United States - Sunset Review Of Antidumping Duties
On Corrosion-Resistant Carbon Steel Flat Products From Japan
(WT/DS244)

Answers from the United States to Questions from the Panel
in connection with the
First Substantive Meeting of the Panel
11 December 2002

I. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS

Q1. The United States argues that certain US legal instruments cited by Japan are discretionary rather than mandatory and therefore cannot be challenged as such under the WTO Agreement. Please provide the Panel with detailed information regarding the legal status and interrelationships, if any, of the following instruments under US law, and in particular whether they are mandatory or discretionary. In particular, in light of the relevant WTO dispute settlement reports, the Panel would like to know whether each of these instruments have an operational life of their own under US law, and whether the DOC is *required* to follow their provisions in sunset reviews.

(i) Tariff Act of 1930 (as amended by the URAA)

1. The Tariff Act of 1930, as amended (the statute or "the Act") is U.S. law and, while the law is mandatory, there are provisions which are discretionary in nature. The U.S. Department of Commerce ("Commerce") is legally bound to ensure that the criteria set out in the statute are satisfied. Consequently, the statute has an operational life in its own right and is the operational basis for Commerce's activities in respect of antidumping measures.[1]

2. The language contained in the relevant provisions under examination indicates whether a particular provision is mandatory or discretionary (*e.g.*, by the use of "shall" or "will", and by the use of modifiers, such as "normally"). To the extent that there is no discretionary language contained in a particular provision, the provisions of the U.S. antidumping law are mandatory.

(ii) Statement of Administrative Action

3. A "Statement of Administrative Action" (or "SAA") is typically required when the Executive Branch of the U.S. Government submits legislation implementing a trade agreement to Congress that will be considered under so-called "fast-track" procedures.[2] Because the Uruguay

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[1] *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 29 June 2001 ("*US Export Restraints"*), para. 8.91.

[2] Under "fast-track" procedures, Congress may not amend the legislation in question; it may only approve or disapprove.

Round Agreements Act ("URAA") was submitted to Congress under "fast-track" procedures, an SAA was required. In the case of the SAA that accompanied the URAA, the function of the SAA is set forth in the SAA itself, as follows:

> This Statement describes significant administrative actions proposed to implement the Uruguay Round agreements. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Uruguay Round agreements.
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> As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.[3]

4. In other words, the SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates. It provides authoritative interpretative guidance in respect of the statute and, as a general proposition, the SAA ranks supreme in terms of legislative history.[4] The unique legal status granted to the SAA, however, is only in respect to its interpretive authority *vis à vis* the statute. Thus, the SAA operates only in conjunction with (and as an interpretive tool for) the U.S. antidumping statute, and cannot be independently challenged as WTO-inconsistent.[5]

(iii) Sunset Regulations

5. Commerce's regulations are U.S. law and, while the regulations are mandatory, there are provisions which are discretionary in nature. Commerce's regulations have force and effect of

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[3] SAA, page 656. The reference to "section 1103" is to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"). Among other things, the 1988 Act provided the Administration with fast-track negotiating authority with respect to the Uruguay Round.

[4] *See supra* note 1.

[5] *US Export Restraints*, paras. 8.98 - 8.100.

law and must be followed where the language of the specific provision leaves no discretion. The regulations, however, have many provisions which provide for the exercise of discretion by the applicable decision-maker. The regulations are issued in accordance with U.S. federal agency rule-making procedures and are accorded controlling weight by U.S. courts unless they are arbitrary, capricious, or manifestly contrary to the statute. Thus, the regulations have an independent operational life of their own.[6]

(iv) Sunset Review Policy Bulletin

6. Under U.S. law, the *Sunset Policy Bulletin* is considered a non-binding statement, providing evidence of Commerce's understanding of sunset-related issues not explicitly addressed by the statute and regulations.[7] In this regard, the *Sunset Policy Bulletin* has a legal status comparable to that of agency precedent. As with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.[8] The *Sunset Policy Bulletin* does nothing more than provide Commerce and the public with a guide as to how Commerce may interpret and apply the statute and its regulations in individual cases. Absent application in a particular case, and in conjunction with U.S. sunset laws and regulations, the *Sunset Policy Bulletin* does not "do something concrete" for which it could be subject to independent legal challenge under the WTO agreements.

