

## ANNEX A

### First Written Submissions by the Parties

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

## ANNEX A-1

### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF JAPAN

#### I. INTRODUCTION

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

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

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

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

---

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

## II. FACTUAL BACKGROUND

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

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

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

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

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

## III. THE ARGUMENT

### A. AUTOMATIC INITIATION OF SUNSET REVIEWS

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

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

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

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

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

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

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

14. In other provisions within the AD Agreement, such as Article 5.6, the authorities do not have carte blanche to automatically initiate investigations without first having “sufficient evidence.” It is illogical to imagine that the AD Agreement only limits administering authorities’ ability to self-initiate in some instances but not in others.

15. Further, the automatic initiation of sunset reviews has a chilling effect similar to the initiation of investigations. Automatic initiation of sunset reviews negate any benefits that exporters may enjoy from knowing that imposition of an anti-dumping duty will terminate predictably after five years. By automatically initiating sunset reviews, the USG virtually assures that the imposition lasts at least six years rather than five years, and for those exporters who cannot afford to participate, the imposition of the anti-dumping duty will continue indefinitely. Automatic initiation thus results in inconsistent interpretation of Article 11.3.

**3. The Context in Which Article 11.3 Operates Confirms There Must Be “Sufficient Evidence” to Justify Initiating a Sunset Review**

16. Furthermore, the text and context of Article 12 explicitly requires that the authorities have “sufficient evidence” to initiate sunset reviews under Article 11.3. The *mutatis mutandis* application of Article 12.1 in accordance with Article 12.3 to Article 11.3 establishes that, once the authorities are satisfied that there is “sufficient evidence” to justify initiation, the authorities must provide public notice of the initiation of the sunset review. To give Article 12 its proper meaning, therefore, the authorities must satisfy the “sufficient evidence” standard to initiate sunset reviews. The USG’s interpretation of Article 11.3 is thus incorrect because it reads the application of Article 12.1 and 12.3 out of the Agreement.

17. The text and context of Article 5.6 also requires that the administering authorities have “sufficient evidence” to initiate sunset reviews under Article 11.3. Because of the *mutatis mutandis* application of the Article 12 to Article 11.3, the language “pursuant to Article 5” in Article 12.1 requires that Article 5.6 must also apply to sunset reviews. Article 5.6 requires that the sufficient evidence standard defined in Article 5.2 must also apply to instances where the administering authorities self-initiate. Therefore, because both Articles 12.1 and 5.6 use the “sufficient evidence” rules, those same rules apply to all initiations, including self-initiations by the authorities in original investigations and sunset reviews.

#### **4. The Prior Panel Decision on Article 21.3 of the SCM Agreement Is Not Persuasive**

18. With all due respect, we submit that the panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/R (3 July 2002), erroneously interpreted the consistency of the automatic initiation of sunset reviews with Article 21.3 of the SCM Agreement, the corollary to Article 11.3 of the AD Agreement. This Panel should not follow the prior panel’s decision. First, the CVD panel misread the text. The panel’s finding of “two modalities” in sunset reviews is true, but incomplete. Even in the case of a “duly substantiated” petition, the authorities must still evaluate whether the evidence is sufficient to “duly substantiate” the petition. Under the CVD panel’s interpretation, there is no standard of “sufficient evidence” in either modality. Second, the CVD panel did not consider Article 21.3 in its proper context. The CVD panel never discussed or even mentioned Article 22.1 of the SCM Agreement (the corollary to Article 12.1 of the AD Agreement), which provides for the “sufficient evidence” standard, standard and also establishes a textual link to Articles 21.3 through 22.7 of the SCM Agreement. Third, the CVD panel allowed “purpose” to override the text and context, resulting in an inadequate analysis of the purpose of Article 21.3 of the SCM Agreement. Finally, the CVD panel misinterpreted the meaning of “special circumstances” in Article 11.6 (the corollary to Article 5.6 of the AD Agreement) of the SCM Agreement. The “sufficient evidence” standard should still be applicable irrespective of the frequency of self-initiation as between an original investigation and a sunset review.

19. For the reasons stated above, the proper interpretation of Article 11.3 in accordance with its text, context, and object and purpose requires a self-initiated sunset review be based on “sufficient evidence.” Although the standard of “sufficient evidence” may vary on a case-by-case basis, automatic self-initiation by the authorities without any evidence cannot be within the scope of the “sufficient evidence” standard. The Act and USDOC’s regulations mandating automatic initiation of sunset reviews without any evidence, therefore, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 on its face. Further, USDOC’s automatic initiation of this sunset review on 1 September 1999 pursuant to the Act and USDOC’s regulations is also inconsistent with these provisions of the AD Agreement.

#### **B. “LIKELIHOOD” OF CONTINUATION OR RECURRENCE OF DUMPING**

20. USDOC’s complete refusal in sunset reviews to undertake a serious prospective examination of the probability of future dumping based on positive evidence is inconsistent with Article 11.3, on its face, as a general practice, and as applied in this case. USDOC’s regulations, the SAA, and the Sunset Policy Bulletin create a myriad of WTO-inconsistencies by preventing any sort of prospective analysis. The “likely” standard under Article 11.3 requires a “determination” based on a prospective analysis of positive evidence that there is a probability, not some remote possibility, that dumping will continue or recur in the future.

