in our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidization." The recent panel in *EC – Bed Linens* also indicates that quantification is a must. Indeed, without an assessment of the magnitude of the probable margin of dumping, one cannot determine the likelihood of "dumping." A "dumping" determination cannot be made in the abstract.

22. Finally, USDOC's rejection of a respondent's submission based on its 30-day submission rule was inconsistent with Articles 6.1, 6.2, and 6.6. The 30-day requirement of Article 6.1.1 is not the end of the analysis, but is an absolute minimum for initial responses, as the Appellate Body in *US – Hot Rolled Steel* stated. A proper interpretation requires examination of the broader obligations contained throughout Article 6. Article 6.1 sets forth the basic rule that parties should be given

"sufficient opportunity" to present all evidence and argumentation within the time constraints imposed by Article 11.4. As demonstrated in *Mechanical Transfer Presses from Japan*, USDOC is able to provide respondents an opportunity to submit evidence with the case brief in a sunset review. Article 6.1 requires USDOC to do so at the time of the case brief in other sunset reviews. Article 6.2 requires the authorities to provide respondents a full opportunity to defend their interests. In this context, Article 6.9 requires the authorities to disclose the essential facts under consideration to allow the parties to defend their interests. The case brief submitted by NSC was its only opportunity to defend its interests after learning what essential facts were under consideration. Therefore, the US refusal to accept NSC's defense in this case is contrary to its Article 6.2 obligations. Under Article 6.6, the authorities are obliged to consider all information in the proceeding. As the Appellate Body in *Bismuth II* stated, the authorities are not free to ignore parties' submitted information. In sum, USDOC's rejection of NSC's submission was inconsistent with Articles 6.1, 6.2, and 6.6.

C. THE MAGNITUDE OF THE DUMPING MARGIN LIKELY TO PREVAIL, ZEROING PRACTICE, AND *DE MINIMIS* STANDARD

23. Japan has argued that reporting WTO-inconsistent dumping margins to the USITC for purposes of its injury analysis is inconsistent with the United States' obligations under Article 11.3. Contrary to the US argument that "there is no provision of the Agreement that requires or precludes the USITC from considering the magnitude of the margin," the obligations of Articles 3.4 and 3.5 are incorporated within Article 11.3 through the definition of injury provided in footnote 9.

24. The Sunset Policy Bulletin, unless a case falls within the limited exceptions as stated in section II.B.1 through II.B.3, irrefutably presumes that the original dumping margins will resume. In this particular case, USDOC also mechanically applied section II.B.1 of the Sunset Policy Bulletin to report the dumping margin in the original investigation to the USITC, ignoring all other facts presented by a respondent. This practice is exactly what the Appellate Body in *US – CVD Sunset* condemned.

25. USDOC's application of dumping margins with "zeroed-out" negative margins to a sunset review is inconsistent with US WTO obligations. Article 2 defines how "dumping" is determined throughout the AD Agreement, including sunset reviews. Article 2.4 sets forth the rules for calculating a dumping margin and is the basis for the dumping determination. Article 2.1 requires that the "fair comparison" in Article 2.4 be made for the whole of the product under consideration, not a subset of the product. A zeroing methodology excludes margins for certain subsets of the product when calculating a dumping margin. Therefore, a dumping determination using a zeroing methodology is not consistent with the obligations of Article 2. Because USDOC uses dumping margins that "zero-out" negative margins when determining whether "dumping" will occur in the future and then reporting the magnitude of that dumping, the United States acts inconsistently with its obligations under Article 11.3.

26. The *de minimis* standard contained in Article 5.8 to sunset reviews applies in Article 11.3. Given the textual difference, particularly the lack of the phrase "for the purpose of this paragraph" in Article 5.8 of AD Agreement, and in light of its negotiating history, the *de minimis* standards in the SCM Agreement and the AD Agreement are not identical, and therefore, the reasoning of the Appellate Body in *US – CVD Sunset* does not apply in this case.

D. THE LIKELIHOOD DETERMINATION MUST BE COMPANY SPECIFIC

27. In response to question 25(c), the United States incorrectly asserted that all the provisions of Article 6 contain some form of evidentiary and procedural components, yet the substantive components of those provisions are not incorporated into Article 11.3. In fact, the negotiating history shows that all the provisions of Article 6 are procedural or evidentiary in nature. As such, they are all

expressly incorporated into Article 11. The fact that some of those procedures may have substantive implications does not foreclose their procedural effect.

28. Article 6.10, which sets forth the rule of a company-specific dumping determination, does not contain any substantive rules on how to determine "dumping" on a company-specific basis. Such substantive rules are set forth in Article 2. The obligations contained in Article 6.10 are procedural in nature and therefore incorporated within Article 11.

