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

Report of the Panel

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

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

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I. INTRODUCTION

A. COMPLAINT OF JAPAN

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

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

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

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

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

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

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

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

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

Chairman: Mr. Dariusz Rosati

Members: Mr. Martin Garcia

Mr. David Unterhalter

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

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

C. PANEL PROCEEDINGS

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

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

II. FACTUAL ASPECTS

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

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

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

2. the US Sunset Regulations[9];

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

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

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

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

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

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

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

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

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

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. JAPAN

3.1 Japan requests the Panel:

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

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

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

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

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

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

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

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

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

   – Both as envisaged in the Sunset Policy Bulletin as such and as applied in this case, the DOC's relying on and reporting to the ITC WTO-inconsistent dumping margins which DOC calculated in prior anti-dumping proceedings based on pre-WTO methodologies and/or on dumping margins with zeroed negative margins, is inconsistent with the United States' obligations under Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement*;

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

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

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

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

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

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

B. UNITED STATES

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

IV. ARGUMENTS OF THE PARTIES

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

V. ARGUMENTS OF THE THIRD PARTIES

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

VI. INTERIM REVIEW

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

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

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

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

A. REQUEST OF JAPAN

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

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

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

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

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

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

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

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

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

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

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

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

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

B. REQUEST OF THE UNITED STATES

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

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[15] Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* ("*EC – Bed Linen (Article 21.5 – India*"), WT/DS141/AB/RW, adopted 24 April 2003, para. 137.

[16] *Ibid*, para. 136.

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

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

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

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

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

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

VII. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

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

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

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

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper

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

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

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

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

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

2. Burden of Proof

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

B. ISSUES RAISED IN THIS DISPUTE

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

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

7.8 First, several of Japan's claims have required us to examine the extent to which the rules set forth in the *Anti-dumping Agreement* in respect of anti-dumping *investigations* apply to sunset reviews. Such claims include Japan's allegations concerning evidentiary standards for self-initiation; *de minimis* standard; cumulation; the basis for a determination of likelihood of continuation or recurrence

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

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

[21] *Ibid*.

of dumping (order-wide or company-specific) and, to a certain extent, the nature of the determination of likelihood of continuation or recurrence of dumping. In this respect, we believe it is appropriate to point out at the beginning of our analysis that original investigations and sunset reviews are distinct processes with different purposes, and that the text of the *Anti-dumping Agreement* distinguishes between investigations and reviews. We base our view on several elements, not least that under the text of the *Anti-dumping Agreement*, the nature of the determination to be made in a sunset review differs in certain fundamental respects from the nature of the determination to be made in an original investigation. In a sunset review, the authorities are called upon to focus their inquiry on the *likelihood of continuation or recurrence* of dumping and injury in the event the measure were no longer imposed. In contrast, in an original investigation, the authorities must investigate the existence of dumping, injury and causal link in order to warrant the imposition of an anti-dumping duty. In light of the fundamental qualitative differences in the nature of these two distinct processes, we would observe, at the outset, that it would not be surprising to us that the textual obligations pertaining to each of the two processes may differ.

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

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

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

(a) US law as such

(i) Arguments of parties

Japan

7.11 Japan submits that US law -- Section 751(c)(1) and (2) of the US Statute and Section 351.218(a) and (c)(1) of the Regulation -- violates Articles 11.1, 11.3, 12.1, 12.3, and 5.6 of the *Anti-dumping Agreement* in that it mandates automatic self-initiation of sunset reviews by the DOC without sufficient evidence. According to Japan, the text, context and object and purpose of the relevant provisions prohibit investigating authorities[22] from self-initiating sunset reviews under Article 11.3 of the *Anti-dumping Agreement* without having sufficient evidence that justifies such initiation. Japan contends that Article 11.3 creates a presumption of termination of an anti-dumping order after five years of application. Therefore, the decision to continue the imposition of the order for

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

another five years under Article 11.3 is equivalent to deciding to impose the order in an original investigation. It follows that the same evidentiary standards that apply to the self-initiation of original investigations also apply to the self-initiation of sunset reviews.

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

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

United States

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

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

[23] Second Written Submission of Japan, paras. 23-27.
[24] Second Written Submission of Japan para. 38.
[25] First Oral Submission of Japan, paras. 23-24.