#### **1. Regulations Mandate Application of “Not Likely” Standard**

21. Section 351.222(i)(1)(ii) of USDOC regulations mandate explicit application of a “not likely” standard, even though a prior panel in *United States – Anti-dumping Duty on Dynamic Random*

*Access Memory Semiconductors (DRAMs) of one Megabit or Above from Korea*, WT/DS99/R (29 January 1999), has made clear that a “not likely” standard does not comply with the “likely” standard of Article 11. Notwithstanding this previous panel decision and the USG’s own acceptance of this panel decision, the USG continues to maintain the “not likely” standard in USDOC’s regulations with respect to sunset reviews. Because USDOC’s regulation mandates termination of an anti-dumping duty based on the “not likely” standard, USDOC’s regulation is thus inconsistent with Article 11.3.

## **2. No Attempt to Determine “Likely” of Dumping Prospectively**

22. The USG’s WTO-inconsistency on this issue does not stop at the provisions of the regulations. The Sunset Policy Bulletin impermissibly restrict any real factual investigation to determine prospectively whether dumping is “likely” to continue or recur, nonetheless the terms “likely” and “determine” in Article 11.3 require that the authorities undertake a prospective analysis of positive evidence to establish whether dumping is likely to continue or recur. Instead of looking forward, as a general practice USDOC looks backwards.

23. Based on statements in the SAA, the Sunset Policy Bulletin establishes four factual scenarios to determine whether dumping is likely to continue or recur. All of these four factual scenarios, however, examine only historical dumping margins and import volumes. The Sunset Policy Bulletin thus impermissibly restricts USDOC’s analysis to a retrospective rather than a prospective analysis. Furthermore, of these four factual scenarios, there is only one scenario in which respondents may be deemed “not likely” to dump in the future. Yet, this factual scenario is virtually impossible to satisfy. Respondents who satisfy one of other three factual scenarios that indicate respondents are “likely” to dump in the future can only overcome this presumption by placing other evidence on the record. To place other evidence on the record, however, a respondent must first establish “good cause.” This restrictive, static, and retrospective approach creates an irrefutable presumption that dumping will continue or recur. USDOC nearly always finds one of the first three scenarios to be applicable to sunset reviews of anti-dumping duty and hardly ever finds other factors or other information sufficient to rebut this presumption.

24. For these reasons, USDOC does not take the proper prospective approach to determine whether dumping is likely to continue in a sunset review and therefore acts inconsistently with Article 11.3 as a general practice.

25. Further, USDOC applied this general practice to this sunset review to determine that dumping is likely to continue in this case. USDOC determined that dumping is likely because respondents met one of the three “likely” scenarios in the Sunset Policy Bulletin (the present import volume had been lower than the volume during the period of the original investigation, and dumping continued at level above 0.5 per cent). In reaching this determination, USDOC refused to consider other information submitted by NSC showing that NSC’s export volume had been lowered due to the production of subject product at its joint-venture in the United States. NSC also presented facts that NSC would not export the subject product at dumped price. USDOC also refused to consider these facts, although USDOC has known of the existence of these facts since the original investigation and subsequent administrative reviews. The determination is thus also inconsistent with Article 11.3.

## **3. USDOC’s Application of 30-Day Submission Rules to This Review**

26. Instead of positively collecting and analyzing information relevant to potential future dumping, USDOC regulations shuts down any meaningful inquiry with rigid procedures and artificial deadlines. Applying the regulations, USDOC stated that it did not consider any information submitted after the 30-day period from the initiation of this sunset review, as provided in its regulations. USDOC then failed to give NSC a full opportunity to defend its interests when USDOC

refused to consider NSC's information in its 11 May 2000 submission. Such a determination is inconsistent with Articles 6.1, 6.2. and 6.6.

C. USE OF WTO-INCONSISTENT DUMPING MARGINS AND *DE MINIMIS* STANDARD

**1. Use of WTO-Inconsistent Margins**

27. In accordance with the Sunset Policy Bulletin, USDOC bases its likelihood determination of future dumping on historical dumping margins, including dumping margins found in the original investigation and those found in subsequent administrative reviews. USDOC applied this general practice to this sunset review. These dumping margins reflect WTO-inconsistent methodologies. As a result, the USG acts inconsistently with Articles 2.2.1, 2.2.2, 2.4.2, 11.3 and 18.3 both as a general practice and as applied in this case.

28. Article 2 sets forth the fundamental definition of "dumping," which governs throughout the rest of the AD Agreement. At the same time, Article 18.3 requires that each Member conduct its sunset reviews in accordance with the provisions of the AD Agreement. Consequently, the USG is under an obligation to apply Article 2-consistent dumping margins in its sunset reviews.

29. In accordance with the Sunset Policy Bulletin, however, USDOC continues to apply to sunset reviews, including this case, dumping margins calculated in the original investigations prior to the WTO Agreement. These margins were calculated pursuant to the Article 2 inconsistent methodologies, including the minimum 10 per cent G&A for COP and CV, the minimum 8 per cent profit for CV, the "10/90" below-cost test, and the individual-to-monthly-average comparison. USDOC uses these WTO-inconstant dumping margins to determine the likelihood of dumping in sunset reviews without any attempt to bring these margins into conformity with Article 2.

30. Further, the Appellate Body in *EC – Bed Linens*, WT/DS141/AB/R (1 March 2001), found that Articles 2.4 and 2.4.2 oblige the authorities to make a dumping determination without "zeroing" negative dumping margins. Yet, as a general practice USDOC has consistently calculated dumping margins in original investigations and subsequent reviews using the zeroing methodology for more than fifteen years. In accordance with the Sunset Policy Bulletin, USDOC uses these dumping margins upon which it bases its likelihood determination.

31. Therefore, by applying these WTO-inconsistent dumping margins, the USG acts inconsistently with its obligation under both Articles 2, and 11.3 and 18.3 as a general practice and as applied in this case.

