

## **ANNEX B**

### **Third Party Submissions**

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## ANNEX B-1

### THIRD PARTY SUBMISSION OF BRAZIL

#### I. INTRODUCTION

1. The Government of Japan (“Japan”) challenges the consistencies of the US law and practice, which allow the continued imposition of antidumping duties in perpetuity, with the obligations under the General Agreement on Tariffs and Trade 1994 (“GATT 1994”), the Agreement on Implementation of Article VI of the GATT 1994 (“AD Agreement”) and Marrakesh Agreement Establishing the World Trade Organization (“WTO Agreement”). The Government of Brazil (“Brazil”) fully concurs with the arguments raised by Japan and share its concerns that the US law and practice involving sunset reviews is in violation of the obligations under these agreements.

2. Brazil makes this third party submission to comment on two of the claims asserted by Japan and discuss their systematic application to all antidumping duty proceedings conducted by the United States. Specifically, Brazil addresses the application of the *de minimis* margin standard of 0.5 per cent and the use of the “zeroing” methodology.

3. Brazil has recently participated in consultations with the United States on these two issues in the context of the continued imposition of the antidumping duty on silicon metal from Brazil.<sup>1</sup> The consultations failed to resolve the dispute. Brazil has not yet requested the establishment of a panel with respect to its challenge.<sup>2</sup>

4. Brazil believes that in maintaining *de minimis* margin of 0.5 per cent and the zeroing methodology, the United States violates Articles 2.4, 2.4.2, 5.8, 11 and 18.3:

- The US regulation and application of the *de minimis* standard of 0.5 per cent to administrative reviews violate Articles 5.8, 11 and 18.3 of the AD Agreement because the definition of *de minimis* established in Article 5.8 is applicable to the consideration of whether the continued imposition of the antidumping duty is necessary.
- The US law and practice which fails to take into account any margin comparison that do not result in a positive margin, *i.e.*, zeroing, violates Articles 2.4 and 2.4.2 of the AD Agreement.

#### II. STANDARD OF REVIEW

5. Pursuant to Article 17.6(ii) of the AD Agreement, the Panel’s approach in this dispute should be to interpret the relevant provisions of the AD Agreement in accordance with customary rules of interpretation of public international law. In the context of the practice developed by the Appellate Body and panels, the “customary rules of interpretation of public international law” has meant the application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (“Vienna

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<sup>1</sup> See WT/DS239/1/Rev.1.

<sup>2</sup> Specifically, Brazil’s challenge was based on the continued imposition of the antidumping duty on Silicon Metal from Brazil with respect to one producer, Companhia Brasileira Carbureto de Cálcio. (“CBCC”). The decision of the United States to maintain the antidumping duty with respect to CBCC was based, in part, on the application of the application of the *de minimis* standard of 0.5 per cent to administrative reviews and the use of the zeroing methodology.

Convention”).<sup>3</sup> This use of the Vienna Convention applies both under Article 11 of the DSU and Article 17.6 of the Antidumping Agreement.<sup>4</sup>

6. Article 31 of the Vienna Convention provides that the words of a treaty must form the starting point of interpreting a treaty, according to their “ordinary meaning,” taking into account their “context” and the “object and purpose” of the treaty. The “context” for this purpose includes other parts of the treaty under review, as well as other instruments related to the treaty at issue, any subsequent agreement, any subsequent practice, and any relevant rules of international law. Where the ordinary meaning is clear, the context, the object and purpose of the treaty, do not override the text of the treaty.<sup>5</sup> At the same time, the interpretation of a given text must not result in reducing whole clauses or paragraphs of the treaty to redundancy or inutility.<sup>6</sup>

7. Where the Panel finds that a relevant provision of the AD Agreement permits more than one possible interpretation, the Panel must find the authorities’ measure to be in conformity with the AD Agreement if it rests upon one of those permissible interpretations. In the typical case, a panel or the Appellate Body has used the Vienna Convention as a tool for determining a single meaning for a particular WTO text.<sup>7</sup> However, “the second sentence of Article 17.6(ii) presupposes that application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the Antidumping Agreement, which, under the Convention, would both be ‘permissible interpretations.’ In that event, a measure is deemed to be in conformity with the Antidumping Agreement ‘if it rests upon one of those permissible interpretations.’”<sup>8</sup>

8. Where the authorities argue that there is more than one permissible interpretation of the AD Agreement provision, the Panel must not accord any deference to the interpretation advocated by the agencies. Instead, the Panel must, as commanded by the first sentence of Article 17.6(ii), apply the interpretive rules of the Vienna Convention to the legal interpretations involved in the dispute.<sup>9</sup> For this reason, the Panel in this case must not give any deference to the United States Department of Commerce’s (“USDOC”) interpretation of the AD Agreement and must interpret the provisions according to customary rules of interpretation of public international law as embodied in the Vienna Convention.<sup>10</sup>

### III. ARGUMENT

#### A. THE APPLICATION OF THE 0.5 PER CENT *DE MINIMIS* STANDARD TO ALL REVIEWS OF ANTIDUMPING MEASURES VIOLATE THE AD AGREEMENT

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<sup>3</sup> *Id.* at para. 57.

<sup>4</sup> *Id.*

<sup>5</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12 n. 20.

<sup>6</sup> *Gasoline*, WT/DS23/AB/R, adopted May 20, 1996, p. 23.

<sup>7</sup> *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, Panel Report, WT/DS99/R (January 29, 1999), para.4.44 (submission by United States).

<sup>8</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body Report, AB-2001-2, WT/DS184/AB/R (July 24, 2001), para. 59.

<sup>9</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Appellate Body Report, AB-2001-2, WT/DS184/AB/R (July 24, 2001), para. 60.

<sup>10</sup> *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, Panel Report, WT/DS99/R (January 29, 1999), para.4.44 (submission by United States). para. 4.63-4.70.

**1. The Definition of the *De Minimis* Margin Standard Provided in Article 5.8 of the AD Agreement Applies to the Entire AD Agreement**

9. In broad terms, the AD Agreement defines the obligations of a Member with respect to three different aspects of an antidumping measure. First, Article 5 provides the rules related to the investigative phase and the decision whether to impose an antidumping duty. Once a decision to impose antidumping duty is made, Article 9 defines the requirements pertaining to the assessment and collection of the antidumping duty, while Article 11 pertains to the duration and revocation of the duty. Due to the differences in purpose, certain procedural differences exist in the three phases; however, the basic principles of the AD Agreement serve as the thread between these Articles.

10. Article 5 of the AD Agreement pertains to the investigative phase of an antidumping proceeding and sets forth the requirements needed to support an investigation and to impose antidumping measures. Specifically, Article 5.5, Article 5.7, and Article 5.8 require that the decision to continue an investigation and to impose an antidumping measure be supported by sufficient evidence of (1) dumping, (2) injury and (3) a causal link between the dumped imports and the alleged injury.

11. Article 5.8 provides in relevant part:

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

12. In accordance with the rules of interpretation set forth above, the terms of Article 5.8 must first be interpreted in their ordinary meaning. The first two sentences of Article 5.8 require an affirmative action, i.e., termination of the investigation, by a Member, if a condition, i.e., existence of a *de minimis* margin, is met. The third sentence defines the condition that triggers the obligation as a margin of less than 2 per cent of the export price. As such, the first two sentences impose affirmative obligations upon a Member, while the third sentence articulates a general principle. The fact that the definition contained in the third sentence serves as a condition for an obligation in the preceding clause does not mean that the condition itself is confined to the obligation.

13. The third sentence of Article 5.8 defines that a margin of less than 2 per cent is "*de minimis*," and does not state that the definition is limited to the termination of investigations, although, admittedly, it is contained in the same paragraph. According to the plain language of the sentence, it is not conditioned upon the rest of Article 5.8 and the United States cannot attach a condition that does not exist. Article 31.4 of the Vienna Convention provides that "[a] special meaning shall be given to a term if it is established that the parties so intended." Here, the parties intended to give a special definition to the term "*de minimis*." There is no other definition of "*de minimis*" contained anywhere else in the AD Agreement. Because this sentence is clear in its ordinary meaning, it does not require a contextual analysis and is not subject to various interpretations.

14. Read in its ordinary meaning, Article 5.8 unambiguously establishes that a margin of less than 2 per cent is "*de minimis*," which, by operation of the first and second sentences, does not justify imposition of antidumping measures. Thus, by definition, a margin of less than 2 per cent does not cause actionable injury under the terms of the AD Agreement. This definition must apply to other types of proceeding contemplated under the AD Agreement.

## 2. The Panel's Decision in DRAMS Interpreting Article 5.8 is Not Dispositive to the Current Proceeding

15. An interpretation of the Article 5.8 *de minimis* standard was recently undertaken in *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above From Korea* (“DRAMS”).<sup>11</sup> In DRAMS, the Panel rejected Korea’s claim that the United States violated Article 5.8 by applying a 0.5 per cent *de minimis* standard in the context of Article 9.3 duty assessment procedures. This finding, however, does not affect the interpretation of the issue in the present proceeding.

16. The disputed issue in DRAMS, as interpreted by the panel, was as follows<sup>12</sup>:

Essentially, the parties disagree as to whether the *second sentence* (and therefore the *de minimis* standard contained in the third sentence) of Article 5.8 applies to both anti-dumping investigations and Article 9.3 duty assessment procedures (referred to in US parlance as “administrative reviews”), or only to anti-dumping investigations. (Emphasis added)

17. Thus, the Panel focused its analysis to interpreting the obligation imposed by the second sentence of Article 5.8, vis-à-vis Article 9.3, rather than on the AD Agreement’s definition of “*de minimis*.” After concluding that the term “cases” used in the second sentence did not include Article 9.3 duty assessment proceedings, the Panel considered the implication of note 22 of the AD Agreement to Article 5.8:

[N]ote 22 of the AD Agreement effectively provides that a finding in a US duty assessment procedures that no duty is to be levied “shall not by itself require the authorities to terminate the definitive duty.” According to note 22, therefore, a finding that an Article 9.3 duty assessment procedure of a zero margin of dumping, which is *de minimis* under both the US 0.5 per cent standard and the 2 per cent standard advocated by Korea on the basis of Article 5.8, shall not by itself lead to termination of the duty. Nevertheless, by arguing that Article 5.8, including the second sentence thereof, applies in the context of Article 9.3 duty assessments, Korea is effectively arguing that a zero per cent, *i.e.*, *de minimis*, margin of dumping shall lead to “immediate termination” of the duty.<sup>13</sup>

18. The Panel found that the interpretation advocated by Korea was inconsistent with note 22, to the extent that note 22 explicitly provides that a finding of no duty in the Article 9.3 duty assessment procedures “shall not” require a termination of the duty.<sup>14</sup> Based on this context, the Panel concluded that “Article 5.8, second sentence, does not apply in the context of Article 9.3 duty assessment procedures.”<sup>15</sup>

19. The Panel also reasoned that the differences between investigations and Article 9.3 duty assessment procedures supported the application of a different *de minimis* standard. First, the function of the *de minimis* standard in investigation, in the context of Article 5.8, is “to determine whether or not an exporter is subject to an anti-dumping order.” In comparison, a *de minimis* test in Article 9.3 duty assessment proceedings only determines whether or not an exporter should pay a duty, and does not exempt the exporter from the order.

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<sup>11</sup> WT/DS99/R (19 January 1999).

<sup>12</sup> *Id.* at 148 (emphasis added).

<sup>13</sup> *Id.* at 150.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* (emphasis added).

20. The Panel's reasoning shows that its decision was narrow and limited to the applicability of the second sentence of Article 5.8 to Article 9.3 duty assessment proceedings. The only issue considered in DRAMS was whether the obligation contained in the second sentence was applicable to duty assessment reviews. The parties in DRAMS did not argue, and the Panel did not consider, the applicability of the definition of the term "*de minimis*" contained in the *third sentence* of Article 5.8 to contexts other than investigations. As discussed above, the plain meaning of Article 5.8 does not limit the definition of *de minimis* to any particular context.

### **3. The 2 Per Cent *De Minimis* Standard Applies in the Context of Article 11 Proceedings**

(a) Article 11 reviews differ in purpose and procedure from Article 9.3 reviews

21. As noted above, the AD Agreement contemplates two different types of post-investigation proceedings, or reviews. The first type of proceeding, described under Article 9.3, is the review required to assess the actual amount of antidumping duty and to collect such duty. Distinct and separate from the Article 9.3 proceeding is the review required to determine the continued necessity of the duty, provided in Article 11.

