ANNEX C

Second Written Submissions by the Parties

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. This submission responds to the First Written Submission of the Government of the United States (the "USG") filed with the Panel on 7 October 2002, and the USG's Oral Statement presented at the Panel's first meeting.

II. GENERAL PRACTICE

2. Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement explicitly require that each WTO Member conform its statutes, regulations, and "administrative procedures" to its WTO obligations. Therefore, the WTO Agreement and the AD Agreement contemplate general practice claims regarding a Member's WTO-inconsistent administrative procedures.

3. The USG argues that if an "administrative procedure" is discretionary it cannot be challenged. The USG claims that the Sunset Policy Bulletin is a non-binding statement by the agency that carries the same weight as other agency determination precedent. The USG, however, conveniently ignores the origins of the Sunset Policy Bulletin. The Sunset Policy Bulletin establishes rules for the conduct of sunset reviews and was crafted precisely to narrow the scope of sunset reviews in accordance with the Statement of Administrative Action("SAA").

4. The rationale of previous panels supports the argument that the Sunset Policy Bulletin is subject to this Panel's review under Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement. The panel in *US – Steel Plate from India* indicated that "pre-established rules" are "administrative procedures" under Article 18.4 of the AD Agreement. The Sunset Policy Bulletin was published on 16 April 1998 in the Federal Register, more than two months before the initiation of the first sunset review by the USG. Further, not unlike other USDOC rules establishing "administrative procedures", the Sunset Policy Bulletin requested public comments. Therefore, the Sunset Policy Bulletin could only be amended like other "administrative procedures" through the notice and comment requirements of US administrative law. These characteristics distinguish the Sunset Policy Bulletin from ordinary USDOC practice in which USDOC is able to deviate from its practice in an individual proceeding by simply explaining its reasoning. The Sunset Policy Bulletin represents a pre-established codification of USDOC's "general practice."

5. Further, the Sunset Policy Bulletin is a concrete independently operational instrument, and therefore, as interpreted by the panel in *US – Export Restraint*, is able to give rise independently to a violation of WTO obligations. USDOC has rigidly applied the Sunset Policy Bulletin to all prior 228 sunset reviews in which the domestic industry participated, and found that dumping was "likely" to continue in every single case. This fact demonstrates the directives of the Sunset Policy Bulletin are essentially mandatory provisions.

6. The panel in *US – Countervailing Measures* found that the mere appearance of executive discretion alone is insufficient to find a law WTO-consistent. "[W]hat is important is whether the government has effective discretion to interpret and apply its legislation in a WTO-consistent manner." USDOC's continued adherence to the Sunset Policy Bulletin establishes a complete lack of any "effective discretion" on the part of USDOC.

7. This reasoning is further supported by the panel's findings in *US – Section 301*. The panel in *US – Section 301* analyzed that administrative procedures may be WTO-inconsistent even where the statutory provisions grant discretion to the authorities to act consistently with its WTO obligations. The nature of the Sunset Policy Bulletin is identical to procedures the panel analyzed in *US – Section 301*.

8. Finally, the Appellate Body in the *US – CVD Sunset* case has implicitly stated that "information as to the number of sunset reviews that have been conducted, the methodology employed by USDOC in other reviews, and the overall results of such reviews" can establish a "consistent practice" challengeable before the panel. Japan has satisfied these requirements.

III. SUBSTANTIVE CLAIMS

A. AUTOMATIC SELF-INITIATION

9. Japan showed in its first submission that the US statute and regulations mandated automatic initiation of sunset reviews without any evidence, and thus is inconsistent with Article 11.3. The USG, however, believes there is no such requirement in Article 11.3 because there is no explicit use of the phrase "sufficient evidence" or a direct cross reference to Article 5.6. This is simply wrong. The sufficient evidence requirements of Article 5.6 are incorporated within Article 11.3 through Article 12.1 and 12.3.

10. The primary objective of Article 11.3 is that all anti-dumping duties terminate after five years. Article 11.3 only allows continuation of an anti-dumping duty in the exceptional circumstance where a sunset review is properly initiated and conducted. The Appellate Body in the *US – CVD Sunset* case has confirmed this interpretation in the context of Article 21.3 of the SCM Agreement stating that "{a}n automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is at the heart of this provision. Termination of a countervailing duty is the rule and its continuation is the exception."

11. Perhaps the most important explicit textual and contextual link is provided by Article 12. Although Article 12.1 does not itself "create" substantive obligations, the language does reflect the substantive obligations imposed by Article 5 to justify initiation by providing "sufficient evidence."

12. The USG offers no explanation for how the first clause of Article 12.1 could not apply to sunset reviews – as set forth in Article 12.3 – without reflecting the sufficient evidence standard for initiating such reviews. Even the USG in its first submission in this case recognizes that the provisions of Article 12 "shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11."

13. The USG, however, blurs the difference between "sufficient evidence" to begin the sunset review and the factual basis needed to make the final determination. Under the USG's interpretation, the authorities need no evidentiary showing at all to trigger the sunset review proceeding. "Sufficient evidence" merely reflects the need for some threshold showing to justify the action. The finding that dumping is *likely* to continue is for the final determination of a sunset review. Articles 11.3 and 12, however, require the authorities have some factual basis to initiate a sunset review. Initiation is not an empty or automatic decision.

14. The USG tries to dismiss the explicit textual link of Article 5, claiming that the provision "pursuant to Article 5" in Article 12.1 does not incorporate Article 5 into Article 12.3, notwithstanding the *mutatis mutandis* language. This is wrong. The *mutatis mutandis* application of one provision requires interpreters to apply all the obligations of one article to the other. It makes no sense not to apply the obligations of Article 5 to Article 11.3 in light of the operation of Article 12.3.

15. The USG improperly focused its interpretation of Article 5.6 only in the context of Article 5 by asserting that the use of the term "investigation" in Article 5.6 indicates that the obligations of the Article only apply to investigations. The language in Article 12.1 and Article 12.3 indicates, however, that Article 5.6 does apply to sunset reviews through the *mutatis mutandis* language of Article 12.3. Japan is arguing that the *mutatis mutandis* language is evidence of the existence of the "sufficient evidence" standard within Article 11.3.

16. Footnote 1 further provides a textual link from Article 5.6 to Article 11.3, as argued below.

17. The USG tries to distinguish the imposition of duties in the original investigation from the continuation of duties in a sunset review. In both instances, however, the authority is deciding whether a duty should exist. The issue before the Panel is whether there is a need to establish a threshold level of evidence before initiating at all. Thus, the initiation decision, in the original investigation and the sunset review is functionally equivalent. The USG also ignores the fact that the original investigation, which is now more than five years old, has little relevance to predicting the future.