**2. USDOC Applies the Wrong *De Minimis* Standard**

32. USDOC's regulations applying a 0.5 per cent *de minimis* standard to sunset reviews, rather than the proper 2.0 per cent *de minimis* standard as provided for in Article 5.8, are both on their face and as applied in this case inconsistent with the USG's obligations under Articles 5.8 and 11.3. If the proper *de minimis* standard were applied to WTO-consistent dumping margins in this sunset review respondents would be found to be *de minimis*, resulting in the termination of the anti-dumping duty.

33. As stated above, the term "dumping" must be given the same interpretation throughout the AD Agreement. Therefore, the rules in the original investigation to determine "dumping" also apply to the "dumping" determinations in sunset reviews as well. Also as discusses above, a sunset review and an original investigation share the same object and purpose. Thus, both also share the same *de minimis* standard under Article 5.8. Further, Article 11.1 mandates that anti-dumping duties should remain in place only as long as they continue to counteract dumping that is causing injury. Article 5.8 states that a dumping margin of less than 2.0 per cent is incapable of causing injury. Therefore, it

would be inappropriate to continue an anti-dumping duty order on respondents when their dumping margins are by definition incapable of causing injury.

34. The panel in *US – German Steel CVD Sunset* supports this interpretation. The panel found that the same *de minimis* standard under Article 11.9 of the SCM Agreement should apply to both original investigations and to sunset reviews of countervailing duty orders under Article 21.3 of the SCM Agreement. The same rationale applies in this case. Further, the panel in *US – DRAMs* also supports that a *de minimis* standard of two per cent applies to sunset reviews.

#### D. USDOC’S ORDER-WIDE BASIS DUMPING DETERMINATION

35. USDOC’s dumping determination in sunset reviews on an order-wide basis is inconsistent with Articles 6.10 and 11.3 of the AD Agreement. The Sunset Policy Bulletin explicitly states that USDOC will base its likelihood determination on an order-wide basis. As a result, USDOC on every occasion has made its determination on an order-wide basis, including this sunset review. This approach is inconsistent with the company-specific evaluation of facts required by Article 6.10. Articles 9.2 and 11.1 also provide Article 11.3 with the contextual support that the authorities shall name suppliers who must be subject to an anti-dumping duty. Thus, USDOC’s determinations in sunset reviews on an order-wide basis are inconsistent with Articles 6.10 and 11.3 both as a general practice and as applied in this case.

#### E. USDOC’S REPORTING OF WTO-INCONSISTENT MARGINS TO THE USITC FOR THE PURPOSE OF ITS INJURY ANALYSIS

36. As a general practice and as applied in this sunset review, USDOC reports to the USITC WTO-inconsistent dumping margins for use in the USITC’s injury analysis. USDOC’s reporting of flawed dumping margins creates another set of WTO inconsistencies.

37. As discussed above, the “likely” standard in Article 11.3 requires a prospective “determination” based on positive evidence that dumping is likely to continue or recur on a case-by-case basis. Thus, simply relying on and reporting previously calculated dumping margins to the USITC does not satisfy the requirements of Article 11.3. Nonetheless, the Sunset Policy Bulletin in accordance with the SAA establishes USDOC’s general practice of reporting previously calculated dumping margins in original investigations in substantially all sunset reviews to the USITC. USDOC never reports probable future dumping margin rates to the USITC. This policy completely ignores the current conditions of the market. In this case, for example, USDOC reported the original seven-year old dumping margins without considering information submitted by NSC showing significant changes in market conditions over the last seven years. USDOC’s reporting of outdated dumping margins to the USITC, therefore, both as a general practice and as applied in this case, is inconsistent with the USG’s obligations under Article 11.3.

38. Moreover, as discussed above, Article 18.3 requires that the USG conduct sunset reviews in accordance with the provisions of the AD Agreement including Article 2. USDOC thus has an obligation to provide the USITC with WTO-consistent dumping margins for the purpose of its injury determination. Yet, USDOC reports WTO-inconsistent dumping margins in original investigations irrespective of their calculation methodologies. Nor does USDOC attempt to adjust the previously calculated margins to be WTO-consistent.

39. In this case, USDOC continued its general practice of not adjusting the originally calculated dumping margins in the original investigation, in reporting these margins to the USITC. USDOC’s reporting of these margins to the USITC, therefore, is inconsistent with Articles 2, 11.3 and 18.3.



F. THE USITC'S CUMULATIVE ASSESSMENT OF NEGLIGIBLE IMPORTS WITH OTHER IMPORTS

40. Article 3.3 requires that the USITC address whether imports from a particular country are negligible in a sunset review. Throughout the AD Agreement, the term "injury" is defined by Article 3, as specifically provided in footnote 9. Therefore, any provisions of the AD Agreement, which require the authorities to evaluate injury, must refer to the obligations under Article 3, including the negligibility standards for cumulation under Article 3.3. Article 3.3 incorporates the three per cent negligibility standard under Article 5.8.

41. Section 752(a)(7) of the Act grants the USITC discretion to determine whether to cumulate respondent countries' imports when determining injury in a sunset review. The USITC exercised this discretion and considered negligibility in a sunset review context. No where in the USITC's determination in this case, however, did the USITC even discuss the negligibility of imports in deciding whether to cumulate imports from Japan with other imports. The USITC ignored the facts in its own record, which demonstrates that the subject imports from Japan have consistently been less than three per cent of the total imports, and an aggregate of all individually negligible imports has been less than seven per cent. Thus, the USITC's decision to cumulate subject imports from Japan with imports from other countries in this sunset review is inconsistent with Articles 3.3, 5.8, and 11.3.