Q2. Regarding US practice in sunset reviews, the Panel notes that previous panels have held that practice as such cannot be challenged under WTO law. In light of the findings in previous WTO dispute settlement reports on this issue, please indicate what constitutes US practice in sunset reviews, where it can be found and whether it is challengeable under WTO law.

7. Japan identified the SAA and the *Sunset Policy Bulletin* as the "practice and procedures" establishing the alleged "irrefutable presumption" in violation of Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").[9]

8. What Japan refers to as "practice" consists of nothing more than individual applications of the U.S. AD law in the context of sunset reviews. While Commerce, like many other administrative agencies in the United States, uses the term "practice" to refer collectively to its

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[6] *US Export Restraints*, paras. 8108 - 8.113.

[7] *Sunset Policy Bulletin*, 63 FR at 18871 ("This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.") (Emphasis added.) Exhibit JPN-6.

[8] As a matter of U.S. administrative law, Commerce practice cannot be binding in the sense that Commerce is not obliged to follow its own precedent so long as it explains departures from such precedent. Thus, as a matter of law, Commerce practice cannot transform a discretionary measure into a mandatory measure.

[9] Japan First Submission, paras. 118 *et seq*.

past precedent, that precedent is *not* binding on Commerce, and is, therefore, irrelevant for purposes of WTO dispute settlement. Japan's alleged "practice" simply consists of specific determinations in specific sunset proceedings. The sort of "practice" alleged by Japan does not constitute a measure within the meaning of the *Understanding on Rules and Proceudres Government the Settlement of Disputes* ("DSU"), and for that reason alone, the Panel should dismiss Japan's claims regarding U.S. "practice."

9. The Dispute Settlement Body ("DSB") (and the panels whose reports it adopts) has authority to issue binding determinations only with respect to particular parties in a dispute before it and only with respect to *that particular dispute*. It cannot – and should not – attempt to say how the WTO agreements might apply to possible future disputes. As the panel noted in *Export Restraints*, administrative agencies are free under U.S. law to depart from past "practice" if a reasoned explanation is given for doing so,[10] and U.S. "practice" therefore does not have "independent operational status" that can independently give rise to a WTO violation.[11]

10. The Appellate Body expressed similar views in *Wool Shirts*[12] and *U.S. Import Measures*[13] finding that panels are to resolve only the particular dispute before them. Nor would findings on possible future practice be wise. As noted by the panel in *EC Audiocassettes*,[14] "[I]t would [not] be appropriate to reach findings on a 'practice' *in abstracto* when [a panel] had determined that the actions taken in a particular investigation were not inconsistent with the Agreement and that the 'practice' was not pursuant to mandatory legislation."

11. More fundamentally, the "future practice" of a Member simply cannot be regarded as a "measure" subject to dispute settlement, because it is purely speculative. For that reason, the DSU applies only to measures "taken", not to measures "that may possibly be taken in the future."[15]

Q7. With respect to the Statement of Administrative Action:

(a) Does the language used in the third paragraph of the introductory section of the SAA indicate that the SAA is simply an authoritative interpretative guide on the meaning of the Statute?

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[10] *US Export Restraints,* para. 8.126.

[11] *See id*.

[12] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted May 23, 1997 ("*Wool Shirts*"), pages 19-20.

[13] *United States - Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, Report of the Appellate Body, adopted January 10, 2001 ("*U.S. Import Measures*"), para. 92.

[14] *EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan*, ADP/136, Report of the Panel, issued on April 28, 1995 (unadopted), para. 365.

[15] Articles 3.3 and 4.2 of the DSU; *see also U.S. Import Measures*, para. 70, where in finding that a particular measure was not within the panel's terms of reference, the Appellate Body considered, among other things, the fact that the measure had not yet been taken at the time the European Communities requested consultations.