18. The Appellate Body's decision in the *U.S – CVD Sunset* case is not controlling here. The Appellate Body's decision with respect to the USG's automatic initiation of sunset reviews without sufficient evidence, did not benefit from an analysis of the significance of the cross reference from Article 5 to Article 11.3 in footnote 1 of the AD Agreement (the corollary to footnote 37 of the SCM Agreement). Absent this analysis, the Appellate Body mistakenly found that the drafter of the SCM Agreement did not intend the evidentiary standards for self-initiation of investigations to apply to self-initiation of sunset reviews.

19. Footnote 1 of the Agreement defines the term "initiated" to mean the procedures a Member employs pursuant to Article 5 to commence an action. It also explicitly provides that this definition of "initiated" applies to the entire AD Agreement. Article 11.3 then provides that a sunset review is "a review initiated." Consequently, the use of the term "initiated" in Article 11.3 demonstrates that the AD Agreement contemplates that a sunset review must be initiated in accordance with the procedural requirements under Article 5, including the sufficient evidence requirement in Article 5.6.

B. PROPER PROSPECTIVE LIKELIHOOD DETERMINATION

20. USDOC's regulations and the Sunset Policy Bulletin prevent USDOC from making truly prospective determinations. The "likely" standard under Article 11.3 requires a "determination" based on a prospective analysis of positive evidence. The Appellate Body in *US – CVD Sunset* supports this conclusion. Yet, USDOC focuses on retrospective evidence when making its sunset review determinations. Consequently, USDOC acts inconsistently with the USG's obligations under Article 11.3.

1. Section 351.222(i)(1)(ii) of USDOC Regulations

21. Japan demonstrated that section 351.222(i)(1)(ii) of USDOC's regulations is inconsistent on its face with the USG's obligations under Article 11.3. Previous panels have determined that the term "likely" in Article 11.3 requires that an administering authority must find that dumping will probably continue or recur upon revocation. The "likely" standard requires a much greater degree of certainty than a standard requiring that dumping be "not likely" to occur in the future. Notwithstanding these previous panel decisions and the USG's own acceptance of the panel decision, the USG continues to maintain the "not likely" standard in USDOC's regulations with respect to sunset reviews.

22. The USG tries to hide completely behind the wording of the statute. The USG argued that since the statute uses the word "likely", there is no issue. The USG also claims that section § 351.222(i)(1)(ii) is ministerial in nature. These arguments are inconsistent with the USG's own statement in the Sunset Regulations "Procedures for Conducting Five-year ("Sunset") Reviews", the text of the regulations, and its own previous explanation. The preamble and the text of the regulations demonstrate that USDOC will only revoke an anti-dumping duty order where it determines that dumping is "not likely." No other provisions of the Sunset Regulations provide any other situations in which USDOC will revoke an anti-dumping duty order. The USG explained in *US – Export Restraint*, at para. 8.111 that the preamble to USDOC's regulations evidences "an agency's contemporaneous understanding of its proposed rules", which "may be consulted to determine the proper interpretation of an agency's regulations." The text of the regulations incorporated this intention. USDOC confirmed this in *Brass Sheet and Strip from the Netherlands*, stating "the Department is required to revoke the order if, based on the record of the proceeding, the Department determines that dumping is not likely to recur."

23. This "not likely" standard is imbedded in the Sunset Policy Bulletin. The Sunset Policy Bulletin in section II.A.4, sets forth a single scenario in which USDOC will determine that dumping is "not likely", while section II.A.3 sets forth three other scenarios in which USDOC will determine that dumping is "likely." No other scenarios are provided for in the Sunset Policy Bulletin. These scenarios show that USDOC distinguishes the "not likely" standard from the "likely" standard. Consistent with the regulations, the "not likely" scenario is the only scenario in which satisfaction of it will result in revocation.

24. The fact that statutory section 751(c) of the Act uses the term "likely" does not insulate USDOC's regulation from WTO challenge. The USG conveniently ignores its own history with respect to Article 11.2 reviews and section 351.222(b) in connection with the panel's determination in *US – DRAMs*, finding that USDOC's "not likely" regulations were WTO-inconsistent. The USG accepted the panel's determination, and amended its regulations to reflect "likely" standard.

2. The Sunset Policy Bulletin

25. Article 11.3 calls for a careful, prospective analysis of the prospects of the likelihood of future dumping. Both the panel and the Appellate Body in the *US – CVD Sunset* case confirmed that the authorities are obligated to take an active role in collecting evidence in sunset reviews. The Sunset Policy Bulletin, however, *de facto* mandates that USDOC examine past dumping margins and import volumes without conducting a prospective analysis. The Bulletin takes a retrospective approach by restricting USDOC to such historical data.

26. By mechanically examining only historical facts and not collecting or examining other positive evidence, the provisions of the Sunset Policy Bulletin ignore the USG's WTO obligations. A determination based on "positive evidence" requires more than simply reviewing a respondent's past import volume and previously calculated dumping margins. The three scenarios in section II.A.3 of the Sunset Policy Bulletin, which are based only on import volumes and dumping margins, create the "presumption" that dumping is likely to continue or recur, as USDOC admitted. USDOC will not even consider "positive evidence", or as the USG calls it "other factors", unless respondents submit such information to establish "good cause." By shifting the burden to respondents to rebut the presumption and then excessively restricting respondents' ability to present "other factors" (or some sort of "positive evidence"), the Sunset Policy Bulletin creates an irrebutable presumption that dumping is likely to continue or recur.

27. The most revealing piece of evidence is the sheer number of times USDOC has found that dumping is likely to continue. In every single case among all 228 sunset reviews in which the domestic industry actively participated, USDOC found dumping was "likely" to continue or recur. In

all of these cases USDOC followed the provisions of the Sunset Policy Bulletin. This also means that nearly every case fit one of the three "likely" factual scenarios. This confirms that USDOC's concrete and *de facto* binding requirements contained in the Sunset Policy Bulletin do not allow USDOC to deviate from the presumption.

3. Application of the Sunset Policy Bulletin to this Case

28. As in the other 228 sunset reviews, USDOC acted inconsistently with its WTO obligations in this sunset review because it strictly applied the Sunset Policy Bulletin, and the "not likely" standard under section 351.222(i)(1)(ii). USDOC based its determination on only past import volumes and dumping margins without making any effort to consider other information. USDOC stated "the fact that NSC reduced its dumping margins during the same time that its import levels have remained stable does not lead us to conclude that dumping is *unlikely* to occur in the future." The USG claimed that, even if USDOC had considered other factors presented by NSC, "the factors do not provide sufficient evidence that NSC is *not likely* to dump in the future." Such a statement does not mitigate the USG's WTO-inconsistent practice. In fact, it shows that USDOC would ignore any changed circumstance and adhere to the preconceived notion that where dumping has existed at all for the past five years dumping is likely to continue in the future. This application of the Sunset Policy Bulletin, which is based only on historical import volumes and dumping margins, without considering any other factors is inconsistent with Article 11.3.