(ii) Arguments of third parties

European Communities

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

Korea

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

Norway

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

(iii) Evaluation by the Panel[28]

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

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

[26] Response of the European Communities to Question 2 from the Panel.
[27] Response of the European Communities to Question 3 (c) from the Panel.
[28] In this section, we address Japan's allegation that the US statute and regulations requiring automatic self-initiation of sunset reviews without sufficient evidence are, as such, inconsistent with Articles 5.6, 11.1, 11.3, 12.1 and 12.3 of the *Anti-dumping Agreement*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[37] *Ibid*, para. 46.

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

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

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

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

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

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

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

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

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

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

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

7.31 Article 12.1 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.41 We disagree. Footnote 1 reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[50] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Arguments of parties

Japan

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

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

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

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

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

United States

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

(ii) Evaluation by the Panel[60]

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

3. *De minimis* standard in sunset reviews

(a) US law as such

(i) Arguments of parties

Japan

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

United States

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

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

(ii) Arguments of third parties

Chile

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

Brazil

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

European Communities

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

Korea

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

Norway

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

(iii) Evaluation by the Panel[64]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Arguments of parties

Japan

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

United States

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

(ii) Evaluation by the Panel[83]

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

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

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

4. Cumulation in sunset reviews

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

(i) Arguments of parties

Japan

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

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

United States

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

(ii) Arguments of third parties

European Communities

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

(iii) Evaluation by the Panel[84]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Use of dumping margins in sunset reviews

(a) US Sunset Policy Bulletin as such

(i) Arguments of parties

Japan

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

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

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

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

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

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

United States

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

(ii) Arguments of third parties

Brazil

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

Korea

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

Norway

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

(iii) Evaluation by the Panel[92]

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

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

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

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

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

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

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

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

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

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

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

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

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

[97] See *supra*, note 95.

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

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

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

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

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

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

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

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

[101] *Ibid.*

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

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

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

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

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

> Under U.S. law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing evidence of Commerce's understanding of sunset-related issues not explicitly addressed by the statute and regulations. In this regard, the *Sunset Policy*

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

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

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

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

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

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

[106] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[123] In this respect the United States stated:

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

Response of the United States to Question 9 (d) from the Panel.

We do not consider that Japan has effectively refuted this.

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

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

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

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

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

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

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

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[124] Appellate Body Report, *US – Carbon Steel*, *supra*, note 22, para. 157.
[125] Response of Japan to Question 79 (b) from the Panel.
[126] Response of Japan to Question 79 (a) from the Panel.
[127] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, *supra*, note 95, paras. 129 and 146.

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

(i) Arguments of parties

Japan

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

United States

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

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

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

(ii) Evaluation by the Panel

7.150 We recall the following facts that are relevant for the consideration of Japan's allegations: the original investigation was carried out and the original measure was imposed before the entry into force of the *WTO Agreement*, and thus the present *Anti-dumping Agreement*. Four administrative reviews were carried out after the imposition of the original anti-dumping measure and following the entry into force of the *WTO Agreement*. In the first two of these administrative reviews[129], the DOC calculated new dumping margins for the review periods. At levels of approximately 12 per cent and 2

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

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

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

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

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

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

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

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

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

7.156 We therefore find that the DOC did not rely upon the original determinations of dumping as a basis for its determination of likelihood of continuation or recurrence of dumping in the instant sunset review. It is therefore not necessary for us to address whether such alleged reliance on the

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

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

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

determination of dumping in an original pre-WTO investigation would have been inconsistent with Articles 2, 11.3 and 18.3 of the *Anti-dumping Agreement*.[133]

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

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

7.158 The DOC applied a weighted average-to-transaction methodology in establishing the dumping margins in administrative reviews. We understand that Japan is not contesting the US use of this methodology, in and of itself.[136] Rather, Japan alleges that the DOC's reliance, in this sunset review, upon administrative review dumping margins calculated on the basis of "zeroing" is inconsistent with Article 2.4 of the *Anti-dumping Agreement*.

7.159 We are aware that the zeroing methodology has the potential of increasing the dumping margin – in relation to a dumping methodology that gives full credit to negative dumping margins -- because it does not allow for an offset for negative dumping margins in the calculation of the overall

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

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

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

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

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

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

margin. Perhaps more importantly here, zeroing may affect the finding as to the very *existence* of dumping, i.e. it may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing. Japan alleges in this case that there would have been no finding of dumping in at least the most recent administrative review in question had the DOC not "zeroed".[137] That, in turn, could have changed the outcome of the subsequent sunset review where the DOC relied upon affirmative dumping determinations in the administrative review as one of the factual bases to establish the likelihood of continuation or recurrence of dumping.