22. Article 11.1 provides that an antidumping measure "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury." In accordance with Article 11.1, Article 11.2 directs the authorities to "review the need for the continued imposition of the duty by "{examining} whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both" and to terminate immediately the duty if the review shows that the duty is no longer warranted. Similarly, Article 11.3 obligates the authorities to terminate the duty after five years, unless it is determined in a review that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

23. As shown above, a "review" for Article 11 purposes is defined as a review for "the need for the imposition of the duty" and to determine whether dumping or injury is likely to continue or recur. Thus, according to the AD Agreement, a "review" for Article 11 purpose, *i.e.*, the revocation of the duty, is to be distinguished from a "review" solely for Article 9 duty assessment purposes. The antidumping duty order can be removed, in whole or in part, following an Article 11 review, while an Article 9.3 review would not do so. Moreover, the continued imposition of duties under Article 11 requires "dumping which is causing injury," while a single Article 9 review does not, by itself, address the injury issue. Note 21 of the AD Agreement reinforces the difference between the two types of reviews: "A determination of final liability for payment of anti-dumping duties as provided for in paragraph 3 of Article 9 does not by itself constitute a review within the meaning of [Article 11]."

24. In this regard, an Article 11 review bears a close connection to Article 5. In contrast to Article 9 duty assessment reviews, both Article 5 and Article 11 are concerned with whether an order should apply at all. In contrast to Article 9, both Article 5 and Article 11 apply tests for dumping *and injury*.

(b) A dumping margin of less than 2 per cent does not constitute "dumping which is causing injury."

25. To apply the principle of Article 11.1 that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury," one must first determine the meaning of the term "dumping which is causing injury." Because Article 11 does not contain a separate definition of "dumping which is causing injury," the definitions established elsewhere in the AD Agreement are applicable in this context.

26. The only place in the AD Agreement that addresses the sufficiency of dumping and injury is Article 5. As noted above, Article 5.8 requires an “immediate termination” of cases where the dumping margin is less than 2 per cent. Thus, the AD Agreement establishes that a dumping margin of less than 2 per cent, by definition, cannot cause injury. Given that injury is necessary to both impose antidumping measures and to maintain such measures, a dumping margin that is insufficient to justify the imposition of antidumping measures in the first place cannot be considered sufficient to maintain such measures. Accordingly, the 2 per cent *de minimis* threshold is applicable in the context of determining the necessity of the continued imposition of the duty under Article 11. In other words, “dumping which is causing injury” must exceed 2 per cent of export price.

(c) The US regulation and practice violate Article 5.8, Article 11 of the AD Agreement

27. Pursuant to section 351.106(c) of the USDOC’s regulations and by practice, the USDOC equates no dumping as less than 0.5 per cent margin of dumping, the threshold that it applies to all “reviews” of the antidumping duty order, irrespective of the purpose of the review. Thus, the United States equates “dumping which is causing injury” as less than 0.5 per cent margin when determining the continued necessity of the antidumping measures. The United States effectively maintains antidumping duties for periods during which there is no dumping which is causing injury, in violation of Article 11.1. Accordingly, Section 351.106 of the USDOC’s regulations, on its face, violates Article 5.8 and Article 11 of the AD Agreement.

#### **4. Article 18.3 Also Supports the Application of the *De Minimis* Standard to Administrative and Sunset Reviews**

28. The application of a *de minimis* standard to administrative review that is different from investigations also violates Article 18.3 of the Agreement. Article 18.3 states:

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

29. Read in its ordinary meaning, this paragraph does not distinguish which “provisions” are applicable to reviews or investigations. The lack of differentiation indicates the Agreement was not intended to set up different rules for reviews and investigations. Therefore, Article 18.3 further supports the conclusion that the *de minimis* standard defined in Article 5.8 is applicable to all segments of an antidumping proceeding.

#### **B. ZEROING**

30. In *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India* (“Bed Linen”)<sup>16</sup>, the Panel ruled that the practice of “zeroing” when establishing the margin of dumping as applied by the European Communities in antidumping investigations was inconsistent with Article 2.4.2 of the Agreement. This decision was recently upheld by the Appellate Body.<sup>17</sup> The United States employs the same methodology of zeroing in its practice and, thus, violates Article 2.4.2 of the Agreement.

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<sup>16</sup> WT/DS141/R (30 October 2000).

<sup>17</sup> WT/DS141/AB/R (1 March 2001).

## 1. The US Law and Methodology

31. The practice of “zeroing,” as addressed in *Bed Linen*, arises in situations where the investigating authority makes multiple comparisons of export price and normal value, and then aggregates the results of these individual comparisons to calculate an overall dumping margin for the specific exporter or producer under investigation. Specifically, the US methodology of dumping margin calculation can be summarized as follows:

- (i) The USDOC first identifies the product under investigation or review into a certain number of different “models” or types of that product, based on certain characteristics of that product. For example, in the silicon metal proceeding, silicon metal with 100% silicon content may be considered one “model,” while silicon metal with 95% silicon content may be considered another “model.”
- (ii) Next, the USDOC compares the export price of each model sold in the United States to the normal value of a like model. In an investigation, the USDOC compares the weighted-average normal value with the weighted-average export price. In an administrative review, the USDOC generally compares the weighted average normal value with the export price for each sale transaction.
- (iii) To calculate the dumping margin for each type or model, the USDOC subtracts export price from normal value for each model. If, for some models, normal value is higher than export price, the USDOC determines a “positive dumping margin” for those models. If, for other models, normal value is lower than export price, the result is a “negative dumping margin” for those models. Thus, the model-specific dumping margin indicates precisely how much the export price is above or below the normal value.
- (iv) The USDOC then sums all model-specific dumping margins to determine the overall dumping margin the product under investigation as a whole. In doing so, any “negative dumping margins” are treated as zero, and only adds up the “positive dumping margins.” This practice is generally referred to as “zeroing.”
- (v) Finally, the USDOC divides the sum of all positive dumping margins by the total value of the all export transactions involving all types or models of that product, resulting in the weighted average dumping margin rate for that respondent.

32. The US methodology, which is also described in the USDOC’s Antidumping Manual, is identical to the practice of the European Communities (“EC”) addressed in *Bed Linens*.<sup>18</sup>

## 2. The Bed Linen Decision

33. Article 2.4.2 states:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigative phase shall normally be established on

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<sup>18</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (30 October 2000), WT/DS141/AB/R (1 March 2001) (“*Bed Linen*”).

the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, region or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

34. In *Bed Linen*, India challenged, among other claims, that the use of the zeroing methodology by the European Communities was not consistent with Article 2 obligations. The Panel agreed with India that the zeroing practice of the European Communities violated Article 2.4.2 of the AD Agreement.<sup>19</sup> Following an appeal by the European Communities, the Appellate Body undertook an analysis of the zeroing practice vis-à-vis the obligations under Article 2.

35. On appeal, the European Communities argued that, where the product under investigation consisted of various “non-comparable” types or models, such investigation entailed two stages in calculating margins of dumping, wherein the dumping margin was first calculated for each type or model, and, then, at the second stage, combined to calculate an overall margin of dumping for the product under investigation. The European Communities contended that Article 2.4.2 was not applicable to the second stage of calculating the overall margin of dumping for the product under investigation.

36. The Appellate Body rejected European Communities’ arguments that the AD Agreement contemplated two different stages of calculating the margin of dumping. First, it began with an analysis of the ordinary meaning of Article 2.1, which states:

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

37. Inferring from the phrase “product is to be considered to be dumped” of Article 2.1, the Appellate Body found that the AD Agreement “concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.” Having defined the *product* at issue as certain cotton-type bed linen, “notwithstanding different possible product types,” the Appellate Body ruled that the European Communities was bound to establish “the existence of margins of dumping” for the *product* as it defined – cotton-type bed linen – and not for the various types or models of that product. Accordingly, “[w]hatever the method used to calculate the margins of dumping, ... these margins must be, and can only be, established for the *product* under investigation as a whole.”

38. The Appellate Body then reviewed the methodology used by the European Communities to calculate the dumping margin in the investigation at issue. Under the methodology provided under Article 2.4.2, the European Communities was required to compare the weighted average normal value with the weighted average of prices of “*all* comparable export transactions.” However, by using the “zeroing” methodology – i.e., counting negative margins as zero, the European Communities treated the prices of those transactions involving models of merchandise with negative dumping margins “to

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<sup>19</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/R (30 October 2000) (“Bed Linen Panel Report”).

be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value.” This practice “inflated the result from the calculation of dumping.”<sup>20</sup> The Appellate Body thus concluded:

[T]he European Communities did *not* establish “the existence of margins of dumping” for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of “zeroing” at issue in this dispute – is not a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2.<sup>21</sup>

39. For these reasons, the Appellate Body upheld the Panel’s conclusion that the zeroing methodology used by the European Communities was inconsistent with the obligations under the AD Agreement.

**3. In accordance with the Reasoning and the Decision of the Bed Linen Case, the US Statute, on Its Face, Violates Articles 2.4 and 2.4.2 of the AD Agreement by Not Conducting a “Fair Comparison” between Export Price and Normal Value**

40. As discussed above, the United States employs the identical practice of “zeroing” when determining the margin of dumping in both investigations and reviews. Furthermore, the USDOC has asserted that “zeroing” is required by the US law.<sup>22</sup> Specifically, Section 771(35)(A) of the Tariff Act of 1930 defines “dumping margin” as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” Section 771(35)(B) provides that “weighted average dumping margin” is “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter and producer.” The USDOC has recently explained in a review proceeding:

These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the “aggregate dumping margins” in section 771(35)(B) makes clear that the singular “dumping margin” in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales.<sup>23</sup>

41. The reasoning of the United States that the definition of the “singular dumping margin” does not apply to the calculation of the “aggregate dumping margin” essentially echoes the arguments made by the European Communities in the Bed Linen case. The Appellate Body, as detailed above, rejected the European Communities’ argument that the calculation of dumping margin entails a two-

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<sup>20</sup> *Id.* at para. 55.

<sup>21</sup> *Id.*

<sup>22</sup> *Final Results of the Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand*, 66 Fed. Reg. 52744 (Oct. 17, 2001), Issues and Decision Memorandum at Comment 10.

<sup>23</sup> *Id.*

stage process. Thus, the US contentions based on the supposed distinction between “singular” and “aggregate” dumping margins are not justified under the AD Agreement.

42. To the extent that section 771(35) of the Tariff Act of 1930 requires zeroing of negative margins, the statute leads to an overall dumping margin that is not based on “all comparable transactions” as required by Article 2.4.2 of the AD Agreement, nor based on a “fair comparison” between export price and normal value, as required by Article 2.4. Thus, section 771(35) of the Tariff Act of 1930, on its face, violates Articles 2.4 and 2.4.2 of the AD Agreement, as determined by the Appellate Body.

#### **4. The Application of the Zeroing Practice in Administrative Reviews Also Violates the AD Agreement**

43. As noted above, the United States, in a review for purposes of duty assessment (or revocation) uses a different methodology to determine the margin of dumping. Instead of comparing the weighted average normal value with the weighted average export price, the margin of dumping in an administrative review, in general, is determined by comparing the price of individual export transactions with weighted-average normal value. This difference in the comparison methodology, however, does not exempt the United States from the obligations imposed by Article 2 in the context of administrative reviews.

44. First, the provisions of Article 2, which is entitled “Determination of Dumping,” set forth principles and obligations to be followed in establishing the existence of dumping. The AD Agreement does not contain a separate set of provisions applicable to the determination of dumping in administrative reviews. As such, Article 2 obligations extend to the determination of dumping in all aspects of antidumping measures, irrespective of the segment of the proceeding.

45. The principle of “fair comparison” established under Article 2.4 does not distinguish whether the comparison is made on an average of all transactions basis or on a transaction-to-transaction basis. Therefore, this principle applies equally to a review as well as to an investigation, no matter what comparison methodology is used. A methodology, on a transaction basis, that assigns to an export transaction a value lower than its actual value violates this principle whether this methodology is used in an investigation or in a review.

46. In a review, the US government compares individual export transactions with normal value and aggregates the results of these multiple comparisons to determine the weighted-average dumping margin. In doing so, the US government disregards those export transactions that yield a negative margin. In effect, the US government assigns to those transactions a value equal to normal value despite the fact that, in reality, such transactions have a value higher than normal value. This methodology is identical to that used by the European Communities which the Appellate Body found to violate Article 2.4 in the *Bed Linen* decision. Accordingly, the US methodology of “zeroing,” whether it involves an average of all transactions and transaction-to-transaction comparison basis in the context of an administrative review, violates Article 2.4 of the Agreement.