4. Submission of all Information/Argument within 30 Days from Initiation

29. Japan argued that application of the 30-day requirement to submit all substantive argumentation, in addition to information showing "good cause", impermissibly restricted the respondent's ability to properly defend its interests in this sunset review, and thus was inconsistent with Articles 6.1, 6.2, and 6.6. In response to Japan's argument, the USG claimed that Japan had "sufficient opportunity" to gather information and present its argument as well as any supporting information including its "good cause" argument. This argument ignores the facts of this case and fails to address Japan's argument that the 30-day rule is unnecessarily restrictive. Further, USDOC's conditional request for information without specifying what information is sufficient to show good cause is inconsistent with Article 6.1.1 and the panel decision in *Ceramic Tiles*.

C. USDOC'S USE OF IMPROPER DUMPING MARGINS

1. USDOC's Use of Pre-WTO Agreement Margin

30. Dumping margins established prior to the passage of the URAA were calculated in accordance with methodologies, which are no longer consistent with the USG's current obligations, and therefore are not an appropriate basis to make determinations with respect to sunset reviews. The USG has initiated all sunset reviews in or after 1998. Therefore, all sunset reviews are "reviews of existing measures" under Article 18.3. The sunset review determination, thus, must be in accordance with the current Agreement. A dumping margin that was calculated pursuant to those old methodologies, therefore, may not be employed in USDOC's likelihood determination.

31. The USG argues that Article 11.3 does not require USDOC to quantify dumping margins. We disagree. Article 2, which is applicable throughout the AD Agreement, sets forth the requirements for calculating dumping margins and defines how dumping must be determined. Article 2.1 provides that a product is considered dumped if the export price is lower than its normal value. The difference is the margin of dumping. The existence of dumping could not be determined unless the authorities calculate a dumping margin. The authorities, therefore, could not find dumping without quantifying the margin of dumping.

32. The USG attempts to refute Article 18.3's application to sunset reviews through the panel's findings in *US – DRAMs*. The panel report specifically states that "the AD Agreement applies to those parts of a pre-WTO measures that are included in the scope of a post-WTO review." A sunset review determines, and therefore its scope is, the likelihood of "dumping" and "injury." Thus, the panel in *US – DRAMs* supports Japan's position that the basis for determining likelihood must be WTO-consistent.

33. The USG assertion that Article 18.3 is simply a timing provision is baseless and wrong. Article 18.3 dictates how and to what extent the obligations of the AD Agreement will be applicable to existing anti-dumping duty orders. Article 18.3.2, together with the chapeau of Article 18.3, requires a Member to terminate the imposition of all previously existing antidumping duties five years after the effective date of the WTO Agreement, unless the Member conducts sunset reviews upon the expiry of these measures. As such, while this provision does have aspects of a timing provision to transition from one regime to the next, it also carries substantive obligations. Article 18.3 attempts to avoid the situation of having all existing anti-dumping duties becoming WTO-inconsistent when the WTO entered into effect. Article 18.3, however, does not immunize those old anti-dumping duty orders forever.

2. Zeroing and the Findings in *EC – Bed Linens*

34. Use of dumping margins with "zeroed-out" negative margins as the basis of sunset review determinations is inconsistent with Article 2.4 and 11.3. The practice of "zeroing" selectively calculates margins only for those sales of products with a positive margin and rejects sales with negative margins. This methodology thus creates an artificially high margin.

35. The Appellate Body's findings in *EC – Bed Linens* clarified that authorities must make all dumping determinations without "zeroing" negative dumping margins. Article 2.4 sets forth how the comparison should be made between the export price and normal value to establish the dumping margin. Article 2, including Article 2.4, applies to all dumping determinations. The dumping margins in all proceedings, including sunset reviews, thus must be established in accordance with the fair comparison requirement under Article 2.4.

36. The Appellate Body in *EC – Bed Linens* stated "from the wording {Article 2.1}, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a *product*'" The report of the DSU Article 21.5 recourse panel in *EC – Bed Linens* confirmed that "the calculation of a dumping margin pursuant to Article 2 constitute a determination of dumping." The Appellate Body proceeded to clarify that Article 2.1 informs the interpretation of Article 2.4 and the "fair comparison" and "price comparability" requirements. Essentially these requirements mean that the establishment of dumping margins under Article 2.4 must be made by evaluating the product under consideration as a whole, not just a portion of the product. The practice of zeroing in establishing dumping margins, therefore, is inconsistent with Article 2.4 of the AD Agreement.

37. The Sunset Policy Bulletin, however, effectively mandates that USDOC apply WTO-inconsistent dumping margins calculated using the zeroing methodology in original investigations and subsequent reviews. As demonstrated in our first submission, USDOC has applied the zeroing methodology to the calculation of dumping margins in original investigations and subsequent reviews. The dumping margins used in sunset reviews by USDOC for its dumping determination and for the magnitude of dumping are therefore skewed by zeroing and do not provide a "fair comparison" between the prospective future export price and normal value. The Sunset Policy Bulletin is therefore inconsistent with Articles 11.3 and 2.4.

38. The key point to *EC – Bed Linens* is that the finding has little relevance with whether the "fair comparison" is made on an average-to-average basis or an average-to-transaction basis. Zeroing in any type of comparisons is distortive and does not provide a fair comparison.

39. Importantly, if zeroing had not been applied in this case, NSC would have had a negative dumping margin in its latest administrative review, thus affecting USDOC's likelihood analysis. As a result, the USG's determination of the likely magnitude of dumping in this sunset review based on dumping margins that contained "zeroed-out" negative margins is inconsistent with Articles 2, 11.3, and 18.3.

3. The *De Minimis* Standard

40. The USG asserts that the 2.0 per cent *de minimis* standard is not applicable to sunset reviews because there is no direct textual link between Article 5.8 and Article 11.3. The USG mistakenly believes that Article 5.8 and Article 11.3 can be read in isolation. The USG ignores the contextual relevance, as well as the object and purpose of Articles 5.8 and 11.3. Article 11.3 refers to both "dumping" and "injury." Because the *de minimis* standard is inseparable from the concepts of "dumping" and "injury", and Article 11.3 incorporates these concepts, the *de minimis* standard is incorporated within Article 11.3.