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

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

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

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

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

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

> "Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a

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

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

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

> reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review." (footnote omitted)

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

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

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

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

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

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

7.172 We do not understand Japan to have alleged that, even in the absence of a violation of Article 2.4, reliance by the DOC on the existence of dumping as established in the administrative

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

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

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

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

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

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

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

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

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

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

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

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

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

7.178 As for the nature of the "likelihood of continuation or recurrence of dumping" determination under Article 11.3, we believe that "likelihood" is an inherently prospective notion. It involves a probabilistic judgment that must necessarily involve less certainty and precision than would be attainable under a purely retrospective analysis. Arithmetic certainty is not required, but the conclusions reached by an investigating authority must be reasonably demonstrable on the basis of the evidence adduced. In this respect, we endorse the view of the *US-DRAMs* panel that, "analysis involving prediction can scarcely aspire to a standard of inevitability".[148] There is thus a considerable difference in the degree of certainty and precision required in a determination of likelihood of

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

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

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

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

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

continuation or recurrence of dumping under Article 11.3 and a determination of dumping under Article 2, which involves a calculation of dumping margins in accordance with the rules set out therein.

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

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

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

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

7.183 We are unable to find, in any of NSC's submissions to the DOC in this sunset review, any indication that the NSC asked the DOC to question or scrutinize the validity of the administrative review dumping margins because they had been calculated on the basis of "zeroing". Rather, these submissions indicate that the NSC itself *relied upon* the decrease in the margins that had been found to exist in the administrative reviews in order to support its sunset review argument to the DOC that there was no likelihood of continuation or recurrence of dumping in the event the order would be

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

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

revoked.[151] Such positive reliance by the NSC itself upon the administrative review dumping margins as a "fact" – without questioning the methodology by which they had been calculated – leads us to conclude that it would not have been unreasonable for the DOC, in the particular circumstances of this case, to have considered that these administrative review dumping margins could properly be taken into account in considering whether likelihood of continuation or recurrence of "dumping" existed. Japan has not demonstrated before us that, in the particular circumstances of this case, an objective and unbiased authority could not reasonably have made the likelihood determination made by the DOC on the basis of the facts that were before it at that time.

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

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

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

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

7.187 We note Japan's statement that the only injury claim Japan is making in the present case relates to cumulation.[155] Therefore we need to clarify the legal basis of this allegation of Japan. As we have stated above (*supra*, para. 7.162), Japan does not argue that Article 11.3 requires investigating authorities to calculate precisely the likely future margin of dumping in sunset reviews. Also as stated above (*supra*, para. 7.162), it is undisputed between the parties that the DOC did not calculate a likely future margin in this sunset review. The DOC did, however, report margins from the original investigation to the ITC as the margins that would prevail if the duty were terminated.

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

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

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

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

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

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

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

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

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

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

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

(a) US Sunset Policy Bulletin as such

(i) Arguments of parties

Japan

7.192 According to Japan, Article 6.10 -- which is expressly incorporated into Article 11 by virtue of the cross-reference in paragraph 4 thereof to "[t]he provisions of Article 6 regarding evidence and

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

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

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

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

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

United States

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

(ii) Arguments of third parties

Chile

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

(iii) Evaluation by the Panel[162]

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

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

(i) Arguments of parties

Japan

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

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

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

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

United States

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

(ii) Evaluation by the Panel[164]

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

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

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

7.201 Article 11.4 states, in part:

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

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

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

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

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

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

7.204 The chapeau of Article 6.10 states:

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

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

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

7.207 The issue therefore is how Article 6.10 is to be understood in the context of sunset reviews. Article 11.3 requires the authorities to determine, *inter alia*, "that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury". It therefore refers to a determination of likelihood of continuation or recurrence of dumping, rather than a "determination of dumping". It also refers to "dumping" but not "the margin of dumping". By contrast, Article 6.10 applies to the calculation of "margins of dumping" for each known exporter or producer concerned of the product under investigation. Considering that we have found no substantive requirement imposed by Article 11.3 or any other provision in the *Anti-dumping Agreement*, that an investigating authority

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

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

must actually calculate the (likely) margin of dumping in a sunset review, we also find that the determination of likelihood of continuation or recurrence of dumping does not fall within the ambit of this aspect of Article 6.10, regulating the process of calculating margins of dumping. The provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.