12. Yes; under U.S. law, the SAA is considered an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round agreements and the antidumping statute in any judicial proceeding in which a question arises concerning such interpretation or application.[16]

(b) What is meant by the terms "particular authority" in the same introductory paragraph of the SAA?

13. "Particular authority" means that the SAA is entitled to more weight than ordinary legislative history, such as House or Senate reports, when interpreting an ambiguous statutory provision.

(c) If the text of the Statute itself were different from the SAA, would the SAA determine in any way the content of the Statute?

14. No. The text of the statute prevails always. As stated above, the SAA is merely the authoritative tool for interpreting the statute, but it cannot override or modify plain statutory provisions.

(d) Is the SAA only used as an interpretative guide in the event that the Statute is ambiguous, or is the SAA followed by the DOC, absent any statutory ambiguity? If so, is the DOC obliged to follow the SAA in either of the following senses:

(i) because the SAA has obligatory content; or

15. The SAA is used as an interpretive guide. Where there is no textual ambiguity in the relevant statutory provision, the plain text of the statute is applied. The SAA has no force of law and cannot stand on its own.

(ii) because the SAA articulates a binding policy from which DOC may not deviate without prior notice, which notice it has not given.

16. The SAA provides interpretative guidance with respect to the statute. It is not a statement of policy, binding or otherwise.

(e) In sunset reviews, does the DOC follow the provisions of the SAA as an authoritative interpretation of the Statute?

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[16] 19 U.S.C. §3512(d).

17. Commerce conducts its sunset reviews consistent with the applicable statutory provisions. In certain circumstances, the SAA provides additional guidance that complements the statutory provisions. As a matter of course, Commerce considers such guidance in making its sunset determinations.

(f) If the DOC were to depart from a particular provision of the SAA, what process would it need to follow and what authority would be needed? If the DOC departed from the SAA, could the DOC be successfully challenged under US law, or how would such a departure be viewed under US law, for example, in terms of legitimate expectations of interested parties?

18. The SAA does not contain "provisions" of law, is not binding, and does not create any obligations independent of those found in the antidumping statute. Thus, a party cannot have any expectations concerning the SAA because the obligations concerning sunset reviews are found in the statute, not in the SAA. Each determination made in every sunset review, including the ultimate decision concerning likelihood, stands on the facts in the administrative record presented in each sunset review. The standard of review applied by U.S. courts in reviewing Commerce's sunset determinations requires that the final determination be in accordance with law and supported by substantial evidence in the administrative record.

Q8. With respect to the US Sunset Regulation:

(b) Could the US please explain precisely what it means by the term "ministerial" in describing the reference to the "not likely" standard in the Sunset Regulations?

19. With respect to the regulations, the term "ministerial" means that the administering authority (the Secretary of Commerce) must perform some procedural act in accordance with the regulatory provision and that the regulatory provision contains no substantive obligations. A ministerial act is one which requires neither an exercise of discretion nor an agency's expertise to perform. For example, section 351.222(i)(1)(ii) provides that, when the Secretary has made a negative likelihood determination (the so-called "not likely" determination), the Secretary shall publish in the *Federal Register* the notice of revocation of the order not later than 240 days after initiation of the sunset review. Section 351.222(i)(1)(ii) merely sets forth the period of time within which Commerce is required to publish notice of the substantive determination already made.

(c) In respect of DOC Regulations 19 CFR 351.222(i) (Exhibit JPN-5), both parties are requested to indicate whether this regulation is mandatory or discretionary and why. Japan is invited to respond to the US contention that this regulation is not substantive in nature and deals with time periods, and in respect of sub-regulation (iii), is

unenforceable.

20. Section 351.222 does not contain any substantive obligations. Parts of section 351.222(i) are mandatory. In particular, the obligations contained in subparts (i)(1)(i) - (iii) are procedural and require Commerce to revoke an antidumping order within particular time limits in specific circumstances.

21. Specifically, Section 351.222(i)(1)(i) is mandatory and procedural, and requires that Commerce revoke an order if no domestic interested party files a notice of intent or the notice is inadequate, not later than 90 days after the date of publication in the *Federal Register* of the notice of initiation of the sunset review.