41. Further, the decision of the Appellate Body in *US – CVD Sunset* does not control the decision in this case because of the cross-reference by Article 5 to Article 11.3 through footnote 1, and the differences in the treaty text and characteristics of *de minimis* dumping and subsidization between the SCM Agreement and the AD Agreement. As the Appellate Body has so often noted, differences in text must have some meaning. The fact that the SCM Agreement has a limiting phrase but the AD Agreement does not, and the fact that the limiting phrase was affirmatively removed from the AD Agreement, strongly suggests that Article 5.8 of the AD Agreement has a different meaning. The scope of the *de minimis* rule thus was "considered in the negotiations" regarding Article 5.8 and a broad scope was affirmatively adopted. That textual difference must be respected by this Panel.

42. First, the lack of the limiting phrase "for the purpose of this paragraph," which appears in Article 11.9 of the SCM Agreement yet does not appear in the third sentence of Article 5.8, distinguishes the AD Agreement from the SCM Agreement. The negotiating history reveals that this limiting phrase was once in several drafts, but was finally affirmatively removed from the final text of the AD Agreement.

43. Second, unlike the SCM Agreement, the AD Agreement has only the single *de minimis* standard in Article 5.8. The 2 per cent standard in the AD Agreement applies to all respondents in all cases. The Appellate Body in *US – CVD Sunset* gave weight to Articles 27.10 and 27.11 of the SCM Agreement, and stated "this unreasonable implication casts further doubt on the 'rationale' attributed by the Panel to Article 11.9's *de minimis* standard." The Appellate Body's rationale does not apply to the AD Agreement.

44. Third, the Appellate Body was not given the chance to review the significance of footnote 37 of the SCM Agreement (the corollary to the footnote 1 of the AD Agreement). As discussed above, the definition of the term "initiated" in footnote 1 provides an explicit cross-reference to Article 5 and to sunset reviews "initiated" under Article 11.3. The Appellate Body in *US – CVD Sunset*, however, without having a chance to review the significance of footnote 37, concluded "we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9." (emphasis added). In this case, there is such a textual link.

45. Finally, the definition of footnote 1 also influences the proper interpretation of the term "cases" in Article 5.8 of the AD Agreement. The cross-reference further shows that this term means

not only investigations but also sunset reviews. The Appellate Body report in *US – CVD Sunset* does not address the role of this textual guidance.

D. USDOC'S REPORTING OF IMPROPER MARGINS TO THE USITC

46. As effectively mandated by the Sunset Policy Bulletin, USDOC never reports probable future dumping margins to the USITC for its injury determination in sunset reviews, including in this specific case. USDOC usually reports to the USITC dumping margins from the original investigation. The Appellate Body report in *US – CVD Sunset* pointed out, that the "{m}ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient." These WTO-inconsistent dumping margins taint the USITC's injury determinations and are inconsistent with Article 11.3.

47. The USG asserts that there is no requirement within Article 11.3 that limits how the margin likely to prevail must be identified. This argument would require the USITC to determine injury in a vacuum and is directly contrary to the obligations of Article 3 and 11.3. Footnote 9 provides that Article 3 applies to all injury determinations. Article 3.4 specifically requires the authorities to consider "the magnitude of margins of dumping" in injury determinations. The authorities must find some factual basis to link the magnitude of dumping in a particular case to the injury being suffered. The magnitude of dumping, therefore, is directly relevant to the USITC's analysis of the future "effects" of dumping in a sunset review under Article 11.3.

E. USDOC'S LIKELIHOOD DETERMINATION ON A ORDER-WIDE BASIS

48. Japan submitted that USDOC was under an obligation to make company-specific dumping determinations in sunset reviews. Article 6.10 explicitly directs the authorities to "determine an individual margin of dumping for each known exporter." Article 11.4 then expressly incorporates this obligation into Article 11.3. The Sunset Policy Bulletin, however, expressly mandates that USDOC "will make its determinations of likelihood on an order-wide basis." USDOC follows this instruction rigidly and always makes an order-wide determination. Therefore, USDOC's general practice of making its likelihood determination on an order-wide basis, and applying that practice in this case, is inconsistent with the USG's WTO obligations under Article 11.3.

49. The USG attempts to refute Japan's argument by claiming that the text of Article 11.3 contemplates a review on only an order-wide basis and that the "substantive" requirements of Article 6.10 do not apply to Article 11. All of the provisions of Article 6, however, establish different types of procedural requirements to some degree. The USG is effectively arguing that, even though all of the provisions of Article 6 have various procedural aspects, Article 6.10 should not be applied to sunset reviews because its procedural aspects will substantively alter how the USG conducts its sunset reviews. Contrary to the USG's argument, the mere fact that some of those procedural requirements, when applied to other provisions, have substantive implications does not foreclose their procedural effect.

50. Previous panels and the Appellate Body support the conclusion that the dumping determination must be made on a company-specific basis. The Appellate Body report in *US – CVD Sunset* has confirmed that the provisions of Article 6 generally apply to sunset reviews. The report of the DSU Article 21.5 recourse panel in *EC – Bed Linens* further clarified that the dumping determination must be made on a company-specific basis.

51. Further, Articles 9.2 and 11.1 provide contextual support for this conclusion. Article 9.2 provides that anti-dumping duties are to be imposed on *all sources* that are found to be dumped. Article 11.1 of course requires that anti-dumping duties be imposed only to the "extent necessary to counteract dumping." Contrary to the USG's allegation, therefore, taking these two provisions

together, if there is no likelihood that an individual company will dump in the future, then continuation of the anti-dumping duty order is no longer necessary to counteract the injurious effect of that company's dumping.

F. USITC'S DECISION TO CUMULATE IMPORTS WITHOUT ASSESSING NEGLIGIBILITY

52. Japan demonstrated in its first submission that the obligations in Articles 3.3 and 5.8 are included in sunset reviews under Article 11.3. The USG accuses Japan of a convoluted interpretation. In fact, Japan's interpretation is quite straightforward. Since Article 3 is titled "determination of injury", and since footnote 9 requires that "injury" is to be applied consistently throughout the Agreement, the same concept must apply to sunset reviews. The Appellate Body in *US – CVD Sunset* has confirmed our position. Thus, the USITC's cumulative analysis without considering whether Japanese imports were negligible under Articles 3.3 and 5.8 was inconsistent with the USG's obligations under Articles 3.3, 5.8, and 11.3.

53. The USG claims that application of Article 3.3 is limited to original investigations. This is incorrect. Article VI:1 of GATT 1994 states that imports from **one country** may be condemned if such imports cause material injury to the domestic industry of the importing country. The basic concept of an injury determination is thus on an individual country basis. Article 3.1 of the AD Agreement confirms this. The only exception to this rule is the narrowly defined circumstances in Article 3.3. If Article 3.3 applies to investigations only, then there is no permission under the AD Agreement for the authorities to cumulate imports at all in sunset reviews.