#### **IV. CONCLUSION**

47. Brazil respectfully urges the Panel to analyze the issues raised by Japan in light of the legal reasoning contained in this submission, in addition to the reasoning detailed in Japan’s submission. In particular, Brazil requests the Panel to take notice of the fact that the effects of WTO-inconsistent methodologies maintained by the United States affect all administrative reviews conducted by the USDOC and not just the sunset review proceedings addressed by Japan.

## ANNEX B-2

### THIRD PARTY SUBMISSION OF CHILE

#### I. INTRODUCTION

1. Chile is grateful for this opportunity which the Panel has given it to present its views on this dispute in accordance with Article 10.2 of the Dispute Settlement Understanding. Chile has a systemic interest in the correct interpretation and application of the anti-dumping disciplines laid down in the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement" or "AD"), in order to avoid abuse of anti-dumping measures as trade barriers, contrary to the letter and spirit of the above-mentioned disciplines.

2. In this dispute Japan challenges the compatibility of United States policy, legislation, regulations and practice in the area of sunset review with its WTO obligations; or as Japan puts it, the United States legislation and practice that allow US anti-dumping duty orders to continue in perpetuity, rather than "sunsetting" after five years.<sup>1</sup>

3. Chile supports many of the arguments put forward by Japan in its first written submission. However, in this third party submission Chile does not wish to address the issue of the application of these policies, legislation, regulations and practices to the specific case of the review of anti-dumping duties on corrosion-resistant carbon steel flat products from Japan, as that would have involved a more detailed study of the original investigation and the contested review. In this submission, Chile wishes to raise a number of issues which it believes the Panel should take into account in settling the claim brought by Japan. These issues fall into four sections.

- (i) Article 11.3 of the Anti-Dumping Agreement establishes that anti-dumping duties have a maximum duration of five years.
- (ii) The review provided for in Article 11.3 is not the same as the investigation to be carried out by the national authority to determine the existence of dumping and level of injury, even when the effect or consequences of both is the same.
- (iii) Without prejudice to the above, the standards applied by the authorities in the review cannot be lower than the standards applied during the investigation; in other words, the reference point in both cases must be the disciplines of the Anti-Dumping Agreement.
- (iv) The lack of explicit disciplines in this respect has been a matter of concern to WTO Members, who have identified this as one of the provisions that need to be "clarified and improved" within the negotiating process currently under way.

#### A. ANTI-DUMPING DUTIES EXPIRE AFTER FIVE YEARS

4. Pursuant to AD Article 11.3, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition. The use of the imperative "shall" indicates that this is a binding provision. In other words, any anti-dumping duty expires or is terminated within five years at most from its application. This is further confirmed in the second part of the provision, which

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<sup>1</sup> First written submission of Japan, paragraph 1.

establishes that the authority may decide that the measure should remain in force if it determines that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

5. Article 11.3 authorizes, as an exception to the general rule ("unless"), the authority to maintain the measure if, prior to its expiry, it determines that the termination of the measure would be likely to lead to continuation or recurrence of dumping and injury. This determination must be the result of a review.

6. The language used by the AD is very different from that used in other WTO agreements. For example, Article 7 of the Agreement on Safeguards refers to the extension of the period of application of a safeguard measure; while Article 5.3 of the Agreement on Trade-Related Investment Measures provides that the Council for Trade in Goods may extend the transition period for the elimination of TRIMS. Only the Agreement on Subsidies uses wording similar to that of the AD (Article 21).

7. This is particularly important for defining the nature of the review provided for in AD Article 11.3. It certainly does not establish a right to an extension or prolongation, whether automatic or not. If that had been the case, the negotiators would have used similar language to that of other agreements.

B. THE REVIEW PROVIDED FOR IN ARTICLE 11.3 IS NOT THE SAME AS THE INVESTIGATION TO BE CARRIED OUT BY THE NATIONAL AUTHORITY TO DETERMINE THE EXISTENCE OF DUMPING AND LEVEL OF INJURY. NEVERTHELESS THE EFFECT COULD BE THE SAME AS THAT OF THE ORIGINAL INVESTIGATION

8. As Japan points out, Article 11.3 reviews are not exactly the same as original investigations, but they are analogous.<sup>2</sup> Both the title of Article 11 and the text of its paragraph 3 refer to a review, and not to an investigation as occurs throughout the AD, for example in Articles 1 and 5. The conclusion that may be drawn from this is that these are two different processes which serve different objectives. Nevertheless, it should be borne in mind that the effect could be the same, in other words, application of an anti-dumping measure.

9. In the case of investigations, the objective is to determine the existence and amount of dumping, level of injury and causal relationship between the two. Its consequences are the application, or not, of anti-dumping duties (or price undertakings). On the other hand, the review provided for in Article 11.3 is aimed at determining whether the termination of an anti-dumping duty upon its expiry would give rise to continuation or recurrence of dumping and injury; and its consequences are the termination, or not, of the anti-dumping duty.

10. Perhaps the most important difference is that the sunset review presupposes the prior existence of an investigation. For without such a prior investigation determining that dumping effectively exists (above *de minimis* levels) and that it is causing injury to the domestic industry, there could be no anti-dumping duty. Without such a duty, there is nothing to expire after five years and nothing to be the object of a sunset review.

11. Furthermore, Article 11.4 had to explicitly state that the provisions of Article 6 regarding evidence and procedure apply to any review carried out under Article 11.3.

12. Unlike an investigation, Article 11.3 calls for a prospective analysis enabling the authority to determine whether the expiry of the duty would lead to continuation or recurrence of dumping and injury. In other words, the authority has to analyse on the basis of concrete evidence whether the importer, after the duty has been terminated, will continue or resume dumping. To carry out this

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<sup>2</sup> First written submission of Japan, paragraph 178.

analysis, it is not enough to engage in mere conjecture or analyse past events, or still less consider only the information in the original investigation. The imposition of an anti-dumping duty for five years will certainly have produced some effects on the market and on producers. In other words, it has changed reality. These elements cannot be disregarded by the investigating authority.

13. In United States legislation and practice, what matters for the analysis (except in very specific and rarely applied circumstances) is (1) whether dumping still exists or not, and (2) the evolution of imports. Furthermore, only if the former has been eliminated and the latter have been maintained or increased will the authority in principle be convinced that expiry of the anti-dumping duty would not lead to recurrence of the dumping. We wonder, for example, how the United States authority takes into account the fact that a dockworkers' strike at major United States ports leads to a fall in imports, which would make it impossible to fulfil the second requirement for determining whether or not an anti-dumping duty should be terminated?

14. The standard applied by the United States authorities is so absurd as to be contrary to the text of AD Article 11.3. Article 11.3 provides that the purpose of the sunset review is to determine whether the expiry would lead to continuation or recurrence of dumping and injury. In other words, it provides for two scenarios, a first in which dumping still exists (and may continue) and a second in which dumping no longer exists (but may recur). In both cases the duty should be terminated unless it is determined that dumping may continue or recur. On the other hand, the United States legislation and regulation does not provide for the first possibility, i.e. that dumping exists and the review will determine whether or not it will continue. The only possibility contemplated by the legislation and regulations is that dumping must have ceased (so that the review is confined to determining whether it will recur).

15. In addition to this prospective analysis, the practice of the authority establishes a presumption that dumping will continue or recur and it is up to the importers to prove that this will not happen. This violates the pro-active, good-faith approach which any objective and impartial investigating authority should adopt, in accordance with the letter and spirit of the Anti-Dumping Agreement.

16. Even though the legislation and practice permits importers to submit information and show there is good cause for the authority to take other factors into consideration, the precedents show that what exists on paper is not always reflected in reality. As indicated in the case *Cut-to-Length Carbon Steel Plate from Canada*<sup>3</sup>, the Department of Commerce found that other factors did not need to be taken into account when dumping still exists after the order has been issued, as this is evidence of the possible continuation or recurrence of dumping. This is borne out in the case *Grey Portland Cement and Cement Clinker from Venezuela*<sup>4</sup>, where the Department of Commerce was clearer still in concluding that, except in very isolated cases, it did not find good cause for examining other factors except in the case of agreements on price undertakings. Consequently, our question is: if termination is only appropriate where dumping no longer exists (in addition to imports having been maintained or increased), in what circumstances would the Department of Commerce agree to analyse other factors? Or, in other words, when does the Department of Commerce consider that good cause exists?

17. The reply to these questions appears to be given in the case *Sugar and Syrups from Canada*.<sup>5</sup> In this case, the USDOC not only considered that there was not "good cause" for accepting other factors submitted by the domestic industry, but then, having seen that the conditions were fulfilled for terminating the measure, in its final determination it did examine other factors to conclude that dumping had not been eliminated and therefore the anti-dumping measure should be maintained. In other words, the authority considers whether or not good cause exists and uses or does not use other

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<sup>3</sup> Annex JPN-24b.

<sup>4</sup> Annex JPN-25k.

<sup>5</sup> Annex JPN-25m.

factors when doing so or not doing so would always allow it to reach the same conclusion: that the anti-dumping duty should not be terminated. The authority thus not only violates its obligations under the WTO but also its own legislation and regulations.

C. THE STANDARDS APPLIED BY THE AUTHORITIES IN THE REVIEW CANNOT BE LOWER THAN THE STANDARDS APPLIED DURING THE INVESTIGATION

18. Considering that the effect of the investigation and of the review is the same - in other words, application/continuation or removal of the anti-dumping duty - the fact that the review is not exactly the same as the investigation does not entail disregarding the implications of using, in the review, standards lower than those used in the investigation. This is particularly true in the case of aspects previously identified in the AD and which are applied in a manner that is incompatible with the WTO. The likely consequence is that in the majority of cases there are abuses.

19. To illustrate the above, we shall mention some of the inconsistencies mentioned by Japan in its first written submission.

20. *De minimis*. There is no justification or logic for maintaining that the use of *de minimis* margins of less than 2 per cent is authorized in the case of reviews. Accepting this leads to cases where for the purposes of a review margins which, in the original determination, were not taken into account because the threshold is higher, are taken into account or included for the review. The result is that exporters previously not subject to AD duties because of the *de minimis* margins would be subject to them following the review. The establishment of the 2 per cent *de minimis* threshold is the result of negotiation, as reflected in the AD. The idea is that dumping margins below 2 per cent do not cause injury and hence do not need to be subject to an AD duty whose purpose is to counter dumping causing injury to the domestic industry. A similar reasoning applies to *negligible imports*.

21. *Order wide basis*. The sunset review must be carried out on the basis of specific firms. As in the case of the original measure, and all the more so in the case of a sunset review, it is not appropriate to apply or continue applying an AD duty to enterprises which are not engaging in dumping. Although this is not explicitly stated in Article 11.3, in principle the AD measure should be terminated after five years for all firms, with the exception to the rule being that the duty should be maintained solely for enterprises where the termination of the duty "would lead to continuation or recurrence of dumping and injury".

22. *Sending the USITC the originally calculated dumping margins*. If imports have not taken place during the established period, the practice of the Department of Commerce is to send the USITC the original margins. After five or more years of application of an AD measure, the reality has changed. How does the investigating authority ensure that the anti-dumping duty will remain in force only to the extent necessary to counteract dumping which is causing injury? For the purposes of the Article 11.3 Review, the authority cannot have recourse once again to the original margins.

23. The above comment is all the more valid where the original margins were calculated using obsolete methodologies (i.e. that pre-date the entry into force of the Anti-Dumping Agreement) or which are incompatible with the WTO. This can lead to the absurd case where the USDOC transmits to the USITC margins calculated on bases which a WTO panel or the Appellate Body have found to be inconsistent with the WTO (such as zeroing or other *de minimis* percentages).

D. THE TOPIC OF SUNSET REVIEW IS PART OF THE NEGOTIATING PROCESS CURRENTLY UNDER WAY, REFLECTING MEMBERS' INTEREST IN THIS ISSUE

24. Paragraph 28 of the Doha Ministerial Declaration provides for the holding of "negotiations aimed at clarifying and improving disciplines" under the AD. It also states that "in the initial phase of

the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase".