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

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

(a) US law and Sunset Policy Bulletin as such

(i) Arguments of parties

Japan

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

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

b. obligation to determine likelihood

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

7.211 Japan submits that, in a sunset review, the investigating authority is required to carry out a prospective analysis regarding the likelihood of continuation or recurrence of dumping. That analysis should rest on sufficient evidence. It is up to the investigating authority to make sure that its findings in this respect are premised on sufficient evidence. The US Sunset Policy Bulletin, however, precludes the DOC from fulfilling that requirement imposed under Article 11.3 of the *Anti-dumping*

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

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

Agreement, because under the "good cause" requirement, the DOC does not consider evidence about factors other than those listed in the US legislation unless "good cause" has been shown as to why the DOC should consider those other factors.[170]

United States

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

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

b. obligation to determine likelihood

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

(ii) Arguments of third parties

Chile

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

European Communities

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

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

Korea

[170] First Written Submission of Japan, paras. 127-129.
[171] Second Written Submission of the United States, para. 23.
[172] Response of the European Communities to Question 11 from the Panel.

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

Norway

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

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

(iii) Evaluation by the Panel[174]

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

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

> "…[U]nless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury…" (footnote omitted)

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

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

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

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

[175] See *supra*, note 104.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"The Secretary may revoke an order in part if the Secretary concludes that:

(…)

(ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value;

(…)"[184]

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

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

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

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

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

b. Obligation to "determine" likelihood

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

7.241 The US Statute reads in relevant part:

"(c) Determination of likelihood of continuation or recurrence of dumping

(1) In general

In a review conducted under section 1675(c) of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under section 1673c of this title would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider—

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

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

(2) Consideration of other factors

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

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

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

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

> "(3) *Substantive response to a notice of initiation – (i) Time limit for substantive response to a notice of initiation*. A complete substantive response to a notice of initiation, filed under this section, must be submitted to the Department not later than 30 days after the date of publication in the FEDERAL REGISTER of the notice of initiation.
>
> …
>
> (iv) *Optional information to be filed by interested parties in substantive response to a notice of initiation* –(A) *Showing good cause*. An interested party may submit information or evidence to show good cause for the Secretary to consider other factors…Such information or evidence must be submitted in the party's substantive response to the notice of initiation under paragraph d(3) of this section."[186] (italic emphasis in original, underline emphasis added)

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

> "(a) dumping continued at any level above *de minimis* after the issuance of the order or suspension agreement, as applicable;
>
> (b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or
>
> (c) dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes for the subject merchandise declined significantly."[187]

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

> "…the Department normally will determine that revocation of an antidumping order … is not likely to lead to continuation or recurrence of dumping where dumping was

[185] Codified in 19 U.S.C. § 1675(a)(c)(1) and (2) (Exhibit JPN-1e at 496-497).
[186] Codified in 19 C.F.R. § 351.218(d)(3)(i) and (iv) (Exhibit JPN-3 at 223-225).
[187] *Sunset Policy Bulletin*, 63 FR at 18872 (Exhibit JPN-6)

> eliminated after issuance of the order … and import volumes remained steady or increased."[188]

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

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

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

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

Arguments of parties

Japan

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

United States

7.248 The United States submits that the Japanese exporters were given 15 months advance notice of the forthcoming initiation of the instant sunset review. Following the initiation, exporters were given 30 days - the same amount of time provided for under Article 6.1.1 - to submit their substantive response. It is therefore evident that NSC was given full opportunity to present evidence in this sunset review. According to the United States, therefore, Japan fails to demonstrate how requiring the exporters to submit all their evidence within 30 days following the initiation of the sunset review violates Article 6.

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

[189] First Written Submission of Japan, paras. 118-119.

[190] First Written Submission of Japan, paras. 127-129.

[191] In this respect we note in particular Japan's statement that it did not challenge the US Regulations as part of its argument about the good cause requirement under US law. *See*, Response of Japan to Question 93 from the Panel.

[192] First Written Submission of Japan, para. 146.

[193] First Written Submission of Japan, para. 149.

Findings of the Panel[194]

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

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

> "We agree with domestic interested parties that NSC has not shown good cause for the Department to consider other factors, including whether NSC's 50 percent-owned galvanizing plant achieved full production or NSC has maintained a steady base of customers. As specified in 19 CFR 351.218(d)(3)(iv), if an interested party wants the Department to consider other factors during the course of a sunset review, the party must submit the evidence of good cause in its substantive response. Because the NSC did not submit the additional information in their substantive response, we do not find good cause to examine other factors in this review. Further, as domestic interested parties point out, even if the Department were to consider these factors, they would be outweighed by the margin and import volume evidence on record. The factors do not provide sufficient evidence that NSC is not likely to dump in the future.[200]

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

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

[196] *Ibid*.