22. Section 351.222(ii)(1)(ii) is mandatory and procedural, and requires that Commerce revoke the order if Commerce makes a negative likelihood determination, not later than 240 days (or 330 days where the review is fully extended) after the date of publication in the *Federal Register* of the notice of initiation of the sunset review.

23. Section 351.222(iii) is also mandatory and procedural, and requires that Commerce revoke an antidumping order if the U.S. International Trade Commission ("USITC" or "Commission") makes a negative likelihood determination in a sunset review, not later than seven days after the date of publication in the *Federal Register* of the notice of USITC's determination concluding the sunset review. In addition, section 351.222(i)(1)(iii) could not impose any substantive obligation on the USITC because these are Commerce regulations and the USITC is an independent agency, with its own regulations, within the executive branch of the U.S. government. Commerce does not have the authority to promulgate regulatory obligations for the USITC.

(d) If there is a disagreement between the United States and Japan as to the proper interpretation of the Regulation or the legal status of the regulation in US law, how should the Panel resolve that interpretative issue? If the Panel is in doubt, does that simply mean that Japan failed to prove its case?

24. The text and context of section 351.222(i) of Commerce's Regulations make clear that this provision is procedural in nature and does not contain any substantive obligations. The section of Commerce's regulations encompassing section 351.222 was added in 1998 in order to implement the provisions of U.S. law governing sunset reviews. The regulatory provisions, including amendments to section 351.222, are procedural in nature and the *Federal Register* notice announcing these provisions is entitled "Procedures for Conducting ("Sunset") Reviews of

Antidumping and Countervailing Duty Orders."[17] Japan has not demonstrated that the United States' explanation as to its own regulation is incorrect or that Japan's reading of the provision is correct. If the Panel is in doubt, Japan has failed to prove its case.

25. It is an accepted principle that questions concerning the meaning of municipal law are questions of fact that must be proven.[18] Likewise, it is equally well-established that municipal law consists not only of the provisions being examined, but also domestic legal principles that govern the interpretation of those provisions.[19] While the Panel is not bound to accept the interpretation presented by the United States, the United States can reasonably expect that the Panel will give considerable deference to the United States' views on the meaning of its own law and regulations.[20]

Q9. With respect to the Sunset Policy Bulletin:

(a) What is the legal implication of the introductory words in Part 1 under the heading, "In general": "in accordance with Section 752 (c)(1) of the Act, in determining whether revocation of an anti-dumping order…"? Does the DOC act in accordance with the Statute, the SAA, the regulations, or the Bulletin, or some combination of these?

26. As previously discussed, the *Sunset Policy Bulletin* contains guidance regarding the conduct of sunset reviews. For the sake of transparency, Commerce used the *Sunset Policy Bulletin* to organize in one place the relevant provisions and guidance found in the statute, the regulations, and the legislative history. To this end, Section I.A.1 of the *Sunset Policy Bulletin*, entitled "In general", reproduces the relevant statutory provisions.

27. As discussed above, Commerce must act in accordance with the requirements of the statute and the regulations. The SAA merely provides interpretive guidance when acting in accordance with a statutory provision. Commerce also normally applies the methodologies outlined in the *Sunset Policy Bulletin*, but may act differently in any particular case provided it explains the reasons for the change.[21]

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[17] *Procedures for Conduction ("Sunset") Reviews of Antidumping and Countervailing Duty Orders*, 54 Fed. Reg. 13516 (March 20, 1998).

[18] *See, e.g.*, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, paras. 64, 73-74, and cases and authorities cited therein.

[19] *See, e.g., United States - Section 301-310 of the Trade Act of 1974,* WT/DS152/R, Report of the Panel, adopted 27 January 2000 ("*U.S. 301*"), para. 7.108 & n. 681.

[20] *U.S. 301*, para. 7.19.

[21] For example, Commerce has the discretion to make exceptions to its practice concerning the submission of information. *See e.g., Preliminary Results of Full Sunset Review; Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 753, 759 (January 6, 2000)(Commerce requested submission of factual information in case briefs).