25. Two of the contributions submitted to the Negotiating Group on Rules refer to the issue of sunset reviews. Document TN/RL/W/10 indicates that the lack of explicit rules cannot lead to the arbitrary introduction by the authorities of procedures and methodologies that differ substantially from those used in initial investigations. In other words, although there are no explicit rules, in the provisions relating to reviews in general and sunset reviews in particular, this does not mean that each investigating authority can establish its own procedures in this respect. When the provisions of the initial investigation under the AD are applicable to reviews, the authorities should take such provisions as a benchmark. When they are not, they should seek new standards which, on the grounds set out above, should be higher than those used in the initial investigation. Further guidelines will probably emerge from the negotiations on this latter aspect.

26. Document TN/RL/W/6 refers explicitly to sunset reviews, asking the following questions: "Should such an AD duty be continued? How can the absence of exports be deemed to establish the likelihood that injurious exports will resume in the future? Is mere allegation or remote possibility enough? Under these facts, when would the order ever be terminated? If the order is never terminated, what is the meaning of a sunset procedure?" It is precisely the answers to these questions which we wish to clarify during the negotiations on rules.

## **II. CONCLUSION**

27. In light of the foregoing, Chile respectfully requests the Panel to take into consideration the elements set out above and rule that the sunset review provided for in Article 11.3 of the Anti-Dumping Agreement is an exceptional review which allows authorities to maintain an anti-dumping duty in very specific circumstances. Otherwise, the duty shall expire in any case within five years at most of its imposition. The lack of precise rules does not entitle an investigating authority to impose or apply standards which differ from those existing in the AD and in no case lower standards than those used during the initial investigation, since while the sunset review and the initial investigation are not exactly the same, their effects are.

## ANNEX B-3

### THIRD PARTY SUBMISSION OF THE EUROPEAN COMMUNITIES

#### I. INTRODUCTION

1. The European Communities (hereinafter "the EC") welcomes this opportunity to present its views in the proceeding brought by Japan over the consistency with Articles VI and X of the General Agreement on Tariffs and Trade (hereinafter, the "GATT 1994"), and with Articles 2, 3, 5, 6, 11, 12 and 18 of the Agreement on Implementation of Article VI of the GATT (hereinafter, the "AD Agreement"), as well as with Article XVI:4 of the Marrakech Agreement establishing the World Trade Organization (hereinafter, the "WTO Agreement") of both the decision by the United States (hereinafter, the "US") not to terminate the imposition of the anti-dumping duties on imports of corrosion-resistant steel from Japan, and the provisions, procedures and practices of the US on which the decision was based.

2. The EC has decided to intervene as third party in this case because of its systemic interest in the correct interpretation of the AD Agreement. The interest of this case, in fact, goes well beyond this single measure and covers the interpretation and application by the US of the AD Agreement with regard to sunset reviews. The lines of similar cases brought by the EC against the US shows the high concern that the relevant US laws<sup>1</sup>, regulations<sup>2</sup> and administrative procedures and practice<sup>3</sup> on sunset reviews of anti-dumping and countervailing duties, as well as the way in which they have been applied, violate several provisions of the WTO Agreements.

3. Many of the issues in dispute relate to questions of fact on which the EC is not in a position to comment. Accordingly, the EC will limit its submission to a number of issues of legal interpretation raised by some of the claims submitted by Japan and which are of particular interest to the EC. In doing so, the EC will follow the sequencing of claims of the submission by Japan.

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

4. Japan has submitted to the Panel that the US law and Sunset Regulations, in particular Sections 751(c)(1) and (2) of the Act and Sections 351.218(a) and (c)(1) of the Sunset Regulations, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 of the AD Agreement because they mandate that USDOC automatically initiate sunset reviews without any evidence. In particular, Japan has argued that the ordinary meaning of the text of Article 11.3, read in its context, that is Articles 11.1, 12.1, 12.3 and 5.6 of the AD Agreement, and in light of its object and purpose, requires sufficient evidence to justify the initiation of a sunset review.<sup>4</sup>

5. In US law and practice, sunset reviews are always automatically initiated five years after the date of publication of an anti-dumping duty order; of a notice of suspension of an investigation; of a determination of injury in an administrative review; or of a sunset review determination to continue an

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<sup>1</sup> The Tariff Act of 1930 (hereinafter, the "Act"), as amended and codified in 19 USC. §1202 through 1677n.

<sup>2</sup> The Implementing Regulations on anti-dumping and countervailing duties issued by US Department of Commerce (hereinafter, "USDOC"), now Section 351 of Title 19 of the US CFR (hereinafter the "*Sunset Regulations*").

<sup>3</sup> The USDOC Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders (hereinafter, the "Sunset Policy Bulletin").

<sup>4</sup> Section A (para. 45 et seq.) of the First Written Submission by Japan.

anti-dumping duty<sup>5</sup>. Section 751(c)(2) of the Act mandates DOC to publish a "notice of initiation" in the Federal Register "no later than the 30 days before the fifth anniversary" of one of these dates. The same obligation is found in §351.218(c)(1) of the Sunset Regulations, which provides:

No later than 30 days before the fifth anniversary date of an order or suspension of an investigation (see section 751(c)(1) of the Act), the Secretary will publish a notice of initiation of a sunset review (see section 751(c)(2) of the Act)

6. The EC agrees with the argument put forward by Japan that the US automatic self-initiation of sunset reviews unavoidably leads to a violation of Article 11.3 of the AD Agreement.

7. It is well-established that the fundamental rules of treaty interpretation have received their most authoritative and succinct expression in Articles 31 and 32 of the Vienna Convention which have attained the status of rules of customary or general international law<sup>6</sup>. These imply the need for a comprehensive interpretation of the text and context and object and purpose,<sup>7</sup> and for the respect of the principle of good faith interpretation, which flows directly from the principle of *pacta sunt servanda* embodied in Article 26 of the Vienna Convention and directs the interpreter to prefer the interpretation that enables the treaty to fulfil its object and purpose, i.e. an effective interpretation<sup>8</sup>.

8. In this light, Japan is right in proceeding to an analysis of the text and context of Article 11.3, as well as of the object and purpose of the AD Agreement.

9. In particular, the EC considers that, although Article 11.3 does not contain any explicit reference to evidentiary requirements for the initiation of sunset reviews, it mandates domestic authorities to engage in a review to "determine" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury. The verb "to determine" is commonly understood to mean to find out, to ascertain, to establish, or, in more articulated terms, to carry out all those activities necessary to reach a decision, i.e. to investigate and decide. Thus, in this light, the very text of Article 11.3 already contains a clear and precious indication of the substantive activities to be undertaken in a sunset review and therefore of the context which is relevant to it.

10. In particular, the immediate context of Article 11.3, i.e. Article 11.1 sets out a fundamental obligation, i.e. that an anti-dumping duty must remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. Articles 11.2 and 11.3 are, in fact, further articulations of the ongoing obligation contained in Article 11.1. Article 11.2 provides the modalities for compliance with this obligation during the period of application of an anti-dumping duty, while Article 11.3 provides the modalities for compliance with this obligation upon expiry of that period. Both provisions emphasise the basic object and purpose of the imposition of anti-dumping duties, i.e. that they can only apply where dumping causes or is likely to cause injury.

11. The direct consequence of this is therefore that the omission in the text of Article 11.3 is justified by the fact that it appears obvious from the overall context and architecture of the AD Agreement that the guarantees so forcefully established for the initiation of an original investigation for the imposition of an anti-dumping duty apply as well to the initiation of a sunset review, which, in

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<sup>5</sup> 19 USC §1675(c)(1)(A) and (B).

<sup>6</sup> See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, page 15, and Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages*"), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, page 9.

<sup>7</sup> See ILC Commentary on the draft Articles 31 and 32 of the *Vienna Convention* (then numbered as Articles 69 and 70), *YILC*, 1966.

<sup>8</sup> See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, page 21.

virtue of Article 11.1, takes place at a time when the presumption is that of termination of that anti-dumping duty.

12. Furthermore, Japan rightly points out that sunset reviews and new investigations have the same effect, i.e. they result in the imposition of anti-dumping duties for a period of five years<sup>9</sup>. Both new proceedings and sunsets, in fact, involve a large amount of investigation by the domestic authorities with a view to determining whether anti-dumping duties should be put into effect. And the role that Articles 5.2 and 5.6 prescribe both for the domestic industry and the domestic authorities is a proactive role marked by a precise evidentiary burden. As this evidentiary burden is explicitly recalled by Article 11.3 for the domestic industry, why should it be excluded for the domestic authorities but only at sunset review stage?

13. Another textual element that should be considered is the combine reading of Articles 12.1 and 12.3. Article 12.1 provides that:

When the authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 5, the ... interested parties ... shall be notified and a public notice shall be given.

And Article 12.3 provides that:

The provisions of this Article apply mutatis mutandis to the initiation and completion of reviews pursuant to Article 11 ...

14. It is clear from the terms of Article 12.3 that the same guarantees that apply to the initiation of an original investigation apply to the initiation of a sunset review. In particular, when read in conjunction with Article 12.1, it clearly disposes that even in a sunset review domestic authorities must be satisfied to have sufficient evidence before they self-initiate sunset reviews. In the contrary case, and unless a valid request is made by the domestic industry, they should leave ADD orders to expire.

15. In conclusion, a proper analysis of the text, context, and object and purpose of Article 11.3 reveals that all provisions of the AD Agreement are potentially applicable mutatis mutandis to it, to the extent that they are relevant to sunset reviews and that their application to Article 11.3 does not create a situation of conflict or is not specifically excluded. The reasons why Article 11.3 does not contain any detailed procedural rule, in fact, is rightly that these are established somewhere else in the Agreement, for instance in Article 5.

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

16. Japan has submitted to the Panel that the Sunset Regulations, and in particular Section 351.222(i)(1)(ii), are not in conformity with Article 11.3 AD Agreement.<sup>10</sup> In particular, Japan has argued that whereas Article 11.3 AD Agreement requires that anti-dumping duties be terminated no later than five years from their imposition "unless the authorities determine [...] that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury"<sup>11</sup>, the Sunset Regulations require USDOC to effectively apply a "not likely" standard.

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<sup>9</sup> Para. 50 et seq. of the First Written Submission by Japan.

<sup>10</sup> Section B.1 (para. 94 et seq.) of the First Written Submission by Japan.

<sup>11</sup> Emphasis added.

17. The EC agrees with the legal views of Japan in this respect. It may be recalled that the pertinent Section of the Sunset Regulations is drafted as follows:

"[i]n the case of a sunset review under § 351.218, the Secretary will revoke an order or terminate a suspended investigation: [...] (ii) Under section 751(d)(2) of the Act, where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of a countervailable subsidy or dumping."<sup>12</sup>

It may also be recalled that the "not likely" standard was introduced in 1998 by amendment of Section 351.222(i)(1) of the Sunset Regulations which provided: "[i]n the case of a sunset review under § 351.218, the Secretary will revoke an order or terminate a suspended investigation, unless: (i) the Secretary makes a determination that revocation or termination would be likely to lead to continuation or recurrence of a countervailable subsidy or dumping (see section 752(b) and section 752(c) of the Act)" (emphasis added).

18. The US argues that "that provision, 19 CFR 351.222(i)(1)(ii), is ministerial in nature and addresses the timing of revocation after Commerce has made a negative final sunset determination under section 751(d)(2)."<sup>13</sup> This statement contradicted by the Explanation of Particular Provisions, which states in respect of the amendments to Section 351.222(i) : "These revisions are intended to clarify the circumstances under which the Department will revoke an order or terminate a suspended investigation and the effective date of revocation." (emphasis added)<sup>14</sup>.

19. A textual comparison of Section 351.222(i)(1)(ii) with Article 11.3 AD Agreement shows that the standard for revocation of an anti-dumping duty in a sunset review under the Sunset Regulations is different from that required by Article 11.3. Article 11.3 provides that the anti-dumping duty shall be terminated or revoked unless it is likely that this would lead to recurrence or continuation of dumping and injury. By contrast, under USDOC regulations, the anti-dumping duty will be revoked where it is not likely that this would lead to continuation or recurrence of dumping.

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

21. That a "likely" standard implies a higher degree of certainty than a "not likely" standard has also been confirmed by the Panel in US DRAMs, as quoted in paragraph 96 of the first written submission of Japan. As the Panel stated in its report, there is a conceptual difference between establishing something as a positive finding, and failing to establish something as a negative finding.<sup>15</sup>

22. In other words, a finding that someone is likely to dump always implies that the same person is not "unlikely" to dump. However, the reverse conclusion does not hold true: the fact that someone is "not unlikely" to dump does not necessarily imply that the same person is also "likely" to dump.