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

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

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

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

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

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

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

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

> *"Article 6*
>
> *Evidence*
>
> 6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

Article 6.2 reads, in part:

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

Article 6.6 provides:

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

7.255 Articles 6.1 and 6.2 make it clear that interested parties have a broadly-defined right to submit evidence to the investigating authority during a sunset review and are entitled to a full opportunity for the defense of their interests. Article 6.6 requires that the authorities satisfy themselves as to the accuracy of information submitted upon which they base their findings. In this respect, while recalling the distinction between rules of procedure and substance in the *Anti-dumping Agreement*[202],

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

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

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

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

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

7.258 The right of interested parties to submit information in a sunset review cannot be unlimited. One of the important limitations that can legitimately be imposed on that right is deadlines for the submission of information. We endorse the view of the panel – with which the Appellate Body also agreed -- in *US-Hot-Rolled Steel* that "in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines."[204] Investigating authorities must be able to control the conduct of their review and to carry out the multiple steps in a review required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their review within the time-limits mandated under the *Anti-Dumping Agreement*.[205] We note, in that respect, that Article 11.4 of the *Anti-Dumping Agreement* stipulates that reviews under Article 11 "shall be carried out *expeditiously* and shall normally be concluded within 12 months of the date of initiation of the review". (emphasis added) Furthermore, Article 6.14 provides generally that the procedures set out in Article 6 "are not intended to prevent the authorities of a Member from proceeding *expeditiously*". (emphasis added) Deadlines are, therefore, necessary and legitimate tools that allow investigating authorities to carry out and complete sunset reviews in a timely manner. Obviously, in cases where the *Anti-dumping Agreement* sets a certain deadline for the submission of certain information, the investigating authorities are bound by the deadline imposed by the *Anti-dumping Agreement*. An example of such a provision is Article 6.1.1 of the *Anti-dumping Agreement*, which requires that exporters be given at least 30 days to respond to the questionnaires sent by the investigating authority. In other cases, the national law of a WTO Member may set a deadline for the exercise of a certain procedural right during an investigation, even where the *Anti-dumping Agreement* may not expressly require such a deadline, provided that the deadline is consistent with a Member's WTO obligations. There must be a balance struck between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.[206]

7.259 In our view, the DOC's application in this case of the 30-day deadline in the US Regulation for the submission of information or evidence to show good cause for the DOC to consider NSC's additional information relating to possible "other factors" did not undermine NSC's "ample

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

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

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

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

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

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

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

7.262 We note Japan's argument that in this sunset review the Japanese exporters did not know until 15 days after the initiation of the sunset review whether the domestic industry would participate in the review. In Japan's view this meant that the exporters in fact had only 15 days to respond to the questionnaires, not even 30 days. According to Japan this violated Article 6.1.[211] In our view, the

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

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

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

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

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

fact that the domestic producers informed the DOC of their intent to participate in the sunset review on day 15 after the initiation of the sunset review does not change the fact that the Japanese exporters had 30 days to respond to the notice of initiation. In our view, the fact that the domestic producers were given 15 days to inform the DOC as to whether they would participate in the sunset review did not affect Japanese exporters' right to be given ample opportunity to present evidence under Article 6.1.

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

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

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

Arguments of parties

Japan

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

United States

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

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

Evaluation by the Panel

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

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

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

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

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

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

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

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

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[213] *Supra*, para. 7.239.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) US law as such

(i) Arguments of parties

Japan

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

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

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

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

United States

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

(ii) Evaluation by the Panel[232]

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

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

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

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

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

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

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

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

> "Thus, to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls

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

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

> outside the scope of Article X of the GATT 1994. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994."[234] (emphasis in original)

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

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

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

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

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

(i) Arguments of parties

Japan

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

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

United States

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

Evaluation by the Panel[235]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.308 That does not seem to be the case here because the sunset review at issue is one of the many other reviews conducted by the United States and the United States seemingly applies the same

provisions of its domestic legislation in all these sunset reviews. The thrust of the claims in these panel proceedings is the alleged inconsistency of US law with relevant WTO provisions. The claims challenging the application of US law in the instant review appear to have been derived from the main claims dealing with the US law as such.

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

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

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

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

(a) US law as such

(i) Arguments of parties

Japan

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

United States

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

(ii) Arguments of third parties

Norway

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

(iii) Evaluation by the Panel

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

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

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

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In conclusion, we find that:

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

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

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

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

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

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

(c) In respect of cumulation in sunset reviews:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WORLD TRADE ORGANIZATION

WT/DS244/4
5 April 2002

(02-1902)

Original: English

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

Request for the Establishment of a Panel by Japan

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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