(b) Under US law, is the DOC allowed not to follow the provisions of the Sunset Policy Bulletin in cases where it deems this necessary? Have there been cases of such departure?

28. The purpose of the *Sunset Policy Bulletin* is to set out, in as comprehensive terms as possible, guidance with respect to sunset reviews and Commerce's conduct of them, both in terms of the procedural and substantive issues that may arise. As a result, Commerce does not "follow" the provisions of the *Sunset Policy Bulletin*; rather Commerce assesses the facts in each case, in light of the statutory and regulatory provisions, and considering the guidance in the *Sunset Policy Bulletin* on methodological or analytical issues not expressly addressed by the statute or the regulations.

29. With respect to an analysis of the likelihood of dumping in a sunset review, Japan admits that Commerce's *Sunset Policy Bulletin* addresses the limited universe of practical scenarios that could arise in the period after imposition of the order - *i.e.* continued existence of dumping, no dumping but depressed import volumes, total cessation of exports, and no dumping and import volumes at or near pre-order levels. That these scenarios are provided for in the *Sunset Policy Bulletin* does not mean that the outcome is predetermined, even when the facts in a particular case fit one of the scenarios. The outcome in each case is determined on the facts of that particular case and must be supported by the evidence on the record of the sunset review at issue. Consequently, each Commerce sunset determination is made on the factual record in that case and, as a result, that final determination cannot be characterized necessarily as a determination either "in accordance with" or a "departure from" the provisions of the *Sunset Policy Bulletin*.[22]

(c) In light of the use of the phrase "not likely" in Section 4 of the Bulletin, is the DOC free to adopt a "likely" standard in its dumping determinations in sunset reviews? For the DOC to be able to depart from the provisions of the Bulletin in certain circumstances, is it necessary that the relevant provisions of the Bulletin be amended, or, does the Bulletin as it stands allow the DOC to depart from these rules without need for such an amendment?

30. First and foremost, Commerce applies the likelihood standard set forth in the antidumping statute. The use of the phrase "not likely" in the *Sunset Policy Bulletin* is not intended to and does not establish a substantive obligation for sunset reviews. It is a shorthand expression describing a negative sunset determination. The *Sunset Policy Bulletin* provides guidance for Commerce in conducting sunset reviews. It does not require Commerce to act in

[22] The U.S. Court of International Trade has held, "As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve." *Rhodia, Inc. v. United States*, Consol. Court No. 00-08-00407, Slip. Op. 2000-109 (CIT September 9, 2002) at 15; *see also*, *Zenith Electronics. Corporation v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996).

any particular manner, but rather describes how Commerce normally would analyze likelihood in a variety of factual situations.

(d) In cases where the DOC departs from the provisions of the Bulletin in a given sunset review, what protection would it have against an interested party which claims that it had a legitimate expectation based on the Policy Bulletin that the DOC would follow a certain course of action in that sunset review? Under US law, does the DOC have to inform interested parties in advance of its intent to depart from certain provisions of the Bulletin in a given sunset review and offer them an opportunity to comment?

31. The *Sunset Policy Bulletin* is a statement of policy and provides a framework for Commerce's conduct of sunset reviews. Commerce issued the *Sunset Policy Bulletin* in an attempt to be as transparent as possible with respect to Commerce's approach to sunset reviews. In an area in which the statute (not to mention the AD Agreement) provides authorities with extremely broad discretion, the United States considered it valuable to provide interested parties with guidance as to the approach Commerce likely would take under given circumstances. The alternative and clearly less desirable approach would be a less transparent system wherein the parties in a sunset review would have little or no idea how the administering authority would address issues raised in sunset reviews.