G. THE USG'S CONDUCTING SUNSET REVIEWS NOT IN A UNIFORM, IMPARTIAL AND REASONABLE MANNER

42. The WTO Agreement regulates both the substance of Members' anti-dumping regimes and their administration, demanding adherence to the fundamental international law principle of good faith. Article X:3(a) of GATT 1994 reflects this obligation, requiring Members to "administer {its measures} in a uniform, impartial and reasonable manner." The panel in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather* (WT/DS155/R) clarified that even examination of administrative rules are permissible under Article X:3(a), provided the rules are administrative in nature. In this case, the USG's policies and procedures discussed below are all administrative in nature and are inconsistent with the fundamental fairness provision of Article X:3(a) of GATT 1994.

**1. The Administration of the USG's Initiation of Sunset Reviews**

43. Section 751(c) of the Act and Section 351.218(a) and (c)(1) of USDOC's regulations establish administrative rules mandating the automatic initiation of all anti-dumping duty orders. The SAA has confirmed that these rules are administrative in nature. By automatically initiating its sunset reviews, the USG neglects its substantive obligations to collect evidence justifying the initiation of a particular sunset review. The automatic initiation of sunset reviews without any grounds, ignoring these substantive issues, is therefore an "unreasonable" administration of its substantive sunset review statute and regulations under Article X:3(a) of GATT 1994.

44. In addition, the USG admitted in the SAA that it automatically initiates sunset reviews to administer the initiation stage to "avoid placing an unnecessary burden on the domestic industry." The USG has chosen to initiate all sunset reviews automatically in favor of the domestic industry at the expense of respondents who suffer from the pro-longed effects of anti-dumping measures due to automatic initiation. Thus, the USG's statute and regulations, which mandates that USDOC administer its sunset reviews by automatic self-initiation without any evidence, is also a "partial" administration of US sunset laws, and thus inconsistent with the USG's obligations under Article X:3(a) of GATT 1994 both on its face and as applied in this case.

## **2. The Administration of USDOC's 30-Day Submission Rules**

45. USDOC stated that it would not consider any information submitted after the first 30-day period from initiation of this sunset review, as provided in its regulations. As a result of USDOC's strict adherence to the 30-day rule, NSC was denied a full opportunity to defend its interests. Such practice is an unreasonable administration of the USG's sunset law.

46. The administration of the 30-day rule also placed a greater burden on respondents. USDOC's regulations require that respondents report much more in-depth and detailed information within the initial 30-day period rather than the domestic industry. In addition to the extra reporting requirements placed on respondents, if respondents wish to present alternative information, they must also provide documentation showing "good cause" as well as the supporting information. Therefore, USDOC's regulations prejudice respondents' ability to effectively defend itself and is a "partial" application of its regulations.

47. By applying these administrative regulations in this case, USDOC administered this sunset review unreasonably and partially with respect to respondents, and, consequently, inconsistently with Article X:3(a) of GATT 1994.

## **3. USDOC's Non-Uniform Approach to Termination Decisions under Article 11.2 and 11.3**

48. Both revocation proceedings under Article 11.2 of the AD Agreement and the sunset proceedings under Article 11.3 share nearly identical objects, purposes, and legal standards to determine the likelihood of continuation or recurrence of dumping. Yet, as a general practice, USDOC has treated revocation reviews under Article 11.2 and sunset reviews under Article 11.3 differently. Under an 11.2 review, USDOC actively collects prospective information regarding current and future market conditions. Further, once a respondent establishes it has shipped in commercial quantities with zero or *de minimis* dumping margins for three consecutive years, it is then up to the domestic industry to rebut the presumption that dumping is not likely to continue or recur upon revocation. With respect to sunset reviews, however, USDOC effectively creates an irrebuttable presumption against respondents that dumping is likely to continue or recur despite any changes in the market over the past five year period. By maintaining two different standards for revocation proceedings under Article 11.2 and sunset reviews under Article 11.3, USDOC fails to administer these two proceedings in a uniform manner as required in Article X:3(a) of GATT 1994.

## **H. MAINTAINING THE ABOVE-DISCUSSED WTO-INCONSISTENT LAWS, REGULATIONS, AND ADMINISTRATIVE PROCEDURES ABROGATES THE USG'S OBLIGATIONS UNDER THE AD AGREEMENT AND ARTICLE XVI:4 OF THE WTO AGREEMENT**

49. Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement both provide that a Member must ensure the conformity of its laws, regulations and administrative procedures with its obligations and should take all necessary steps to ensure such compliance. Given all of the WTO-inconsistencies discussed above, the USG still has not brought its sunset laws into conformity with the AD Agreement and Article X:3(a) of GATT 1994 or applying the existing legislation and accompanying regulations and policy guidelines in an inconsistent fashion. Therefore, the USG acted inconsistently with Article XVI:4 of the WTO Agreement and Article 18.4 of the AD Agreement.

## **IV. CONCLUSION**

For the reasons discussed above, Japan respectfully requests that the Panel: (1) find that the specific statutory provisions, regulations, and determinations made by the USG are inconsistent with the various enumerated provisions of the AD Agreement, GATT 1994 and the WTO Agreement; (2) recommend that the Dispute Settlement Body request that the USG act to amend the above listed

elements of its sunset statute, regulations, and policies to conform with its obligations under the WTO Agreement; and (3) find that compliance with its WTO obligations requires that the USG terminate the anti-dumping duty order on the subject product from Japan.