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<sup>12</sup> 19 C.F.R. § 351.222(i)(1)(ii) (emphasis added).

<sup>13</sup> Para. 101 of the First Written Submission by the US.

<sup>14</sup> Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, Interim final rules, 20 March 1998, Federal Register No. 63 FR 13519

<sup>15</sup> See Panel Report, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea* ("United States - DRAMs"), WT/DS99/R, adopted 19 March 1999, para. 6.45.

23. The European Community submits that this reasoning, which the Panel applied in interpreting Article 11.2 AD Agreement, is perfectly transposable to Articles 11.3. Article 11.2 governs the review of the continued necessity of an anti-dumping duty on the own initiative of the authorities or upon request by any interested party during the normal lifetime of a duty in place. In contrast, the sunset provision of Article 11.3 stipulates that any definitive anti-dumping duty shall be terminated at the latest after five year from its imposition, and only exceptionally authorises the authorities to maintain them where the requirements of Article 11.3 are fulfilled.

24. In other words, whereas under Article 11.3 the expiry of the duty is the rule and its maintenance the exception, this is not the case under Article 11.2. Given this systematic relationship between Articles 11.2 and 11.3, it is not conceivable that a stricter standard for the revocation of duties would apply under Article 11.2 than in the context of a sunset review under Article 11.3.

25. For these reasons, the European Community considers that as under Article 11.2, a "not likely" standard is incompatible with Article 11.3. Accordingly, Section 351.222(i)(1)(ii) of the *Sunset Regulations* is not compatible with the US obligations under the *AD Agreement*.

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

26. Japan has submitted that USDOC in its practice in sunset reviews fails to "determine" whether dumping is "likely" to occur.<sup>16</sup> In particular, Japan has argued that USDOC determinations are not based on a prospective analysis of positive evidence ascertaining that continuation or recurrence will be probable.

27. The EC agrees with Japan's argument that Article 11.3 requires that the "likelihood" of the continuation or recurrence of dumping must be established on a prospective basis.<sup>17</sup> By definition, an assessment of the "likelihood" of continuation or recurrence of dumping requires the authorities to make a judgement about events in the future. Such a judgement about future events cannot be carried out by merely assuming that the current situation will continue unchanged or that the pre-AD order situation will recur. Rather, it will be necessary to establish, on the basis of all current information available, what the likely course of future events might be.

28. The need for a prospective, rather than a retrospective, analysis has been confirmed by the Panel in *US-DRAMS*.<sup>18</sup> Even though the Panel reached this finding in the context of Article 11.2 AD Agreement, as the EC has already stated, it is not conceivable that the standards for the maintenance of anti-dumping duties in sunset reviews would be any less strict than those for a review under Article 11.2, which is completed during the original lifetime of an anti-dumping duty.

29. The EC also agrees in principle with Japan that a "determination" of the likelihood of continuation or recurrence of dumping and injury must be based on positive evidence.<sup>19</sup> Of course, the EC recognises that given the "prospective" character of the likelihood determination, which concerns events in the future, evidence for such a determination can never be fully conclusive, and will not lead to complete certainty. Article 11.3 therefore does not require absolute certainty about the continuation or recurrence of dumping. However, it does require the authorities to take into account all available evidence in order to determine whether continuation or recurrence of dumping is "likely". An authority would fail to meet this standard if, in a determination in a sunset review, it

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<sup>16</sup> Section B.2 (para. 107 et seq.) of the First Written Submission by Japan.

<sup>17</sup> Para. 108 of the First Written Submission by Japan.

<sup>18</sup> Panel Report in *US DRAMS*, cited above, para. 6.28; quoted in para. 110 of the First Written Submission of Japan.

<sup>19</sup> Para. 112 of the First Written Submission of Japan.

based itself purely on the fact that dumping had occurred in the past, without addressing the question of whether dumping is likely to also recur or continue in the future.

30. The EC is not in a position to comment on the USDOC's determinations regarding the Japanese producers concerned. However, the Community is of the view that the US law with respect to likelihood determinations in sunset reviews of anti-dumping orders, as well as the USDOC's general practice based on it, as described in its Sunset Policy Bulletin,<sup>20</sup> falls short of the requirements of Article 11.3 AD Agreement.

31. As set out by Japan, according to Section II.A.3 of the Sunset Policy Bulletin, USDOC normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where:

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

32. According to Section II.A.4 of the Sunset Policy Bulletin, USDOC will normally determine that revocation of an anti-dumping order or termination of a suspended investigation is not likely to lead to continuation or recurrence of dumping "where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased".

33. Finally, Section II.C of the Sunset Policy Bulletin states that USDOC will consider "other factors" only if "good cause" is shown. With reference to the SAA, the Sunset Policy Bulletin indicates that such other factors might include "the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilisation; any history of sales below cost of production; changes in manufacturing technology in the third country; and prevailing prices in relevant markets". The Sunset Policy Bulletin goes on to state that the burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question.

34. Incidentally, the EC considers that these factors are already predetermined by US law, in particular by Section 752(c)(1) and (2) of the Act, which read:

- (1) In general – In a review conducted under section 751(c) of this title, the administering authority shall determine whether revocation of an antidumping duty order or termination of a suspended investigation under section 734 of this title would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.

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<sup>20</sup> 63 Fed. Reg. 18871 (16 April 1996) (Exhibit JPN-6).

(2) Consideration of other factors – If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.

35. The European Community agrees with Japan that this general policy of USDOC as set out in the Sunset Policy Bulletin falls foul of the standard for likelihood determinations in Article 11.3 AD Agreement. Of the three cases in which USDOC normally will determine that a likelihood of continuation or recurrence of dumping exists, the second and the third clearly do not appear adequate to establish such likelihood. The fact that imports of the subject merchandise ceased after issuance of the order or the suspension agreement as such is in no way indicative of whether the producers of the product concerned will again begin dumping after the duty is terminated. Similarly, it is not clear why the fact that dumping was eliminated after the issuance of the order, and import volumes for the subject merchandise declined significantly, as such should indicate that the producers will again start dumping after the duty is removed.

36. This inadequacy of the standard applied by USDOC becomes even more obvious in the positive formulation of the same standard. The requirement that "dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased", defies all economic theory. It is clear that if an anti-dumping duty is imposed, this will necessarily have an anti-competitive effect for the products concerned. If, notwithstanding the imposition of an anti-dumping order, imports remain stable or increase and dumping ceases, then this must be due to factors unrelated to dumping. However, in this case, the scenario is in no way different from scenario (c), in which dumping also ceases, and from scenario (b), for which the continuation of dumping is irrelevant.

37. It is interesting to note that with respect to sunset reviews in countervailing duty proceedings, the Sunset Policy Bulletin does not refer to the import volumes during the period the CVD is in place, but rather to the question of the continuation of the subsidy programme.<sup>21</sup> It is not clear why trends in import volumes should have a decisive importance for antidumping duties, but not for countervailing duties. It therefore appears that US practice in this respect is not only incompatible with the AD Agreement, but also inherently inconsistent.

38. In the view of the EC, USDOC, by giving primary importance to trends in import volumes, is basing itself on a factor which is not primarily related to dumping, and which therefore cannot be conclusive for establishing the likelihood of continuation or recurrence of dumping. In exchange, USDOC makes no attempt to inquire into the economic and other incentives for producers to make renewed recourse to dumping practice likely or unlikely. On the contrary, by requiring "good cause" for the examination of all other factors, USDOC shuts the door to a meaningful likelihood determination.

39. By conditioning the determination concerning the likelihood of continuation or recurrence of dumping on what Japan has rightly referred to as "a commercially impractical scenario",<sup>22</sup> USDOC is presenting producers with a nearly impossible task. The practical effect of this policy is to perpetuate anti-dumping orders. In short, the policy of USDOC can be described by "once a dumper, always a dumper". However, this is not compatible with the sunset provisions of Article 11.3 AD Agreement, which specifically provide that antidumping duties are not perpetual, and must in principle not be extended beyond five years.

40. Overall, USDOC practice as set out in the Sunset Policy Bulletin does not appear compatible with the "likely" standard in Article 11.3.

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<sup>21</sup> Section III.A.3.a.

<sup>22</sup> Para. 124 of the first written submission of Japan.

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

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

42. The EC agrees with Japan's claim. However, it considers that this WTO-inconsistent behaviour is already mandated by US law.

43. In making a preliminary or final anti-dumping duty determination in an initial investigation, the US authorities will apply the *de minimis* standard which is set forth in section 1673b(b)(3) of the Act.<sup>23</sup> This standard provides that:

In making a determination under this subsection, the administering authority shall disregard any weighted average dumping margin that is *de minimis*. For purposes of the preceding sentence, a weighted average dumping margin is *de minimis* if the administering authority determines that it is less than 2 per cent *ad valorem* or the equivalent specific rate for the subject merchandise.

44. In sunset reviews, section 1675a(c)(4)(B) of the Act provides that:

For purpose of this paragraph, the administering authority shall apply the *de minimis* standards applicable to reviews conducted under subsections (a) and (b) of Section 751. (emphasis added)

Section 751(a) of the Act provides for periodic review of the amount of any antidumping duty and Section 751(b) for the review of the final determination or suspension agreement for change in circumstances.

45. Section 351.106(c)(1) of the Sunset Regulations provides that:

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

46. Section II.A.5 of the Sunset Policy Bulletin provides that:

In accordance with section 752(c)(4)(B) of the Act and 19 CFR 351.106(c)(1), the Department will treat as *de minimis* any weighted average dumping margin that is less than 0.5 per cent *ad valorem* or the equivalent specific rate.

47. It follows from the above description that the relevant US laws and administrative practice is to apply a 2 per cent *de minimis* rule in the initial determination of a dumping margin and to apply, as a general rule, a 0.5 per cent *de minimis* rule in all reviews, including sunset reviews. The SAA accompanying the URAA<sup>24</sup> explained that:

The requirements of Article 5.8 apply only to investigations, not to reviews of anti-dumping duty orders or suspended investigations.

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<sup>23</sup> See 19 USC §1673b(b)(3) and 1673d(a)(4).

<sup>24</sup> At pg. 845.

The SAA also explained that:

The Administration intends that Commerce will continue its present practice in reviews of waiving the collection of estimated cash deposits if the deposit rate is below 0.5 per cent *ad valorem*, the existing regulatory standard for *de minimis*.<sup>25</sup>

48. With regard to the parallel provisions in the field sunset reviews for countervailing duties, the Panel in *US – Corrosion-resistant carbon steel from Germany* confirmed that the US law in itself is contrary to the WTO Agreements<sup>26</sup>.

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

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

50. The EC does not consider itself in a position to comment on the appropriateness of the inclusion of imports from Japan into the cumulation.

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

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

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

54. The European Community sees no reason why these provisions should not apply in the context of sunset reviews. The Panel findings in *US DRAMs* has no relevance to the present case<sup>27</sup>. This Panel addressed the question of whether a *de minimis* standard applied in a duty assessment procedure under Article 9.3 of the AD Agreement. Whether a *de minimis* standard applies in a sunset review was answered positively by *US – Corrosion-resistant carbon steel from Germany* (see above at 46). The same panel also expressly considered that a literal reading would limit provisions such as Article 15.3 "in ways that would negatively affect the operation of the Agreement, particularly in respect of sunset reviews, something that cannot have been intended by the drafters"<sup>28</sup>. Article 15.3 is the parallel provision of Article 3.3 AD Agreement in the SCM Agreement.

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<sup>25</sup> The 0.5 per cent *ad valorem* was the DOC's previous *de minimis* threshold for new investigations

<sup>26</sup> Panel Report, *United States - Countervailing Duties on Certain Corrosion-resistant Carbon Steel Flat products from Germany*, WT/DS213/R, published on 14 June 2002, para. 8.80.

<sup>27</sup> Para. 185 of the First Written Submission of the US

<sup>28</sup> Ibid note 27, paras. 8.16 and 9.20

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

LIST OF EXHIBITS

Exhibit EC-1 Uruguay Round Agreement Act – Statement of Administrative Action (“SAA”) –  
extracts

## ANNEX B-4

### THIRD PARTY SUBMISSION OF KOREA

#### I. INTRODUCTION

1. At the conclusion of the Uruguay Round, the adoption of Article 11.3 of the AD Agreement, which provided for the termination of anti-dumping measures after 5 years absent a finding that termination would lead to continuation or recurrence of dumping and injury was widely welcomed. This “sunset” provision was hailed as a major step towards preventing abuse of the anti-dumping remedy which allowed measures to remain in effect long after they had ceased to serve their intended purpose. However, the implementation of the sunset provision over the past seven years has not lived up to the original expectations, leading to widespread cynicism that sunset termination of anti-dumping measures has turned out to be the exception rather than the rule.