E. THE USITC'S DECISION TO CUMULATE IMPORT WITHOUT ASSESSING NEGLIGIBILITY IS INCONSISTENT UNDER ARTICLE 11.3

29. In response to question 22, the United States asserts that use of the term "investigation" in Article 3.3 limits the applicability of the negligibility standard only to original investigations. Contrary to the US assertion, Article 3.3, which refers to "assessing the effects of such imports" for determining injury, is inseparable from Articles 3.1, 3.4 and 3.5, and, in accordance with footnote 9, must be evaluated in conjunction with one another, whether in an original investigation or a sunset review.

30. There were conflicting views among the Members on the permissibility of cumulative assessment in the Tokyo Round AD Code. The newly added Article 3.3 in the Uruguay Round AD Agreement and the term "may" in Article 3.3 resolved this issue. Under the current AD Agreement, the cumulative assessment is permissible only when certain conditions set forth in Article 3.3 are met.

31. Japan claims in the terms of reference that Article 3.3 must be observed when making a cumulative assessment in sunset reviews. To rebut the US argument that Article 3.3 does not apply to Article 11.3, Japan argues that no cumulative assessment would be permitted if Article 3.3 were not to apply to sunset reviews. Japan's argument is thus within the terms of reference.

32. Contrary to the US argument, the Appellate Body in *US – CVD Sunset* supports Japan's claim. The Appellate Body noted that footnote 45 (the corollary to footnote 9 of the AD Agreement) indicates that the term "injury" "shall be interpreted in accordance with the provisions of {Article 15}." Because Article 11.3 requires the USITC to determine the likelihood of future "injury," the USITC must follow the obligations set forth in Article 3.

33. The United States argued that the USITC had addressed the volume of subject imports in the USITC's report. To the contrary, neither one of these sections, nor any other section in the USITC's report addressed the 3 per cent / 7 per cent negligibility standard when deciding to cumulate imports from Japan. By not considering whether imports from Japan were negligible, the USITC acted inconsistently with its WTO-obligations.

F. ARTICLE X:3(A) OF GATT 1994 REQUIRES THE UNITED STATES TO ADMINISTER ITS LAWS IN A UNIFORM, IMPARTIAL, AND REASONABLE MANNER

34. As this issue has been thoroughly briefed, we will not repeat our arguments here. We do note, however, that the US assertion that Japan has not presented any evidence to support its claims with respect to this issue is simply false.

III. CONCLUSION

35. For these reasons, Japan respectfully requests that the Panel: (1) find that the above-mentioned US laws, regulations, administrative procedures and its determinations are inconsistent with its WTO obligations and (2) recommend that the United States take appropriate actions to conform to its obligations.

ANNEX D-9

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES – SECOND MEETING

1. The claims raised by Japan in its submissions related to self-initiation standards, an alleged *de minimis* requirement, the evidentiary and procedural requirements applicable to sunset reviews, and an alleged strict quantitative negligibility requirement for sunset reviews, fail because they rely on obligations not found in Article 11.3 of the AD Agreement. On this basis, the Panel should reject Japan's claims and refuse to impute into Article 11.3 of the AD Agreement "words that are not there."

2. Consistent with DSU Article 3.2 and accepted WTO jurisprudence, the United States has argued that the Panel should interpret the text of the AD Agreement, and in particular Articles 11.3 and 11.4, in accordance with the ordinary meaning of the terms of the AD Agreement in their context and in light of the Agreement's object and purpose. This should be a straightforward exercise because the terms themselves are straightforward.

3. Simply put, Article 11.3 provides that a definitive antidumping duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of dumping and injury – is made. This likelihood finding is made in the context of a sunset review that, according to the explicit terms of Article 11.3, may be initiated on one of two bases – on an authority's "own initiative" *or* upon a "duly substantiated request" by or on behalf of the domestic industry. There is no textual or contextual qualification of the right to initiate on the authority's "own initiative." There is also no requirement in Article 11.3 or elsewhere in the AD Agreement to consider the magnitude of current dumping in determining the likelihood that, absent the antidumping duty, dumping would be likely to continue or recur or even to quantify the dumping margins likely to prevail in the event of revocation. Further, there is no requirement in Article 11.3 or elsewhere in the AD Agreement to make likelihood of dumping determinations on a company-specific basis. Neither is there a requirement in Article 11.3 or elsewhere in the AD Agreement that the negligibility standards of Article 5.8 apply to the likelihood of injury determination in sunset reviews. Finally, under the terms of Article 11.4, a sunset review must be conducted in accordance with the evidentiary and procedural requirements of Article 6. Commerce's sunset determination in corrosion-resistant steel from Japan comports with all of the obligations required by the terms of the AD Agreement.