## ANNEX A-2

### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

#### I. INTRODUCTION

1. In this proceeding, Japan challenges the findings of the US Department of Commerce (“Commerce”) and the US International Trade Commission (“USITC”) in the sunset review of the antidumping duty order on corrosion-resistant carbon steel flat products from Japan, in which the United States determined that revocation was likely to lead to the continuation or recurrence of dumping and injury and, as a result, continued the order. Japan claims that those findings are inconsistent with various provisions of the Marrakesh Agreement Establishing the World Trade Organization (“WTO Agreement”), the General Agreement on Tariffs and Trade 1994 (“GATT 1994”), and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“AD Agreement”). Japan also purports to challenge certain “practices” of the United States with respect to sunset reviews, without explaining how those practices are *mandatory* and, therefore, subject to review by this Panel. Finally, Japan challenges certain US statutory and regulatory requirements regarding sunset reviews, claiming that these are inconsistent with various provisions of the WTO Agreement, GATT 1994, and the AD Agreement.

2. Article 11.3 is the only provision of the AD Agreement that sets forth the substantive requirements for determining whether an order should be revoked five years after its imposition. In other words, Article 11.3 establishes the standards and criteria required by the AD Agreement with respect to sunset reviews. The terms of Article 11.3 are, however, very limited. They require simply that the authorities determine whether revocation of the order is likely to lead to the continuation or recurrence of dumping and injury. The United States, in the determination challenged by Japan, as well as in its antidumping law, has complied with the requirements of Article 11.3.

3. Nowhere does Article 11.3 address the type of evidence to be used or indicate the types of calculations, if any, that are necessary to determine whether, absent the order, dumping and injury is likely to continue or recur. Nevertheless, the terms of Article 11.3 make it clear that the purpose of a sunset review is to determine, based on a *predictive* analysis, whether the conditions necessary for the continued imposition of an antidumping duty exist. Thus, the focus of a sunset review under Article 11.3 is likely *future* behaviour if the remedial measure were removed, not whether or to what extent dumping or injury currently exists or has existed in the past.

4. Almost every aspect of Japan’s first submission – including its claims that the United States has reversed the “presumption of revocation,” has engaged in WTO-prohibited “zeroing,” and has failed to apply the *de minimis* “rule” – is permeated with a basic misapprehension about the object and purpose of sunset reviews. For Japan, the fundamental operating assumption is that a sunset review is a proxy for a new antidumping investigation. Japan is unable to cite any textual support in the AD Agreement or the WTO Agreement for this supposition, because no such support exists. Japan’s view is, moreover, inconsistent with the object and purpose of sunset reviews as reflected in Article 11.3. Plainly stated, a sunset review is not a proxy for an investigation, nor is it a proxy for an annual administrative review; the sunset review procedure stands on its own.

5. Japan’s concerns are nothing more than attempts to read obligations into the agreements that are not there, and to seek to obtain through the dispute settlement process results which may only be obtained at the negotiating table. That, however, is not the function of the dispute resolution process as established by the Understanding on Rules and Procedures Governing the Settlement of Disputes

(“DSU”). As is made clear in Article 3.2 of the DSU, recommendations and rulings of a panel “cannot add to or diminish the rights and obligations provided in the covered agreements.” This Panel should reject Japan’s effort to add to its rights at the expense of the United States.

6. In sum, the United States has met its WTO obligations and is not in violation of Article X of GATT 1994, Articles 2, 3, 5, 6, 11, 12, 18.3, 18.4 of the AD Agreement, or Article XVI:4 of the WTO Agreement.

## **II. FACTUAL BACKGROUND**

7. On 9 July 1993, Commerce published its final affirmative antidumping duty determination on certain steel products from Japan, including corrosion-resistant carbon steel flat products. On 9 August 1993, the USITC notified Commerce of its final affirmative determination that imports of certain corrosion-resistant carbon steel flat products from Japan were causing injury to the US domestic industry. On 17 August 1993, Commerce issued the antidumping duty order on these products.

8. On 1 September 1999, Commerce and the USITC published notices of initiation of the sunset review of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan. On 2 August 2000, Commerce published its final sunset determination, finding that continuation or recurrence of dumping was likely. On 13 November 2000, the USITC published its final sunset determination, finding that continuation or recurrence of injury was likely. On 15 December 2000, the United States published notice of the continuation of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan based on the decisions by Commerce and the USITC.

## **III. SUBSTANTIVE ARGUMENT**

### **A. JAPAN BEARS THE BURDEN OF PROVING ITS CLAIMS**

9. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation. If the balance of evidence and argument is inconclusive with respect to a particular claim, the Panel must find that the complaining party, Japan, failed to establish that claim. The United States believes that Japan has failed to meet its burden to establish a *prima facie* case in this dispute.

### **B. ARTICLE 11.3 OF THE AD AGREEMENT DOES NOT REQUIRE AN ANTIDUMPING DUTY ORDER TO BE TERMINATED AFTER FIVE YEARS**

10. Japan argues that Article 11.3 of the AD Agreement requires antidumping duty orders to be terminated after five years. Article 11.3 creates no such requirement.

11. Article 11.3 permits the authorities to evaluate an antidumping duty order five years from its imposition, and does not require the termination of an antidumping duty order after five years if a sunset review results in a determination that terminating the order would be likely to lead to continuation or recurrence of dumping and injury. Japan’s assertions to the contrary misstate the explicit terms of Article 11.3.

### **C. THE AD AGREEMENT DOES NOT IMPOSE EVIDENTIARY REQUIREMENTS ON THE SELF-INITIATION OF SUNSET REVIEWS UNDER ARTICLE 11.3**

12. Article 11.3 contains no reference to evidentiary requirements for the self-initiation of sunset reviews. Nonetheless, Japan argues that an evidentiary requirement is a “procedural rule” and

because Article 11, including Article 11.3, has no “procedural rules,” such rules can and must be found elsewhere throughout the AD Agreement and then applied to Article 11.3 sunset reviews.