2. A review of the USDOC’s record in this regard is very revealing. Korea notes that 305 sunset reviews were initiated in the United States. Out of these 305 cases, the USDOC revoked the measure in 73 cases on the ground that the domestic industry did not respond to USDOC’s notice of initiation.<sup>1</sup> For all of the remaining 232 cases, the USDOC found that the termination of the measure would be likely to lead to continuation or recurrence of dumping. In other words, the USDOC ruled against revocation of the measure in every single case that was contested by the domestic industry.

3. In Korea’s view, the USDOC’s blatantly lop-sided record in these reviews establishes clearly that either the US sunset rules *per se* or the manner in which they are applied in particular cases, or both, are inconsistent with the AD Agreement. While Korea agrees generally with the points made by Japan in its first submission, Korea will in this submission elaborate on the following four points, which are discussed below in chronological order:

- First, the USDOC’s initiation of sunset reviews is automatic, and does not comply with the evidentiary requirements of the Agreement.
- Second, the USDOC applies a ‘not likely’ standard to the sunset termination of a dumping order, in contrast to the ‘likely’ standard of Article 11.3;
- Third, the USDOC’s presumption of likelihood of dumping is made on the basis of insufficient facts and through the application of arbitrarily pre-determined rules and assumptions; and
- Fourth, the USDOC maintains the presumption and reach a determination by imposing an arbitrary and impossibly high ‘good cause’ burden upon respondents’ presenting facts adverse to the presumption.

4. As Korea will elaborate below, the rules and procedures governing each of the above four steps in US sunset reviews are heavily biased in favor of continuation of the anti-dumping measure. When combined together, these rules and practices have imposed an insurmountable barrier on all interested parties that have sought a USDOC finding that termination of a dumping measure would not lead to continued dumping. The failure of the USDOC *ever in 233 cases* to find that revocation of an order would not lead to recurrence of dumping is, in itself, *prima facie* evidence that the USDOC’s rules and practices are not consistent with its WTO obligations. It is worth noting, in this regard, that

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<sup>1</sup> See Data Compilation of All Sunset Reviews Conducted by USDOC (Ex. JPN-31).

USDOC made these 233 determinations at a time of unprecedented strength and high consumer spending in the US economy.

5. Finally, Korea will argue below that disciplines applying to initial anti-dumping investigations must apply *mutatis mutandis* to sunset reviews. In particular, the disciplines on the prevention of zeroing of negative margins, stipulated in Article 2.4, and on *de minimis* standards, stipulated in Article 5.8, apply to sunset reviews with equal force as they do to initial investigations.

## II. AUTOMATIC INITIATION OF SUNSET REVIEW WITHOUT SUFFICIENT EVIDENCE

6. Section 751(c)(1) of the Tariff Act of 1930, as amended (the “Act”),<sup>2</sup> mandates that the US authorities “shall” conduct a sunset review in every instance and mandates automatic initiation of such a review without requiring any evidentiary finding that the review is justified or necessary. Moreover, the Statement of Administrative Action (“SAA”) expressly states that this “automatic initiation will avoid placing an unnecessary burden on the domestic industry and promote efficiency of administration.”<sup>3</sup> As a textual matter, this provision for automatic initiation reverses the presumption contained in Article 11 that anti-dumping measures normally expire after 5 years. Moreover, the practical effects of automatic initiation further undermine this presumption in two ways. First, automatic initiation removes, at least in part, the burden on parties favoring continuation of the measure to show that termination would result in continued dumping and injury by removing the threshold step of showing evidence supporting such a likelihood. Second, automatic initiation increases the burden on parties seeking termination of a measure by forcing them to participate in reviews that might not otherwise be initiated. In this section, Korea will argue that the automatic initiation is contrary to the United States’ obligations under Articles 11.3 and 12.1 of the AD Agreement.

### A. TEXTUAL ANALYSIS OF ARTICLE 11.3

7. The text of Article 11.3 provides two different means through which a sunset review can be initiated; first, “on their [the authorities’] own initiative” *or*, second, “upon a duly substantiated request made by or on behalf of the domestic industry (...).” With respect to a review initiated at the authorities’ own initiative, Article 11.3 is silent about the threshold of evidence that should be met before a review is initiated. As noted above, the United States has interpreted this silence to mean that there is no threshold at all, and, as noted, its interpretation is reflected in section 751(c)(1) of the Tariff Act and in the SAA.<sup>4</sup>

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

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<sup>2</sup> 19 USC. §1675a(c)(1).

<sup>3</sup> Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, page 879.

<sup>4</sup> SAA at 879

<sup>5</sup> Webster’s dictionary offers as the following primary definitions of “unless”: “if it be not that, were it not the fact that; if not; except when; except that.” *See* Webster’s New Universal Unabridged Dictionary, 2<sup>nd</sup> Ed. (1983), p. 2001.

9. Moreover, nothing in the text of Article 11.3 supports the US position that a review may be initiated *automatically* in every case. Contrary to the arbitrary interpretation of the US, the text does not provide that “the authorities shall conduct a review every five years.” In this sense, Article 11.2 may be contrasted with Article 11.2, which states that the authority “*shall*” conduct a review “where warranted.” Thus, Article 11.2 imposes an affirmative burden to conduct a review in certain circumstances, while Article 11.3 contains no such mandatory burden. By claiming the right to conduct a review, which it initiates automatically in every case, the United States’ law goes well beyond any reasonable construction of the language and meaning of Article 11.3.

B. TEXTUAL ANALYSIS OF ARTICLE 12.1, WHICH PROVIDES A CONTEXT FOR THE INTERPRETATION OF ARTICLE 11.3

10. Further support for Korea’s interpretation of Article 11.3 is found in the text of Article 12.3, which stipulates that “the provisions of the Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11”. (emphasis added).

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

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

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

14. Article 12.1.1 also provides helpful context for the interpretation of Articles 11.3. and 12.1. Article 12.1.1 provides that “a public notice of the initiation of an investigation shall contain (...) *adequate information* on the following:”. (emphasis added) The items on which adequate information is required include: ‘the basis on which dumping is alleged in the application’ and “a summary of the factors on which the allegation of injury is based”. If an authority were permitted to initiate a sunset review automatically without a prior determination of the sufficiency of the evidence, there would be no reason for requirement that the authority provide in the public notice *adequate information* on the basis of the alleged dumping and injury. Again, since Article 12.1.1 applies to the initiation of reviews under Article 11, the absence of a reference to “sufficient evidence” in Article 11.3 cannot be interpreted to mean that authorities can automatically initiate the review process without any evidence.

C. THE OBJECTIVE AND PURPOSE OF THE AD AGREEMENT

15. The objective and purpose of the AD Agreement is to establish multilateral disciplines over the application of anti-dumping measures. Thus, Article 1 of the AD Agreement, titled ‘Principles’, reads; “the following provisions *govern* the application of Article VI of GATT 1994.” (emphasis added)

16. The initial investigation can lead to the imposition of a dumping order, valid for five years. The AD Agreement provides detailed and specific rules applying to the imposition of the order, in order to establish multilateral disciplines over it. The sunset review can lead to the imposition of a dumping order, valid for another 5 years. Since the objective and purpose of the AD Agreement is the establishment of multilateral disciplines over the application of Article VI of GATT, the absence from Article 11.3 of particular rules for sunset reviews cannot be interpreted to mean that investigating authorities are free to establish their own arbitrary rules for sunset reviews and to initiate such reviews in every case without any showing of sufficient evidence.

17. Narrowing the focus, the objective and purpose of Article 11.3 is to establish multilateral discipline over a sunset review. The discipline is that a dumping order is normally to be terminated in five years, *except when (n.4)* there is a good reason to believe that the termination of the measure is likely to lead to continuation or recurrence of dumping and injury.

18. In the *US – Byrd Amendment* case, a panel opined on the importance of the principle of good faith as a general rule of conduct in international relations and stated that “good faith requires a party to a treaty to refrain from acting in a manner which would defeat the objective and purpose of a treaty as a whole or the treaty provision in question.”<sup>6</sup> The automatic initiation of a sunset review, without any evidence, defeats the objective and purpose of Article 11.3, because it imposes additional burden upon the normal sunset termination, without any justification in the form of evidence to justify the initiation of the review.

### III. THE ‘NOT LIKELY’ STANDARD OF THE USDOC

19. USDOC’s regulation 19 C.F.R. 351.222(i)(1)(ii) sets forth a WTO-inconsistent “not likely” standard for sunset reviews. As a panel on *US-DRAMS* found, a finding that an event is “likely” implies a greater degree of certainty that the event will occur than a finding that the event is not “not likely.” As the same panel pointed out, the fact that an event is not “not probable” does not by itself render that event “probable.”<sup>7</sup> Since the USDOC regulation uses a standard of “not likely” rather than the “likely” standard of Article 11.3, the USDOC’s standard is biased in favor of the continuation of the dumping order and therefore inconsistent with the WTO obligation of the US.

20. The United States may argue that the difference between “likely” and “not likely” is simply an issue of mere semantic differences, and that in effect, a failure to find that continued dumping is likely is the same thing as a finding that continued dumping is not “not likely”. However, this difference in terminology critically alters the burden of proof imposed on the parties in sunset reviews. The statement that measures “shall terminate” and “likely” standard of Article 11.3 both require that the administering authority make an affirmative determination that dumping is likely to continue. By switching this to a “not likely” standard, the United States in effect flips the burden of proof on its head and requires respondent to prove that termination of the measure will not result in continued dumping. This unjustified shift of burden can readily be seen in the practices of the USDOC. As will be illustrated in the following section, the DOC applies the arbitrarily pre-established test provided in the Sunset Policy Bulletin and unjustifiably shifts the burden arising from Article 11.3 by presuming that dumping is *likely* to continue. Then, the DOC requires respondents to demonstrate that dumping is *not likely* to continue, imposing an impossibly high threshold.

21. This impermissible burden placed on respondents is extremely unfair. In this connection, Korea recalls the admonition of the Appellate Body in the *US – Hot Rolled Steel*, where it stated that “under Article 2.4, the obligation to ensure a ‘fair comparison’ lies on the investigating authorities,

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<sup>6</sup> WT/DS217,234/R, para.7.64

<sup>7</sup> US-DRAMS, at para 6.46

and not the exporters.”<sup>8</sup> By the same logic, the obligation under Article 11.3 to *determine* whether termination would be likely to lead to continued dumping also lies on the investigating authorities, and should not be transferred to the exporters by means of unjustified presumption allowed under the Sunset Policy Bulletin.

22. In the *US – DRAMS* case, the United States accepted the panel’s finding that “not likely” standard is not consistent with “likely” standard and amended its regulations in connection with Article 11.2 of the AD Agreement<sup>9</sup>. However, while amending the regulation, the United States did not amend other rules and regulations related with the implementation of the amended regulation, thus distorting the US implementation of the DSB ruling. In the instant case, the US should be required to amend not only the ‘not likely’ standard enshrined in the USDOC regulation but also other relevant rules and regulations, including the Sunset Policy Bulletin cited above.

#### IV. THE USDOC PRESUMES “LIKELIHOOD” THROUGH THE APPLICATION OF ARBITRARILY PRE-DETERMINED SCENARIOS

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

- there has been continued dumping at any level above *de minimis* (i.e., 0.5 per cent) after the imposition of the anti-dumping duty order;
- imports ceased after the imposition of the anti-dumping duty order; or
- dumping ceased thereafter, but import volumes declined significantly from pre-order level.<sup>10</sup>

##### A. USDOC’S SCENARIOS CREATE AN IRREFUTABLE PRESUMPTION

24. As Japan has correctly argued, the commercial reality is that in practice these three scenarios cover every case.<sup>11</sup> The only scenario, under which dumping is presumed to be unlikely, is commercially impractical – *where* dumping was completely eliminated and import volumes remained steady or even increased in terms of relative market share since the imposition of the order<sup>12</sup>. Thus, the Sunset Policy Bulletin invariably leads to an unjustified and effectively irrefutable presumption of the likelihood of dumping.