54. The USG claimed that no quantification of import volumes is required for the injury determination in sunset reviews. This argument ignores the fact that Article 3.3 refers to "assessing the effects of such imports." Article 3.1 requires that the injury determination be based on the volume of the dumped imports. Article 3.4 also requires the authorities to consider "the magnitude of dumping" and the "effect of the dumped import." Article 3.5 then requires the authorities to consider whether the dumped imports injure the domestic industry "through the effects of dumping." These concepts are inseparable and must be evaluated in conjunction with one another. Indeed, how could the authorities cumulatively assess the effects of dumping from multiple countries without quantifying the import volume from the respective countries?

55. The USITC has considerable experience collecting and assessing data related to future injury through its threat of injury determination. Therefore, there is no reason why the USITC could not also collect data to prospectively evaluate a country's potential future negligibility.

G. ARTICLE X:3(A) OF GATT 1994

56. The following GATT 1994 Article X:3(a) inconsistencies have occurred in the US administration of its sunset review statute, regulations, and rules: (1) USDOC's automatic initiation of sunset reviews, which is both "unreasonable" and "partial", as it reduces the burden on domestic parties at the expense of respondents; (2) USDOC's refusal to accept and consider other evidence outside of a respondent's substantive response, which was both "unreasonable" and "partial", as USDOC demands respondents provide more information in less time; and (3) USDOC's approach to termination decisions under Article 11.2 and Article 11.3, which is "non-uniform", as both previous panels and US courts recognize the same "likely" standard exists in both reviews.

57. The USG asserts that the examination of measures under Article X:3(a) of the GATT 1994 is limited to the overall application of those measures and not to the specific results of those measures in the current proceeding. Japan, however, does not argue that the specific substantive results in this sunset review are inconsistent with the Article X:3(a). Japan has demonstrated in its first submission

that all three of the issues for which Japan has raised Article X:3(a) claims involves administration of substantive sunset review rules.

IV. CONCLUSION

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

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. The United States will use this submission to highlight the major legal and factual errors underlying Japan's claims. In addition, the United States will emphasize the significance of the Appellate Body's recent report in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*Corrosion-Resistant Steel from Germany*"), in which the Appellate Body rejected many of the same arguments Japan presents here.

2. At the outset, the United States reiterates that Japan has misconstrued the appropriate scope of review under WTO law and practice. Japan claims that review by this Panel "extends to administrative procedures that ignore relevant WTO obligations," including the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act and the Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin ("Sunset Policy Bulletin"). Japan calls these its "general practice" claims. Japan's arguments in this regard ignore the well-established principle that in order for a measure as such to breach an obligation of the Marrakesh Agreement Establishing the World Trade Organization and/or the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), that measure must mandate WTO-inconsistent action or preclude WTO-consistent action. Japan has made no effort to demonstrate that the "general practices" it purports to identify mandate WTO-inconsistent action or preclude WTO-consistent action. Consequently, those claims cannot be sustained.

3. Most of the remainder of Japan's claims fail because they rely on obligations not found in Article 11.3 of the AD Agreement. Japan asserts that the following obligations must be read into Article 11.3 and applied in sunset reviews: (1) the initiation standards and *de minimis* requirement of Article 5 of the AD Agreement, (2) restrictions on the permissible methodology for calculating aggregate dumping margins found by the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), and (3) the strict quantitative negligibility assessment that is required in investigations for the cumulation of imports. These assertions, however, find no support in the AD Agreement and run afoul of basic principles of treaty interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which "neither require nor condone the imputation into a treaty of words that are not there[.]" The Panel should reject Japan's claims and refuse to impute into Article 11.3 of the AD Agreement "words that are not there."

4. Japan is also wrong with respect to its claims that (1) the Department of Commerce's ("Commerce") regulations establish a "not likely" standard for likelihood of dumping determinations and (2) Commerce failed to apply the substantive and procedural requirements of the AD Agreement in the instant sunset review. In fact, the "likely" standard required under Article 11.3 of the AD Agreement is fully implemented under US law. Moreover, in determining that dumping was likely to continue or recur in the event of revocation, Commerce followed the substantive and procedural requirements of the AD Agreement. Commerce found, based on the results of two completed assessment reviews, that Japanese producers/exporters had continued to dump throughout the life of the order and that import volumes were significantly lower than pre-order volumes.

A. SELF-INITIATION OF SUNSET REVIEWS IS NOT INCONSISTENT WITH ARTICLE 11.3 OF THE AD AGREEMENT

5. Japan alleges that the provisions of US law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with the AD Agreement. The Appellate Body, however, recently affirmed a panel's rejection of a similar claim by the EC that the provisions of US law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). Although that case, *Corrosion-Resistant Steel from Germany*, dealt with Article 21.3 and other provisions of the SCM Agreement, the relevant provisions of the AD Agreement are essentially identical to those of the SCM Agreement, and the Appellate Body's reasoning is equally valid in this proceeding.

6. Specifically, the Appellate Body found that, "when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may be taken." The United States observes that both Article 21.3 of the SCM Agreement and Article 11.3 of the AD Agreement refer, without qualification, to the self-initiation of sunset reviews.

7. The Appellate Body also referred to the lack of any explicit cross-reference to evidentiary rules relating to initiation, and found that the negotiators of the AD Agreement did not intend to make such rules applicable to the self-initiation of reviews under Article 21.3 of the SCM Agreement. The same may be said of Article 11.3 of the AD Agreement, which is the parallel provision of Article 21.3 of the SCM Agreement and which also contains no explicit cross-reference to evidentiary rules relating to initiation.

8. In analyzing the context of Article 21.3 of the SCM Agreement – Articles 21.2 and 21.4, which are paralleled in the AD Agreement by Articles 11.2 and 11.4 – the Appellate Body found no reason for applying any rules for initiation in the context of sunset reviews. The Appellate Body also looked at Article 22 of the SCM Agreement, and found that none of its provisions establishes any evidentiary standards applicable to the initiation of sunset reviews. The United States notes that Article 12 of the AD Agreement is perfectly analogous to Article 22 of the SCM Agreement, and neither do any of its provisions establish any evidentiary standards applicable to the initiation of sunset reviews.

9. Finally, the Appellate Body turned to Article 11 of the SCM Agreement and found no indication of an intent to apply evidentiary requirements for the initiation of investigations to the ability of authorities to self-initiate sunset reviews. The same conclusion applies to the analogous provision in the AD Agreement, Article 5.

10. Japan argues that the authorities should not be able to self-initiate reviews unless they have first satisfied the evidentiary requirements for the initiation of an investigation under Article 5, citing Article 12.1, footnote 1, and what makes "sense." As pointed out in *Corrosion-Resistant Steel from Germany*, however, there is no textual link between Article 11.3 and the initiation standards in Article 5. Moreover, as the Appellate Body found in *Corrosion-Resistant Steel from Germany*, there is no other link, express or implied, to any standard that might limit the ability of authorities to self-initiate sunset reviews.