13. Japan fails to explain why, in this case, the absence of any reference to evidentiary requirements where authorities initiate a sunset review means anything other than the plain meaning: that the Members did not agree to assume any such requirements. When Article 11 contemplates procedural requirements, it states such requirements explicitly.

14. Japan next attempts to rely on the object and purpose of Article 11 to establish that the “sufficient evidence” standard of Article 5.6 is the evidentiary standard for self-initiation of sunset reviews under Article 11.3. Rather than reading the terms of the provision and interpreting them *in light of* the object and purpose of the AD Agreement, however, Japan effectively calls for the ascertainment of the object and purpose of a particular provision of the AD Agreement and then applies that object and purpose *in spite of* the ordinary meaning of the words. The initiation of a review is the necessary beginning of a process leading to a determination of whether or not dumping and injury are likely to continue or recur. Japan’s argument is based upon an incorrect equation of the standards for initiation with those for the substantive determination to be made in a review.

15. Japan also makes the argument that the context of Article 11.3 confirms that the evidentiary requirement for self-initiation of sunset reviews under Article 11.3 is the “sufficient evidence” standard found in Article 5.6. However, consideration of the ordinary meaning to be given to the terms of Article 11.3 in their context and in light of the object and purpose of the AD Agreement provides no support for Japan’s contention. Japan simply seeks to read into Article 11.3 “words that are not there.”

16. Consequently, US law is not WTO-inconsistent in providing for automatic self-initiation of sunset reviews, and Commerce’s automatic self-initiation in the case of the Japan steel sunset review is therefore not WTO-inconsistent.

D. US REGULATIONS AND COMMERCE’S SUNSET POLICY BULLETIN ARE NOT INCONSISTENT WITH THE ARTICLE 11.3 OBLIGATION TO DETERMINE WHETHER DUMPING IS LIKELY TO CONTINUE OR RECUR

17. Japan asserts that Section 351.222(i)(1)(ii) of Commerce’s Sunset Regulations is inconsistent with the Article 11.3 obligation to determine likelihood. Japan misconstrues the purpose, and, consequently, the meaning of that regulatory provision. 19 C.F.R 351.222(i)(1)(ii) is ministerial in nature and addresses the timing of a revocation after Commerce has made a negative final sunset determination under section 751(d)(2).

18. Section 751(d)(2) of the Tariff Act of 1930 is the provision of US law governing full sunset reviews. Section 751(d)(2) clearly and unambiguously states that Commerce must determine that dumping “would be likely” in the context of a sunset review before an order could be maintained. Contrary to Japan’s assertions, in accordance with the US statute, Commerce must use a “likely” standard in determining whether dumping will continue or recur.

19. Japan identifies the “Statement of Administrative Action” (“SAA”) and the Sunset Policy Bulletin as the “practice and procedures” establishing an alleged “irrefutable” presumption that dumping is likely to continue in violation of Article 11.3 of the AD Agreement. Neither the SAA nor the Sunset Policy Bulletin, however, mandate or preclude actions subject to the AD Agreement. Moreover, neither the SAA nor the Sunset Policy Bulletin does anything concrete, independently of any other instrument. Therefore, neither gives rise to an independent violation of WTO obligations. Instead, Japan may only challenge Commerce’s actual actions in the context of the final sunset determination of corrosion-resistant steel from Japan.

20. Commerce applied a “likely” standard in the sunset review in this case. Commerce found dumping and depressed import volumes in the period prior to the sunset review. Consequently, in accordance with the obligations of Article 11.3, Commerce drew a reasonable and logical inference that this evidence was indicative of likely continuation or recurrence of dumping in the absence of a duty.

21. Japan argues that Commerce’s focus on evidence of “historical dumping” is insufficient to support Commerce’s finding in this case. Here, Commerce found that the subject merchandise was dumped in several periods prior to the sunset review. It stands to reason, therefore, that dumping will likely continue when there is no order in place because dumping occurred when there *was* an order in place. In fact, historical dumping in the presence of a discipline can be highly probative of the behaviour of exporters in the absence of a discipline.

22. Japan also argues that Commerce’s rejection of certain information that addressed reasons for the depressed import volumes was improper. Japan is incorrect in its assertion. In the first instance, Commerce decided not to consider the information because neither the information itself nor a justification of its relevance had been supplied in a timely fashion. Consequently, Commerce did not apply the requirement for “good cause” in this case. Second, Commerce explained that, even had the information been considered, it would not have affected Commerce’s ultimate determination that it was likely that dumping would continue or recur because, whatever the circumstances concerning the import volumes, there remained the evidence that exporters were dumping after issuance of the order.

23. Finally, Japan’s claim that Commerce applied a different “likely” standards in this case than it does in Article 11.2 reviews is simply incorrect. Commerce’s analysis, exactly like that in an Article 11.2 review, focused on the existence of dumping in the period prior to the sunset review and the likelihood of future dumping by the Japanese producers of corrosion-resistant steel. Japan has failed to identify and articulate how Commerce’s application of the policies set forth in the SAA and Commerce’s Sunset Policy Bulletin is inconsistent with the obligation to determine likelihood under Article 11.3 of the AD Agreement.