25. Article 11.3 stipulates that dumping order shall be terminated, unless the authorities *determine* that the expiry of duty would be likely to lead to continuation or recurrence of dumping and injury. As noted above, applying the statements of the Appellate Body stated in *US – Hot Rolled Steel*, this obligation to make this determination lies on the investigating authorities. The authorities cannot fulfill this obligation properly or fairly where they pre-judge the outcome by restricting the circumstances that will be deemed to justify an affirmative determination to arbitrary, pre-determined and commercially implausible scenarios, and by limiting their determination to a narrow analysis of circumscribed facts (*i.e.*, the margin of dumping and the trends in import volumes.)

26. The Appellate Body, with respect to the obligation arising from Article 4.2 of the Safeguards Agreement, has stated that a panel’s assessment has two aspects. First, a panel must review whether

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<sup>8</sup> *US-Hot Rolled Steel*, WT/DS184/AB/R, para.178

<sup>9</sup> Ex. JPN-7

<sup>10</sup> Ex. JPN-6

<sup>11</sup> Japan’s first submission to the panel, para 120

<sup>12</sup> *Ibidem*, para 124

the competent authorities have, as a *formal* matter, evaluated all relevant factors and, second, a panel must review whether those authorities have, as a *substantive* matter, provided a reasoned and adequate explanation of how the facts support their determinations.<sup>13</sup> Article 17.6(i) of the AD Agreement, which governs the standard of review applicable to the review of a dumping order, contains both *formal* and *substantive* requirements as well.

27. The US laws and practices fail to meet these standards. They limit authorities' obligation to gather positive facts to just two of those facts – the changes in dumping margins and the trends in the import volumes. They replace the process of making unbiased and objective assessment of facts with the consideration of these limited facts that must satisfy arbitrarily pre-determined scenarios in order to support an affirmative determination. Thus, the US laws and practices fail to meet either the *formal* or the *substantive* standards by which they must be reviewed.

28. The United States might argue that the respondents can rebut the presumption of likelihood of dumping by placing other evidence on the record. This does not cure the inconsistency with Article 11.3. First of all, as we have seen, this requirement turns the burden of proof on its head: while Article 11.3 provides explicitly that it is the authorities that should *determine* the likelihood of continued dumping, the USDOC's rules articulated in the Sunset Policy Bulletin transfers this burden to the respondents. Second, even if the respondents may place other evidence on the record, the USDOC's policies make clear that two facts – the margins of dumping and trends in import volumes – will be accorded greater weight in the analysis than any other facts the respondents may produce. Finally, and more importantly, as will be elaborated in the following section, the USDOC places an arbitrarily high "good cause" barrier upon respondents, making it practically impossible for the respondents to cross the barrier to rebut the presumption.

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

29. The depth of the bias of US laws and regulations in favor of finding of continuation of dumping, elaborated above in the chronological order of a US sunset review, is completed by the arbitrary and impossibly high burden placed upon respondents to show "good cause" in order to rebut the irrefutable presumption against termination established by the pre-determined scenarios in the Sunset Policy Bulletin.

30. Section II.C of the Sunset Policy Bulletin states that "the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question."<sup>14</sup> (emphasis added)

31. In this quotation, other factors refers to factors other than the USDOC's preferred two facts, i.e., the changes in the margin of dumping and the import volume. Given its obligation under Article 11.3 to determine the likelihood of dumping, there is no reason why the USDOC should not consider other – indeed, all relevant<sup>15</sup> – factors in its analysis from the beginning. There is no basis in the AD Agreement for the USDOC to limit arbitrarily the scope of its initial consideration of facts. This error is compounded by the fact that the USDOC does not simply accept evidence regarding other factors later in the proceeding, but imposes an additional burden – also not supported by the text of Article 11.3 – that respondents must make a showing of "good cause" before evidence on these factors will be considered. The failure of the USDOC simply to accept all relevant evidence submitted by the parties constitutes a systematic failure to meet the *formal* conditions identified by the

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<sup>13</sup> *US-Safeguards on Lamb Meat*, WT/DS177,178/AB/R, para.141

<sup>14</sup> Ex JPN-6

<sup>15</sup> See, for example, Article 3.4, which calls for consideration of "all relevant economic factors" in determining injury.

Appellate Body for the investigating authority. The US sunset rules are therefore inconsistent with US obligations under Article 11.3.

32. Furthermore, practical experience shows that the burden of proof imposed by the “good cause” requirement is impossibly high. Of the 233 contested cases reviewed by the USDOC, it considered whether “good cause” existed in only 15 cases. And, of those 15 cases, the USDOC actually found “good cause” to exist in only 5 cases. Notwithstanding its consideration of “other factors” in those 5 cases, the USDOC found the other facts insufficient to negate the presumptions prescribed by the Sunset Policy Bulletin<sup>16</sup>. This incorrigibly lop-sided record establishes beyond doubt that the US standards, contained in the USDOC regulations and in the Sunset Policy Bulletin, impose burdens of proof not found in the text of the AD Agreement, unjustifiably limit the evidence that will be considered, and unfairly pre-judge the outcomes of sunset reviews. These measures are thus not consistent with US obligations under Article 11.3.

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

33. In its first submission to the Panel, Japan has argued that disciplines applying to the initial investigation of dumping should also apply with equal force to the sunset review of dumping. In particular, Japan argues that the practice of “zeroing,” prohibited under Article 2.4, is also prohibited under Article 11.3,<sup>17</sup> and that the use of a 2 per cent threshold for *de minimis* margins, applied under Article 5.8, also applies to Article 11.3.<sup>18</sup>

34. Korea supports Japan’s position on these points. In this final section, Korea shall provide its views on the objective and purpose of the AD Agreement and, in this connection, why the disciplines applying to the initial investigation apply *mutatis mutandis* to sunset review as well.

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

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

37. Article 11.3, *per se*, does not contain detailed substantive provisions governing the conduct of a sunset review. To enable the investigating authorities to assess detailed facts and arguments presented in a sunset review, therefore, *either* the detailed provisions provided elsewhere in the AD Agreement should be applied to the sunset review, *or* each investigating authority is free to develop its own detailed rules for these reviews. The second option would, of course, lead to a proliferation of

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<sup>16</sup> Japan’s first submission, paras.131-133

<sup>17</sup> *Ibidem*, para.175

<sup>18</sup> *Ibidem*, para.187

140 different rules governing a sunset review, resulting in the complete loss of multilateral control over these reviews.

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

## ANNEX B-5

### THIRD PARTY SUBMISSION OF NORWAY

#### I. INTRODUCTION

1. The present case concerns whether the US basic anti-dumping duty law, Tariff Act of 1930 (hereinafter the Act), Sunset regulations and policy practices, Sunset Policy Bulletin, and their concrete application to imports of certain corrosion-resistant steel products from Japan are inconsistent with the United States Government's (hereinafter the USG's) obligations under the General Agreement on Tariffs and Trade 1994 (hereinafter "GATT 1994") and the Agreement on Implementation of Article VI of GATT 1994 (hereinafter the "AD Agreement"), and Marrakesh Agreement Establishing the World Trade Organization (hereinafter the "WTO Agreement"). Moreover, whether the US statutes and regulations implementing sunset reviews are on their face and as applied, both as a general practice and in this case, inconsistent with numerous substantive provisions of these agreements.

2. Norway has systemic interests in the interpretation and application of the "sunset provisions" of the AD Agreement, and thus reserved its third party rights in this case during the Dispute Settlement Body meeting on 22 May 2002.<sup>1</sup>

3. As a third party, Norway would like to address, in our view, certain critical issues. They will be presented below as follows:

- The US standard for initiation for sunset reviews (chapter II)
- The US standard for the subsequent investigation in sunset reviews (chapter III)
- The US standard of dumping margins and *de minimis* requirement in sunset reviews (chapter IV)
- The US ensurance of the conformity of its laws with their WTO obligations (chapter V)

#### II. THE UNITED STATES DEPARTMENT OF COMMERCE (USDOC) STANDARD FOR INITIATION OF SUNSET REVIEWS – AUTOMATIC INITIATION AND THE "SUFFICIENT EVIDENCE" STANDARD

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

5. Below Norway will set forth its legal analysis of the abovementioned provisions of the AD Agreement and the violations committed by the United States.

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<sup>1</sup> WT/DS244/5.

A. 2.1 THE REQUIREMENTS OF ARTICLE 11.3 OF THE AD AGREEMENT IN RESPECT OF SUFFICIENT EVIDENCE TO INITIATE A SUNSET REVIEW.

6. Article 11.3 of the AD Agreement provides in pertinent parts:

“..any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (...), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping”. (emphasis added)

7. The question in this case is which evidentiary standard is applicable to sunset reviews, given that Article 11.3 of the AD Agreement is silent on this point. The United States maintains that there are no requirements, as nothing is spelt out in the provision itself. As Norway will demonstrate below, this is not the case, and the standard in Article 5.6 applies equally to sunset reviews. This is because any provision must be interpreted according to recognized principles of public international law on treaty interpretation, as found inter alia in the Vienna Convention on the Law of the Treaties.

8. Article 31 of the Vienna Convention on The Law of Treaties, requires treaty provisions to be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the *light of its object and purpose*”.

**1. The Object and Purpose of the Sunset Provisions in the AD Agreement**

9. Article 11.1 provides the general objective applicable to all decisions to continue imposing an anti-dumping duty – that the duty may remain in force only as long as necessary to counteract injurious dumping.

10. Under Article 11.3 of the AD Agreement, WTO Members are required to terminate anti-dumping duties on a date no later than five years from their imposition, unless it is determined in a review, that the expiry of the duties would be likely to lead to continuation or recurrence of dumping and injury. This corresponds to the purpose of Article 11.1 of the AD Agreement which provides that an antidumping duty shall be maintained only as long as necessary and to the extent to counteract dumping which is causing injury.

11. It follows from Article 11.3 that as a main rule anti-dumping duties shall be terminated no later than five years from their imposition – the presumption being that dumping is counteracted after such period.

12. A review is meant only to take place in exceptional circumstances when there is a clear indication based on the situation existing at the time of review that the expiry of the duty would be likely to lead to continuation or recurrence of both dumping and injury. The purpose of “initiating” a sunset review, which as has been mentioned is an exceptional occurrence, is thus not only to begin analyzing whether continuation of the order is necessary, but also to determine if “initiation” itself is necessary.

13. Therefore, the object and purpose of Article 11.3 first requires that the administering authority make a threshold decision as to whether to begin a sunset review at all. Initiation is not an empty or automatic decision.

## 2. The Context in which Article 11.3 of the AD Agreement Applies

14. As stated above, the absence of the words “sufficient evidence” in article 11.3 in the AD Agreement, does not mean that there are no standards for initiation of sunset reviews. The absence of any specific language in Article 11.3 with respect to how an administering authority is to initiate sunset reviews is not conclusive; the absence simply confirms that one must look elsewhere in the Agreement for those specific rules. This is evident from the object and purpose of the sunset provision in the AD Agreement.

15. Furthermore the textual context of the provision mandates clearly what the evidentiary standard is.

16. There is an abundance of textual context that confirms the existence of a “sufficient evidence” standard before initiating a sunset review, as is the case for the initial investigation. A proper analysis of the context of Article 11.3 reveals that no provision of the AD Agreement can be read in isolation, and that all provisions are applicable *mutatis mutandis* to Article 11.3 to the extent that they are relevant to sunset reviews. Moreover, each provision of the AD Agreement must be interpreted in the context of all the other provisions of the Agreement.

17. There are in particular three textual links that the Government of Norway would like to mention in support of the above interpretation of the provision based on its object and purpose and context.. Firstly, the textual link in Article 12.3 of the *mutatis mutandis* application of article 12 to article 11, secondly the reference to Article 5 in Article 12.1. and thirdly the footnote 1 to the AD Agreement.

18. Norway submits that the text and reference in Article 12.1 and Article 12.3 reflects the contextual point that the “sufficient evidence” standard applies to all announcement to initiate by the authorities, not just announcements of original investigations.

19. The text and context of Article 12 explicitly requires that the authorities have “sufficient evidence” to initiate sunset reviews under Article 11.3. The *mutatis mutandis* application of Article 12.1 in accordance with Article 12.3 to Article 11.3 establishes that, once the authorities are satisfied that there is “sufficient evidence” to justify initiation, the authorities must provide public notice of the initiation of the sunset review. To give Article 12 its proper meaning, therefore, the authorities must satisfy the “sufficient evidence” standard to initiate sunset reviews.