11. Japan posits that the AD Agreement *indirectly* incorporated a link between the investigation and sunset review provisions. The Members, however, found it necessary to provide a *direct and explicit* link in Article 11.4 between Article 6 and the conduct of sunset reviews. Plainly, the Members chose not to incorporate by reference into Article 11.3 the initiation requirements of Article 5. The Panel should decline Japan's request to create an evidentiary obligation for self-

initiation in sunset reviews conducted pursuant to Article 11.3 that has no basis in the text of the AD Agreement.

B. US LAW IS CONSISTENT WITH THE OBLIGATION IN ARTICLE 11.3 OF THE AD AGREEMENT TO DETERMINE WHETHER DUMPING IS LIKELY TO CONTINUE OR RECUR IN THE EVENT OF REVOCATION

12. The statutory language governing the obligation to determine likelihood of dumping in sunset reviews is found in section 751(c) of the Tariff Act of 1930, as amended (the "Act"). That language is essentially identical to the language in Article 11.3 of the AD Agreement and is therefore consistent with Article 11.3. In addition, US sunset review regulations, as such, provide for a determination of "likelihood" of continuation or recurrence of dumping.

13. The Appellate Body in *Corrosion-Resistant Steel from Germany* found that the EC did not satisfy its burden of showing that US law mandates Commerce to act inconsistently with Article 21.3 of the SCM Agreement, or that such law restricts in any way Commerce's discretion to make a determination consistent with Article 21.3. The Appellate Body, therefore, upheld the panel finding that, "US law is not inconsistent with Article 21.3 of the SCM Agreement with respect to the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review." The Panel should likewise find that US law is consistent with Article 11.3 of the AD Agreement.

14. Japan, citing Commerce's regulations at 19 C.F.R. 351.222(i)(1)(ii), claims that US law in regard to sunset reviews requires the application of a "not likely," as opposed to a "likely," standard. While it is true that section 351.222(i)(1)(ii) provides for revocation "where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of ... dumping," the provision is purely procedural in nature and does not in any way alter the substantive requirements of the statute and regulations.

15. The final sunset determination in this case applied the principle set forth in the Sunset Policy Bulletin that Commerce will normally determine that revocation of an antidumping order 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;

(b) imports of the subject merchandise ceased after issuance of the order; or

(c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.

16. If there is evidence that dumping has continued under the discipline of the order, it is reasonable for Commerce *normally* to conclude that dumping will continue without the discipline of the order. This conclusion is not a presumption that dumping is likely to continue or recur in every case until proven otherwise. Rather, it is Commerce's reasonable determination, based on evidence of behaviour after the order was put in place, that this condition is indicative of future behaviour in the absence of an order.

17. Japan argues that Commerce makes a retrospective, rather than a prospective, likelihood determination and that the "good cause" standard for consideration of "other factors" in the likelihood analysis precludes a prospective analysis. Neither of these statements is an accurate representation of the facts. Commerce considers the behaviour of producers/exporters and whether that behaviour is likely to continue or recur. In the instant case, Japanese producers/exporters have continued to dump since the imposition of the antidumping order. Japan does not dispute this fundamental fact.

Furthermore, there was no evidence to support an inference that Japanese producers/exporters would stop dumping if the discipline of the order were removed. No such evidence was offered by any party, and none was apparent to Commerce. Japan's arguments as to the "good cause" standard cannot obscure this fundamental deficiency in the evidence presented to Commerce by the Japanese companies, nor can they obscure the relevance of the evidence relied upon by Commerce, especially the evidence of continued dumping over the life of the order.

18. During the course of the sunset review proceeding, Nippon Steel Corporation ("NSC"), one of the Japanese producers/exporters, did provide Commerce with evidence regarding the reduced import volumes. This evidence was not, however, presented in NSC's substantive response. Rather, NSC waited until it submitted its case brief to present the evidence and never explained a "good cause" basis for consideration, thus violating both of the requirements of 19 C.F.R. 351.218(d)(3)(iv). Japan also suggests that there was some other evidence in Commerce 's records that Commerce should have considered in connection with the likelihood determination. The United States, and the Panel, should not be left to guess as to what that evidence might be.

19. Moreover, Japan suggests that whether dumping is likely to continue or recur in the event of revocation is necessarily dependent on the magnitude or level of dumping. This is not, in fact, the case. Commerce's approach to the likelihood of dumping determination is qualitative, not quantitative. A qualitative approach is entirely consistent with the requirements of Article 11.3.

C. US LAW, AS SUCH AND AS APPLIED BY COMMERCE, IS CONSISTENT WITH THE ARTICLE 6 OBLIGATION TO PROVIDE INTERESTED PARTIES WITH AMPLE OPPORTUNITY TO PRESENT EVIDENCE WHICH THEY CONSIDER RELEVANT

20. There is no dispute that the procedural and evidentiary provisions of Article 6 of the AD Agreement apply to sunset reviews under Article 11.3. Thus, each of the procedural and evidentiary requirements of Article 6 is reflected in US sunset review requirements.

21. Japan maintains that Commerce violated Article 6 by imposing unfair procedural burdens on NSC. Japan challenges, in particular, Commerce's rejection of a claim by NSC regarding "other factors" that allegedly accounted for, *inter alia*, the reduction in import levels since the imposition of the antidumping duty order. Japan's challenge is without merit.

22. First, Commerce's promulgation of a 30-day deadline for the submission of substantive responses is entirely consistent with the AD Agreement. Second, rather than discussing "other factors" in its substantive response and explaining why "good cause" existed for their consideration – as is required under 19 C.F.R. 351.218(d)(3)(iv) – NSC waited until the filing of its case brief to bring its evidence to Commerce's attention and, even at that late date, failed to provide a "good cause" basis for consideration of that evidence. Third, even if NSC had been uncertain as to what constitutes "good cause," the facts of this case are that it made *no effort* to establish grounds for considering its "other factors" submission.

D. CONSISTENT WITH THE AD AGREEMENT, COMMERCE REPORTS THE MAGNITUDE OF THE DUMPING MARGIN LIKELY TO PREVAIL IN THE EVENT OF REVOCATION TO THE US INTERNATIONAL TRADE COMMISSION ("USITC") FOR USE IN ITS INJURY ANALYSIS

23. In accordance with US law, in making its sunset injury determination, the USITC "may consider the magnitude of the margin of dumping." In order for the USITC to have the option of doing this, Commerce must report the margin(s) likely to prevail in the event of revocation.