E. COMMERCE’S ANALYSIS OF DUMPING IN THE CONTEXT OF THE LIKELIHOOD AND “MARGIN LIKELY TO PREVAIL” DETERMINATIONS IN THIS CASE WAS CONSISTENT WITH THE AD AGREEMENT

24. Japan further attempts to undermine the determinations in this case by asserting that Commerce’s reliance on pre-WTO Agreement dumping margins in analyzing the likelihood of continuation or recurrence of dumping is inconsistent with Articles 2, 11.3, and 18.3 of the AD Agreement, both as a general practice and as applied in this case. In the same vein, Japan challenges, both in general and as applied in this case, Commerce’s reliance on margins from the original investigation because of the application of allegedly WTO-inconsistent methodologies in that segment of the proceeding. Japan also maintains that Commerce’s sunset practice, both in general and as applied in this case, violates the AD Agreement by relying on dumping margins from the original investigation and the two completed administrative reviews which were calculated using what Japan refers to as a “zeroing” methodology, *i.e.*, a methodology in which no offset is granted to the respondent for negative differences between the normal value and export price (or constructed export price) of individual transactions. Finally, Japan contends that the approach Commerce uses to identify the rate of dumping likely to prevail in the event of revocation, both as a general practice and as applied in this case, violates Articles 2, 11.3, and 18.3 of the AD Agreement.

25. As an initial point, Japan has not demonstrated that Commerce is required by any aspect of US law to rely on any of the margin information to which Japan objects for purposes of sunset reviews. Consequently, Japan may only challenge Commerce’s reliance on such information *in this case*.

26. Japan's arguments further fail because they are based on the incorrect assumption that a sunset review is a proxy for a new investigation, and that the applicable test under Article 11.3 is therefore whether, in a current investigation of the subject merchandise, the authorities could rely on the information in question. Under Article 11.3 of the AD Agreement, however, Commerce is not required to (1) conduct a new investigation, (2) quantify current or past dumping margins, or (3) apply any particular methodology to the consideration of dumping margins. Moreover, Japan's arguments regarding the use of pre-WTO margins from the investigation fail for the additional reason that the investigation was not subject to the AD Agreement. Accordingly, and consistent with its obligations under the AD Agreement, Commerce in this case *reasonably* relied on evidence of dumping and import volumes over the life of the order.

F. THERE IS NO *DE MINIMIS* STANDARD FOR SUNSET REVIEWS

27. Under Article 5.8 of the AD Agreement, Members must apply a two percent *de minimis* standard in antidumping duty *investigations*. Japan, however, argues that the Article 5.8 *de minimis* standard is also applicable in sunset reviews under Article 11.3.

28. Nothing in the text of Articles 5.8 or 11.3 requires application of the Article 5.8 two percent *de minimis* standard in Article 11.3 sunset reviews, or any other type of review. In particular, there is no reference in Article 11.3 to a *de minimis* standard and the text of Article 5.8 makes no reference to Article 11.3. Nor do the context or the object and purpose arguments Japan makes lend any support to its theory.

29. Once again, Japan completely ignores the fundamental difference between investigations, in which a *de minimis* standard is required under Article 5.8, and sunset reviews. The distinction between the purpose of an investigation and the purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer that the *de minimis* standard for investigations applies in sunset reviews.

30. Finally, Japan would have the Panel read into the use of the word "dumping" in Article 11 an implicit reference to Article 5.8 because authorities must terminate an investigation if the margin of dumping is *de minimis*. Nothing in the word "dumping," as defined in the AD Agreement, implies anything about a *de minimis* standard. Given the text of the AD Agreement, the only conclusion one can reach is that there is no obligation to apply the Article 5.8 *de minimis* standard in an Article 11.3 sunset review.

31. In an attempt to bolster its non-existent textual argument, Japan cites the fact that the United States applies a *de minimis* standard in sunset reviews as indicative of the requirement to apply a *de minimis* rule in the context of Article 11.3 sunset reviews. The United States' *de minimis* "practice" does not implicate the AD Agreement. As demonstrated above, there is no *de minimis* standard in sunset reviews. Thus, Members are free to determine what, if any, *de minimis* standard they will apply.

G. THERE IS NO OBLIGATION UNDER ARTICLE 11.3 OR ELSEWHERE IN THE AD AGREEMENT TO DETERMINE LIKELIHOOD ON A COMPANY-SPECIFIC BASIS

32. Japan maintains that sunset review determinations of whether revocation is likely to lead to continuation or recurrence of dumping must be made on a company-specific basis, citing Articles 11.3 and 6.10 of the AD Agreement.

33. However, the text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, makes no reference to determining the likelihood of dumping for individual companies. Moreover, the provisions of Article 6, as incorporated into Article 11 reviews



by Article 11.4, are not intended to have an impact on the substantive standards or criteria to be applied in sunset reviews; they are only intended to have an impact on the *manner* in which the substantive standards or criteria are applied. Consequently, there is nothing in Article 11 that even suggests standards or criteria for the likelihood of dumping determination that focus on an individual company's likelihood of continuation or resumption of dumping. The order-wide approach required by US law is therefore entirely consistent with the AD Agreement.

H. COMMERCE COMPLIED WITH THE EVIDENTIARY AND PROCEDURAL REQUIREMENTS OF ARTICLE 11.3 IN THIS CASE

34. There is no dispute that, based on Article 11.4, the provisions of Article 6 on evidence and procedure apply to sunset reviews under Article 11.3. Japan does not challenge the WTO-consistency of US law in this regard; Japan does, however, claim that Commerce failed to comply in this case with the evidentiary and procedural requirements of Article 11.3.

35. Japan alleges in several instances that the procedures followed in this case were in some way unfair, without demonstrating how the procedures in question were inconsistent with the AD Agreement. The fact is, Commerce followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Article 6.

I. THE USITC'S DECISION TO CUMULATE IMPORTS FROM VARIOUS COUNTRIES IN THIS SUNSET REVIEW IS CONSISTENT WITH THE AD AGREEMENT

36. Despite Japan's assertions to the contrary, consideration of the text of Articles 11.3, 3.3 and 5.8 of the AD Agreement, as well as the structure of the AD Agreement as a whole, shows that the AD Agreement does not require any, much less a strict, quantitative negligibility analysis in a sunset review. US law, like the AD Agreement, does not require the application of a quantitative negligibility test in sunset reviews. Moreover, US law permits, but does not require, the USITC in a sunset review to cumulate imports if it finds that certain statutory elements are met.