20. Because of the *mutatis mutandis* application of the Article 12 to Article 11.3, the language “pursuant to Article 5” in Article 12.1 requires that Article 5.6 must also apply to sunset reviews. Article 5.6 requires that the sufficient evidence standard defined in Article 5.2 must also apply to instances where the administering authorities self-initiate. In this way, the text and context of Article 5.6 also requires that the administering authorities have “sufficient evidence” to initiate sunset reviews under Article 11.3.

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

22. Thirdly, we would also like to point to the fact that footnote 1 to the AD Agreement, in which it is stated that:

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

23. The word “initiated” in Article 11 shall thus be understood as a procedural action in accordance with Article 5. This makes it, in our view, clear that Article 5.6 must apply to a sunset review.

24. Therefore, the “sufficient evidence” rule, apply to all self-initiations by the authorities in both original investigations and sunset reviews.

### **3. 2.1.3 The Prior Panel Decision on Article 21.3 of the SCM Agreement is Not Persuasive**

25. With all due respect, Norway submits that the panel in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*,<sup>2</sup> erroneously interpreted the consistency of the automatic initiation of sunset reviews with Article 21.3 of the SCM Agreement, the corollary to Article 11.3 of the AD Agreement. This Panel should not follow the prior panel’s decision.

26. The CVD panel did not consider Article 21.3 in its proper context, and in light of its object and purpose as mandated by the recognized principles of Public International Law relating to treaty interpretation. Furthermore, the CVD panel never discussed or even mentioned Article 22.1 of the SCM Agreement (the corollary to Article 12.1 of the AD Agreement), which provides for the “sufficient evidence” standard, and also establishes a textual link to Articles 21.3 through 22.7 of the SCM Agreement. This point is now before the Appellate Body, which held its oral hearing on 11 October 2002. Norway trusts that the Appellate Body will correct this error by the Panel in that case.

## **B. 2.2 CONCLUSION**

27. For the reasons stated above, the proper interpretation of Article 11.3 in accordance with its context, object and purpose requires a sunset review initiated by the authorities to be based on “sufficient evidence.” Although the standard of “sufficient evidence” may vary from case to case, automatic self-initiation by the authorities without any evidence cannot be within the scope of the “sufficient evidence” standard.

28. The Act and regulations mandating automatic initiation of sunset reviews without any evidence, therefore, are inconsistent with Articles 11.1, 11.3, 12.1, 12.3 and 5.6 on its face. Further, USDOC’s automatic initiation of the sunset review in this case, on 1 September 1999, pursuant to the Act and regulations is also inconsistent with these provisions of the AD Agreement.

## **III. THE UNITED STATES DEPARTMENT OF COMMERCE (USDOC) STANDARD OF THE SUBSEQUENT INVESTIGATION IN SUNSET REVIEWS – THE “LIKELY” STANDARD**

A. 3.1 THE USDOC’S REFUSAL IN SUNSET REVIEWS TO UNDERTAKE A SERIOUS PROSPECTIVE EXAMINATION OF THE PROBABILITY OF FUTURE DUMPING BASED ON POSITIVE EVIDENCE IS INCONSISTENT WITH ARTICLE 11.3, ON ITS FACE, AS A GENERAL PRACTICE AND AS APPLIED IN THIS CASE.

29. Article 11.3 of the AD Agreement provides that:

“..any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition...unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by

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<sup>2</sup> WT/DS213/R, adopted 3 July 2002

or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping". (emphasis added)

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

31. In the case *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead Bismuth Carbon Steel Products Originating in the United Kingdom* the Appellate Body considered that (in the context of a review under Article 21.2 of the SCM Agreement, the corollary to Article 11.2 of the AD Agreement)<sup>3</sup>:

"In order to establish the continued need for countervailing duties, an investigating authority will have to make a finding on *subsidisation* i.e. whether or not the subsidy continues to exist".

32. When such requirements are applied to a review under Article 21.1 of the SCM Agreement – and thus also to Article 11.2 of the AD Agreement – which is not obligatory and takes place during the life time of the original duty, it should be clear that a positive finding on dumping is necessary also in the context of an Article 11.3 investigation.

33. In an Article 11.3 investigation the basic obligation is the termination of the original duty, while the possibility of continuing a duty following a sunset review constitutes the exception. In the opinion of the Norwegian government the latter requires an unbiased review independent of the results of the original investigation to be undertaken in full conformity with all the procedural and substantive requirements for an initial determination of dumping and injury set forth in Articles 1 *et sec.* There is no reason to understand the requirement of "determination" of dumping and injury differently in Article 11.3 as compared to *inter alia* Articles 3 and 5. This is also supported by Article 11.1 and the purpose of the AD Agreement.

#### B. 3.2 THE US REGULATIONS

34. Section 351.222(i)(1)(ii) of the US regulations mandate explicit application of a "not likely" standard, even though a prior panel in *United States – Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabit or Above from Korea*,<sup>4</sup> has made clear that a "not likely" standard does not comply with the "likely" standard of Article 11.

35. Notwithstanding this previous panel decision and the US's own acceptance of this decision, the US continues to maintain the "not likely" standard in regulations with respect to sunset reviews. Because the US regulation mandates termination of an anti-dumping duty based on the "not likely" standard, USDOC's regulation is thus inconsistent with Article 11.3.

#### C. 3.3 THE SUNSET POLICY BULLETIN

36. The US's WTO-inconsistency on this issue does not stop at the provisions of the regulations. The Sunset Policy Bulletin impermissibly restrict any real factual investigation to determine prospectively whether dumping is "likely" to continue or recur, nonetheless the terms "likely" and

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<sup>3</sup> See Panel Report WT/DS138/R, adopted 7 June 2000, at para. 6.18, as upheld by the Appellate Body Report, WT/DS138/AB/R, adopted 7 June 2000, at para. 51.

<sup>4</sup> WT/DS99/R, adopted 29 January 1999

“determine” in Article 11.3 require that the authorities undertake a prospective analysis of positive evidence to establish whether dumping is likely to continue or recur. Instead of looking forward, as a general practice the USDOC looks backwards.

37. The USDOC examines only historical dumping margins and import volumes. The Sunset Policy Bulletin thus impermissibly restricts the USDOC’s analysis to a retrospective analysis. This restrictive, static, and retrospective approach creates an irrefutable presumption that dumping will continue or recur.

38. According to the written submission of Japan the USDOC applied this practice to the sunset review to determine that dumping is likely to continue in this case. In reaching its determination, USDOC refused to consider any information submitted by the Japanese company Nippon Steel Corporation (NSC). NSC presented facts showing that NSC would not export the subject product at dumped price and submitted information showing that the export volume had been lowered due to the production of subject product at its joint-venture in the United States.

39. According to the Japanese submission the USDOC had even known of the existence of these facts since the original investigation and subsequent administrative reviews.

D. 3.4 CONCLUSION

40. For the reasons stated above, Norway considers that, USDOC does not take the proper prospective approach to determine whether dumping is likely to continue in a sunset review and therefore acts inconsistently with Article 11.3 as a general practice and in this case.

**IV. THE USDOC STANDARD OF DUMPING MARGINS AND *DE MINIMIS* RULE**

A. 4.1 THE USDOC’S USE OF DUMPING MARGINS INCLUDING THE “ZEROING” METHODOLOGY IS INCONSISTENT WITH ARTICLES 2.2.1, 2.2.2, 2.4.2, 11.3 AND 18.3 BOTH AS A GENERAL PRACTICE AND AS APPLIED IN THIS CASE

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

42. In accordance with the Sunset Policy Bulletin, however, USDOC continues to apply to sunset reviews, including this case, dumping margins calculated in the original investigations prior to the WTO Agreement. These margins were calculated pursuant to Article-2 inconsistent methodologies. USDOC uses these WTO-inconstant dumping margins to determine the likelihood of dumping in sunset reviews without any attempt to bring these margins into conformity with Article 2.

43. The Appellate Body in the case *EC – Bed Linens*,<sup>5</sup> found that Articles 2.4 and 2.4.2 oblige the authorities to make a dumping determination without “zeroing” negative dumping margins. Yet, as a general practice USDOC has consistently calculated dumping margins in original investigations and subsequent reviews using the zeroing methodology for more than fifteen years. In accordance with the Sunset Policy Bulletin, USDOC uses these dumping margins upon which it bases its likelihood determination, contrary also to the requirement of Article 18.3 of the AD Agreement that requires that the present Agreement be applied to all cases – including reviews – after the creation of the WTO.

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<sup>5</sup> WT/DS141/AB/R 2001,

**1. 4.1.1 Conclusion**

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

B. USDOC'S REGULATIONS APPLYING A 0.5 PER CENT *DE MINIMIS* STANDARD TO SUNSET REVIEWS, RATHER THAN THE PROPER 2.0 PER CENT *DE MINIMIS* STANDARD AS PROVIDED FOR IN ARTICLE 5.8, ARE BOTH ON THEIR FACE AND AS APPLIED IN THIS CASE INCONSISTENT WITH THE US'S OBLIGATIONS UNDER ARTICLES 5.8 AND 11.3.

45. As stated above Norway considers that Article 5 of the AD Agreement is applicable also for sunset reviews. Article 5 is part of the context within which Article 11.3 operates. A proper interpretation of Article 11.3 in accordance with its context and its object and purpose, interpreted in accordance with the general principles of public international law as embodied *inter alia* in Article 31 of the Vienna Convention on the Law of Treaties, leads to the natural interpretation that the same *de minimis* standard shall be applied to all cases.

46. Article 5.8 of the AD Agreement provides in the context of original investigations:

“[...] There shall be immediate termination in cases where the amount of dumping is *de minimis*. [...] For the purpose of this paragraph, the amount of a subsidy shall be considered to be *de minimis* if the subsidy is less than 2 per cent ad valorem.”

47. The Member States of the WTO have agreed that dumping below this threshold does not permit a countervailing action. There is no exception to this rule, and immediate termination shall be the result in such cases.

48. The relevant US laws and administrative practice is to apply a 2 per cent *de minimis* rule in the initial determination of dumping as required by the AD Agreement, but to apply, as a general rule, a 0.5 per cent *de minimis* rule in all reviews, including sunset reviews.

49. Reviewing the need for a duty to continue under Article 11.3, in conjunction with Articles 11.1 and 5.8 has the same implications as determining whether the original substantive conditions on the basis of which it was initially imposed continue to exist.

50. The *de minimis* standard in the AD Agreement is based on the fact that a dumping margin of less than 2 per cent is presumed incapable to cause injury. If this dumping cannot cause injury in an original investigation, it is logically and legally unavoidable to conclude that it cannot cause injury in a sunset investigation. Consequently the United States should have lifted the anti-dumping duties and changed the *de minimis* threshold to 2 per cent in all review processes.

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

52. According to the facts submitted by the Japan in its written submission in the present case, if the proper *de minimis* standard were applied to WTO-consistent dumping margins in this sunset review respondents would be found to be *de minimis*, resulting in the termination of the anti-dumping duty.

C. 4.2.1. CONCLUSION

53. Based on the above, Norway submits that the 0,5per cent *de minimis* standard used by the United States for sunset reviews represents a clear violation of Article 11.3 of the AD Agreement read in conjunction with Article 5.8 of the AD Agreement both as a general practice and as applied in this case.

**V. US ANTI-DUMPING LEGISLATION IS INCONSISTENT WITH ARTICLE 18.4 OF THE AD AGREEMENT AND ARTICLE XVI:4 OF THE WTO AGREEMENT**

54. Article 18.4 of the AD Agreement provides that:

“Each member shall ensure not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.”

55. Furthermore, Article XVI:4 of the WTO Agreement requires that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

56. Thus, by being inconsistent with Article 11 and related articles of the AD Agreement as they apply to a sunset review, the US law, regulations and practices as such, and as applied to the products in question in this case, are also inconsistent with Article 18.4 of the AD Agreement and Article XVI:4 WTO Agreement.

**VI. CONCLUSION**

57. For the reasons stated in the submission, Norway respectfully request the Panel to consider the US law, regulations and practices inconsistent with the obligations of the United States under: Article 11 and related articles of the AD Agreement as they apply to a sunset review, Article 18.4 of the AD Agreement and Article XVI:4 WTO Agreement.

58. Finally Norway respectfully requests the Panel to recommend that the United States bring its legislation into conformity with the corresponding covered agreements.

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