4. In contrast to the United States' text-based analysis, Japan makes various assumptions regarding the "purposes" of various provisions of the AD Agreement and then attempts to derive from these alleged purposes obligations not found in the text. This approach, of course, is the very antithesis of the basic principle of treaty interpretation reflected in Article 31 of the Vienna Convention.

5. In the recent case of *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*,[1] the Appellate Body rejected the interpretive approach advocated by Japan. First, the Appellate Body rejected a claim by the EC that the *de minimis* standard for countervailing duty investigations is also applicable to countervailing duty sunset reviews by virtue of Article 21.3 of the SCM Agreement. Second, the Appellate Body affirmed the panel's rejection of a claim by the EC that the provisions of US law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the SCM Agreement. Although *Corrosion-Resistant Steel from Germany* addressed Article 21.3 and other provisions of the SCM

[1] WT/DS213/AB/R, Report of the Appellate Body, adopted 19 December 2002.

Agreement, the relevant provisions of the AD Agreement are essentially identical to those of the SCM Agreement and the Appellate Body's reasoning is equally persuasive in this proceeding.

6. Four examples of that reasoning are very illuminating with respect to the claims Japan makes before this Panel. First, the Appellate Body began its analysis both on the self-initiation issue and the *de minimis* issue with the text of Article 21.3, the substantive sunset review provision, in an effort to determine whether that text includes the same alleged obligations as those claimed by Japan in the instant dispute. In this regard, the Appellate Body recognized that (1) "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning,'"[2] and (2) "when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may take place."[3] Second, the Appellate Body noted that Article 21.3 of the SCM Agreement contains no explicit cross-reference to evidentiary rules relating to initiation and went on to state that, "[w]e believe the absence of any such cross-reference to be of some consequence given that, as we have seen . . . the drafters of the SCM Agreement have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings."[4] Third, the Appellate Body accorded meaning to the fact that there is an express reference in Article 21.4 of the SCM Agreement to Article 12 (regarding evidence), but not to Article 11 (regarding initiation). The lack of a cross-reference was interpreted by the Appellate Body as an indication that "the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3."[5] Finally, the Appellate Body made findings regarding the object and purpose of the SCM Agreement, concluding that, "[t]aken as a whole, the main object and purpose of the SCM Agreement is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures."[6]

7. In addition to the general legal issues just discussed, Japan has also made case-specific claims regarding Commerce's sunset determination involving corrosion-resistant carbon steel flat products from Japan. Commerce's determination – that the expiry of the antidumping duty order would be likely to lead to the continuation or recurrence of dumping – is based on *continued dumping* over the life of the order. After providing all interested parties with ample opportunity to submit for the record their views as well as any information they deemed to be relevant, Commerce reasonably concluded that, in the event of revocation, dumping is likely to continue or recur.

8. As the United States has detailed in it submissions, the AD Agreement does not require the USITC to engage in a negligibility assessment in deciding whether to cumulate imports in sunset reviews. Specifically, the United States has emphasized that neither the text of the Agreement nor its object and purpose supports Japan's assertion. Indeed, the Appellate Body in *Corrosion-Resistant Steel From Germany* recently rejected the panel's conclusions that were premised on arguments similar to those made by Japan here and found that the *de miminis* standard in Article 11.9 of the SCM Agreement did not apply to Article 21.3 sunset reviews. Applying the same reasoning underlying the Appellate Body's report with respect to Article 11.9 of the SCM Agreement compels the conclusion in this matter that the negligibility standards of Article 5.8 of the AD Agreement pertaining to original investigations do not apply to Article 11.3 sunset reviews.

9. Notwithstanding the Appellate Body's report in *Corrosion-Resistant Steel From Germany*, Japan continues to argue that the negligibility standards of Article 5.8 are incorporated into Article 11.3 reviews via footnote 9 to Article 3. However, the Appellate Body found that the text of

[2] *Id*., para. 65.
[3] *Id*., para. 104.
[4] *Id*., para. 105 (emphasis in original).
[5] *Id*., para. 72.
[6] *Id*., para. 73.

Article 15 of the SCM Agreement, including its footnote 45, which is identical to footnote 9, does not support the conclusion that a *de minimis* subsidy is non-injurious.[7] The Appellate Body also rejected the conclusion that an interpretation that the same *de minimis* rate be considered injurious in the original stage but not at the sunset stage would lead to irrational results, and observed that original investigations and sunset reviews are distinct processes with different purposes, which may explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.[8]

10. Quite simply, in applying the Appellate Body's reasoning from its report in *Corrosion-Resistant Steel From Germany* to this matter, it is evident that the negligibility standard in Article 5.8 is an agreed rule that if imports are found to be negligible in an *original investigation*, authorities are obliged to terminate their investigation, with the result that no antidumping order be imposed. Thus, Japan's contentions should be rejected.

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[7] *Id*., para. 79.
[8] *Id*., paras. 84-89.