37. By its plain language, Article 11.3 does not contain a negligibility test. Nor is there any reference to negligibility concepts elsewhere in Article 11. The plain terms of Article 11 neither implicitly nor explicitly incorporate negligibility concepts from Article 5.8 and Article 3.3. If the negotiators of the AD Agreement had wanted to incorporate into Article 11.3 the concepts of negligibility from Article 5.8 or 3.3, they could and would have done so as they did in many express cross-references in the AD Agreement.

38. On its face, Article 3.3 applies to investigations, not reviews. Moreover, Article 3.3 refers to present events, whereas Article 11 refers to future or likely events. Article 3.3 does not refer in any manner to Article 11.3 reviews. Similarly, the plain language of Article 5.8 dispels any notion that its quantitative negligibility test applies to sunset reviews. The text of that provision indicates that it applies only to investigations. Nowhere in Article 5.8, or elsewhere in Article 5, is there any reference to Article 11.3 reviews.

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

40. Additionally, an examination of footnote 9 in light of the object and purpose of the AD Agreement reveals why the negligibility requirements of Article 5.8 logically do not apply in sunset reviews. The focus of a review under 11.3 differs from that of an original investigation under Article 3. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without a remedial AD measure in place. In an original investigation, the authorities must examine the volume, price effects, and impact of unrestrained and unfairly traded imports on a domestic industry that may be indicative of present injury or threat.

41. In a sunset review, the investigating authorities, in deciding whether to remove the order, examine the *likely* volume of imports *in the future* that have been restrained for the last five years by the antidumping duty order and their *likely* impact *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years, a fact recognized by the standard of “continuation or recurrence of injury.” Thus, the inquiry contemplated pursuant to Article 11.3 is counterfactual in nature, and entails application of decidedly different standards with respect to the volume, price and relevant impact factors from that applicable to original investigations. The authority must then decide the likely impact of a prospective change in the status quo, *i.e.*, the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports.

42. The absence of language regarding negligibility in Article 11.3 is consistent with the purpose of the sunset review provisions. The purpose of the antidumping duty order is to reduce or eliminate material injury caused by unfair acts in the market or to require adjustment of prices to eliminate dumping and injury. As a result of the order, dumped imports may have decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. Under Japan’s argument, because certain imports cannot compete in the marketplace under the constraints of the order, *i.e.* without dumping, and as a result have declined in volume or exited the market altogether, the order should then be revoked. This result, so incongruous with the purpose of the sunset review provision, should be summarily rejected by the Panel.

J. THE ACTIONS AT ISSUE ARE CONSISTENT WITH THE AD AGREEMENT AND DO NOT VIOLATE ARTICLE XD:3(A) OF GATT 1994

43. Having failed to demonstrate that the US law and the application of that law are contrary to the AD Agreement, Japan tries to revisit its claims by turning to Article X:3(a) of the GATT 1994. Japan is apparently alleging that this Panel should find that, even if the contested decisions were consistent with the AD Agreement, they might nevertheless violate the Article X:3(a) requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner (which Japan terms “due process”).

44. In considering the application of Article X:3(a) to this case, the Panel should note three things: First, Article X:3(a) is limited to the *administration* of certain laws, regulations, judicial decisions and administrative rulings of general application, *not* to the laws, regulations and administrative rulings themselves. Therefore, to the extent that Japan is complaining about laws, regulations and rulings of general application, as contrasted with their administration, its complaint is not properly founded in Article X:3(a).

45. Second, the purpose of GATT Article X:3(a) is to ensure that the administering authority has administered the law or the regulations in a uniform, impartial, and reasonable manner by ensuring that similarly situated persons are not treated differently. The purpose of GATT Article X:3(a) is not,

as Japan claims, to ensure that the administering authority administers different provisions that cover different situations in the same manner.

46. Third, a “uniform, impartial and reasonable” system is not necessarily one in which each decision looks like the one before. The Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the AD Agreement – from other Article X:3(a) disputes, in which the overall administration of some programme was alleged to be arbitrary.

47. Japan has not alleged that the overall procedure of the antidumping law of the United States is applied arbitrarily, or that Members are otherwise deprived of basic due process, such as notice and opportunity for review in antidumping proceedings. Rather, it disagrees with the specific results in this proceeding. As noted above, however, Commerce and the USITC conducted the sunset review at issue in a matter consistent with the AD Agreement.

**K. US LAW IS IN CONFORMITY WITH ARTICLE XVI:4 OF THE WTO AGREEMENT**

48. Congress specifically undertook to make the antidumping provisions of US law consistent with US international obligations. It adopted requirements that fully satisfy the obligations of the AD Agreement. Since US laws are in conformity with the AD Agreement, the United States is therefore not in violation of Article XVI:4 of the WTO Agreement.

**L. THE SPECIFIC REMEDY SOUGHT BY JAPAN IS INCONSISTENT WITH ESTABLISHED PANEL PRACTICE AND THE DSU**

49. Japan has requested this Panel to recommend that, if the Panel finds that there is insufficient evidence to determine that dumping and injury were likely to continue or recur if the order were revoked, the DSB request the United States to terminate its antidumping duty order. In so doing, Japan has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Japan on the merits, the Panel nonetheless should reject the requested remedy, and instead make a recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its antidumping measure into conformity with its obligations under the AD Agreement.

**IV. CONCLUSION**

50. Based on the foregoing, the United States respectfully requests that the Panel reject Japan’s claims in their entirety.

---