24. In the instant case, Commerce found that, while dumping had continued throughout the life of the order, import volumes had decreased. This pattern indicated that changing prices in response to

the dumping order had likely harmed the exporters' sales volumes. Consequently, under US law, there was no basis to report lower, more recently calculated margins to the USITC, and Commerce therefore reported the margins from the original investigation. This action was consistent with the obligations of Article 11.3 of the AD Agreement. Specifically, there is no provision of the Agreement that requires or precludes the USITC from considering the magnitude of the margin of dumping likely to prevail in the event of revocation, and there is no provision of the Agreement that limits how such a margin might be determined. Rather, under Article 11.3, the authorities must simply determine whether "expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury." Article 11.3 plainly does not require the quantification of a dumping margin in sunset reviews and does not include any specifications regarding the methodology or methodologies that must be employed in such reviews. Commerce reports the margin likely to prevail in the event of revocation to the USITC purely as a matter of US domestic law.

25. Japan's fallacious claim regarding the quantification of dumping margins forms the basis of its claim regarding "zeroing." Japan's reliance on *EC Bed Linen* is unpersuasive for three reasons. First, and most importantly, Japan ignores the fact that Article 11.3 of the AD Agreement does not require administering authorities to calculate or recalculate dumping margins in sunset reviews. Second, Japan assumes incorrectly that the *magnitude* of the dumping margins in the original investigation and over the life of the antidumping order had an impact on Commerce's analysis of the likelihood of continuation or recurrence of dumping in this case. Finally, *EC Bed Linen* involved (1) an *investigation* subject to the AD Agreement, (2) average-to-average price comparisons under Article 2.4.2 of the AD Agreement, and (3) consideration of the EC's dumping calculation methodology. *None* of those circumstances was present in the case at hand.

26. In sum, Japan's claims regarding Commerce's identification of the margin likely to prevail in the event of revocation have no basis in the AD Agreement and should be rejected by the Panel.

E. THERE IS NO *DE MINIMIS* STANDARD FOR SUNSET REVIEWS IN THE AD AGREEMENT

27. Japan claims that the *de minimis* standard for antidumping investigations found in Article 5.8 of the AD Agreement is also applicable to sunset reviews under Article 11.3. In *Corrosion-Resistant Steel from Germany*, the Appellate Body rejected a similar claim by the EC that the *de minimis* standard for countervailing duty investigations is also applicable to countervailing duty sunset reviews. In so doing, the Appellate Body reversed the panel on this point because a finding that "the *de minimis* standard of Article 11.9 is implied in sunset reviews under Article 21.3 would upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3."

28. In examining the text of Article 21.3 of the SCM Agreement – which has a direct parallel in the text of Article 11.3 of the AD Agreement – the Appellate Body recognized that "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning.'" Thus, the lack of any indication in the text of Article 21.3 that a *de minimis* standard must be applied in sunset reviews serves, at least at first blush, to indicate that no such requirement exists. The Appellate Body also examined the text of Article 11.9 of the SCM Agreement – which has its parallel in the text of Article 5.8 of the AD Agreement, which establishes a *de minimis* standard for antidumping investigations – and found no suggestion of applicability beyond the investigation stage.

29. The Appellate Body found further support for its conclusion in the lack of any textual link between Articles 21.3 and 11.9 of the SCM Agreement; similarly, there is no textual link between Articles 11.3 and 5.8 of the AD Agreement. In analyzing the context of Article 21.3 of the SCM Agreement – Articles 21.1 and 21.4, which are paralleled in the AD Agreement by Articles 11.1 and 11.4 – the Appellate Body also found no indication that the *de minimis* standard applicable to investigations is applicable to reviews.

30. The Appellate Body then went on to consider the object and purpose of the SCM Agreement, and concluded that, "[t]aken as a whole, the main object and purpose of the SCM Agreement is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures." Given the similar structure and wording of the AD Agreement, it may be concluded that an object and purpose of the AD Agreement is to increase and improve GATT disciplines related to the use of antidumping duties. Moreover, as the Appellate Body remarked with respect to the SCM Agreement, it can similarly be said that, although the AD Agreement is aimed at striking a balance between the right to impose antidumping duties and the obligations that Members must respect in order to do so, this understanding of the purpose of the Agreement does not help in resolving the *de minimis* issue.

31. Turning to the panel's analysis, the Appellate Body stated that it does "not believe that there is a clear 'rationale' behind the 1 per cent *de minimis* rule of Article 11.9 that must also apply in the context of reviews carried out under Article 21.3." The Appellate Body also rejected the panel's finding that it would yield irrational results if the *de minimis* standard applied to investigations but not to sunset reviews, because of the fundamental contrast between the purpose of an original investigation and the purpose of a sunset review. Precisely the same analysis is applicable to the AD Agreement. There is no clear rationale behind the *de minimis* rule of Article 5.8 that must also apply in the context of sunset reviews; no irrational results follow from interpreting Article 11.3 according to its plain meaning and not interpolating a *de minimis* standard; and the determination required under Article 11.3 differs in certain essential respects from the nature of the determination to be made in an original investigation.

32. The function of the *de minimis* standard in Article 5.8 is to determine whether dumping warrants the imposition of antidumping duties in the first instance, not to regulate likelihood determinations in sunset reviews. Japan's claim that a *de minimis* standard exists for sunset reviews under Article 11.3 of the AD Agreement is without merit. Applying the customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the AD Agreement.

F. CONDUCT OF SUNSET REVIEWS ON AN ORDER-WIDE BASIS IS CONSISTENT WITH THE AD AGREEMENT

33. As the United States explained in its first written submission, Commerce makes the likelihood of dumping determination on an order-wide basis. This approach is entirely consistent with the requirements for sunset reviews under Article 11.3 of the AD Agreement. The text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, makes no reference to determining the likelihood of dumping for individual companies. Indeed, the text does not distinguish between the specificity required for the likelihood of dumping determination and the specificity required for the likelihood of injury determination, and the latter determination is *inherently* order-wide. Moreover, the provisions of Article 6 incorporated into Article 11 reviews by Article 11.4 are not intended to have an impact on the substantive standards or criteria to be applied in sunset reviews. Those provisions are only intended to have an impact on the *manner* in which the substantive standards or criteria are applied. Consequently, there is nothing in Article 11 that even suggests standards or criteria for the likelihood of dumping determination focusing on individual companies' likelihood of continuation or resumption of dumping. Commerce's order-wide approach is therefore consistent with the AD Agreement.

34. Japan argues that one cannot make a clear distinction between the procedural/evidentiary obligations and the substantive obligations of Article 6. Japan's argument, however, is at odds with the Appellate Body's findings in *Corrosion-Resistant Steel from Germany*. In that case, the Appellate Body made the distinction relied upon here by the United States, albeit in the context of interpreting

Article 12 of the SCM Agreement (which is parallel to Article 6 of the AD Agreement). As the Appellate Body found, "Article 12 sets out obligations, *primarily* of an evidentiary and procedural nature, that apply to the conduct of an *investigation*." Similarly, Article 11.4 of the AD Agreement is only intended to incorporate for purposes of Article 11 reviews those provisions of Article 6 that are of a procedural/evidentiary nature, not those of a substantive nature. Japan's request to have Article 6.10 incorporated by reference into Article 11.4 *for substantive purposes* should therefore be rejected by this Panel.

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

35. As the United States detailed in its first written submission, the AD Agreement does not require application of a negligibility test in deciding whether to cumulate imports in sunset reviews. Specifically, the United States emphasized that in applying the basic rules of treaty interpretation neither the text of the AD Agreement nor its object and purpose support Japan's assertion that the AD Agreement requires a negligibility assessment in Article 11.3 reviews. Indeed, the Appellate Body in *Corrosion-Resistant Steel From Germany* rejected the panel's conclusions that were premised on arguments similar to those presented by Japan in this dispute.

36. In its oral statement at the first meeting with the Panel, Japan repeated its assertion that the AD Agreement requires the same strict quantitative assessment in sunset reviews as it does in original investigations. In so doing, Japan relies on an interpretation of Articles 3, 5.8, and 11 of the AD Agreement that cannot be reconciled with the text of these provisions. In addition, Japan offers unpersuasive reasons as to why it believes the US position is incorrect.

37. Japan contends that sunset determinations under Article 11.3 are also subject to the provisions of Article 3, in particular the conditions for cumulation under Article 3.3 and by cross-reference in that paragraph, the negligibility requirements under Article 5.8. Therefore, Japan asserts that the USITC was required to address in its sunset review the threshold question of whether imports from individual countries are negligible before reaching the issue of cumulation.

38. The Appellate Body in *Corrosion-Resistant Steel from Germany* found that the *de minimis* standard in Article 11.9 of the SCM Agreement, the counterpart provision to Article 5.8 of the AD Agreement, did not apply to Article 21.3, the SCM provision pertaining to sunset reviews. Applying the same reasoning underlying the Appellate Body's report compels the conclusion here that the negligibility standards of Article 5.8 of the AD Agreement do not apply to Article 11.3 sunset reviews.

39. Starting with the text, Article 11.3, on its face, does not contain a negligibility standard, nor is there a reference to the negligibility concept anywhere in Article 11. Furthermore, the plain terms of Article 11 neither implicitly nor explicitly incorporate the negligibility provisions of Article 3.3 or Article 5.8. Similarly, neither Article 3.3 nor Article 5.8 contains any cross-reference to Article 11.3.

40. Turning to context, the Appellate Body found no indication in Article 21.4 of the SCM Agreement that the drafters intended the obligations of Article 11 of the SCM Agreement to apply to Article 21.3 countervailing duty sunset reviews. Analogously, there is nothing in Article 11.4 of the AD Agreement that would indicate that the drafters intended the obligations of Article 5 of the SCM Agreement to apply to Article 11.3 antidumping duty sunset reviews.

41. Japan, in the alternative, contends that the negligibility standards of Article 5.8 are incorporated into Article 11.3 reviews via footnote 9 to Article 3. In *Corrosion-Resistant Steel from Germany*, the Appellate Body found that the text of Article 15 of the SCM Agreement, including its footnote 45, which is identical to footnote 9, does not support the conclusion that a *de minimis* subsidy is inherently non-injurious. Likewise, Article 3 and its footnote 9 do not make any reference to any

specific level of dumped imports, and neither do any of the other provisions in the AD Agreement. Moreover, the text of the AD Agreement as a whole provides no support for the view that a negligibility assessment is an interpretation of injury or that negligible imports are equivalent to no injury.

42. The Appellate Body also rejected the panel's conclusion that an interpretation that the same *de minimis* rate could be considered injurious in the original investigation stage but not at the sunset review stage would lead to irrational results, and observed that original investigations and sunset reviews are distinct processes with different purposes, and that this may explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.

43. The negligibility standard in Article 5.8 simply is an agreed rule that if imports are found to be negligible in an *original investigation*, authorities are obliged to terminate their investigation, with the result that no antidumping duty be imposed on such imports. Japan's argument that the Article 5.8 negligibility requirements are applicable to Article 11.3 sunset reviews should be rejected by the Panel.

44. Japan also contends that because the USITC does not make a quantitative negligibility assessment in sunset reviews, the USITC does not engage in any quantitative analysis in sunset reviews. Japan's contention is misplaced.

45. As an initial matter, in the context of this dispute, Japan has raised a challenge to the USITC's decision to cumulate Japanese imports with imports from other subject countries in the circumstances of its corrosion-resistant sunset review. Thus, any claims that Japan raises generally with respect to the conduct of sunset reviews by the USITC, or specifically with respect to the corrosion-resistant sunset review, that go beyond the decision to *cumulate* are simply outside the Panel's terms of reference and should not be substantively decided by this Panel.

46. Moreover, as a factual matter, Japan is incorrect that the USITC does not engage in any quantitative analysis in deciding whether to cumulatively assess the likely impact of dumped imports in sunset reviews. Under US law, the USITC "shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry." As the USITC explained in its determination, with respect to the "no discernible adverse impact" provision, it considers both "the likely *volume* of the subject imports and the likely impact of those imports on the domestic industry." In deciding that imports from Japan and other subject countries were likely to have "discernible adverse impact" on the domestic industry, the USITC discussed the volume of subject imports and cited to a table that identified the *quantity* of subject imports for the original investigation period and the years leading up to the sunset review. Thus, Japan's argument that the USITC does not consider import volume in determining whether to cumulate imports from various countries is without merit.

H. THE US CONDUCT AT ISSUE WAS CONSISTENT WITH THE OBLIGATION IN ARTICLE X:3(A) OF GATT 1994 TO ADMINISTER ITS LAWS IN A UNIFORM, IMPARTIAL, AND REASONABLE MANNER

47. The United States' actions in this case were consistent with GATT Article X:3(a) because Commerce and the USITC implemented *by its terms and provisions* the US sunset review regime.

48. The United States notes that, to the extent that Japan is complaining about laws, regulations, and rulings of general application, as contrasted with their administration, Japan's complaint is not properly founded in Article X:3(a). As shown in our first written submission, Article X:3(a) is limited to the administration of certain laws, regulations, judicial decisions and administrative rulings of general application, not to the laws, regulations, and administrative rulings themselves.

II. CONCLUSION

49. Based on the foregoing, the United States renews its request that the Panel reject Japan's claims in their entirety.