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

II. EVIDENTIARY STANDARDS FOR SELF-INITIATION OF SUNSET REVIEWS

Q10. Assume *arguendo* that Article 11.3 creates a presumption that an anti-dumping duty should be terminated after five years and that the initiation of a sunset review is an exception to that general presumption. Do you consider that automaticity of self-initiation under US law has the effect of undermining or reversing this presumption? Is there any situation in which the United States would allow the application of the general rule contained in Article 11.3 (i.e. permitting the duty to expire instead of self-initiating a sunset review)? More generally, is self-initiation mandatory under US law or does the DOC have the discretion not to self-initiate a sunset review?

33. Regardless of whether such a presumption exists, the plain text of Article 11.3 provides for initiation on the administering authority's own initiative. As the Appellate Body stated in

German Steel (in discussing the parallel sunset provision of the *Agreement on Subsidies and Countervailing Duties* ("SCM Agreement"), Article 21.3), "[T]he principle obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to *terminate* a countervailing duty *unless* a specific determination is made in a review."[23]

34. The United States self-initiates sunset reviews in every case pursuant to section 751(c)(2) of the Act.

Q11. Assume *arguendo* that the US domestic producers in a given sunset review informed the DOC before the initiation of the sunset review that they were not interested in proceeding with the review. Would that constitute sufficient grounds for the DOC not to self-initiate that particular sunset review or would it simply afford a basis not to proceed with a review?

35. If the U.S. domestic producers provided Commerce with written notice that the industry no longer had an interest in the maintenance of a particular antidumping duty order, Commerce would not initiate a sunset review and would revoke the order.

Q12. Article 11.3 refers to the reviews "initiated" by investigating authorities "on their own initiative".

(a) In the ordinary sense, does the word "initiate" or the phrase "to take an initiative", require that there be at least some reason to either choose to do or not to do something? Is this what the term "initiate" means in the context of Article 11.3 (i.e. not a standard of sufficient evidence but at least some sort of rationality standard by which you choose whether or not to initiate a sunset review)? If so, does US law comply with that proposition?

36. Article 11.3 only requires that the administering authority take the necessary steps to initiate the sunset review. Article 11.3 does not require that the administering authority have a reason for self-initiating the sunset review, nor is there any other evidentiary standard prescribed for the self-initiation of sunset reviews.[24]

(b) Is your reading of the word "initiation" in Article 11.3 purely a procedural one? Does "initiation" not have to have any substantive reason or requirement (no matter how thin)? If you believe that it is purely procedural, please explain why the drafters used the phrase "on their own initiative" in Article 11.3? Is this phrase also purely

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[23] *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, AB-2002-4, WT/DS213/AB/R, circulated 28 November 2002, para.108 (emphasis in original).

[24] *See German Steel*, para. 116.

procedural? If so, why was it necessary to put in those words? Does this phrase require the investigating authority to have a reason in order to initiate a review on its own initiative?

37. Initiation is a procedural act. The use of the phrase "on their own initiative" simply describes the self-initiation by the administering authority, in contrast to an initiation based on a duly motivated request from the domestic industry. Article 11.3 does not require the administering authority to have a reason to self-initiate a sunset review, nor is there any other evidentiary standard prescribed for the self-initiation of sunset reviews.[25]

(c) Does the word "initiate", as used in Article 11.3, mean the same thing as in footnote 1 of the Agreement? Does initiating a review mean the same thing as initiating an investigation?

38. No. The word "initiate" in footnote 1 only applies to investigations "as provided in Article 5." Initiating a sunset review under Article 11.3 does not mean the same thing as initiating an investigation under Article 5 because the standards for initiating these proceedings are different. For example, Article 11.3 contains no criteria for initiating a sunset review; an administering authority may only self-initiate an investigation under Article 5.6 if sufficient evidence of dumping, injury, and causal link exists.

39. The Appellate Body in *German Steel* stated, in discussing the Article 21.3 sunset provision and Article 11 investigations provision of the SCM Agreement, that "our review of the context of Article 21.3 of the SCM Agreement reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with evidentiary standards set forth in Article 11 of the SCM Agreement relating to initiation of investigations."[26] Similarly, there is no obligation in Article 11.3 of the AD Agreement to comply with the evidentiary requirements of Article 5 of the AD Agreement relating to investigations.

Q13. In paragraph 23 of Japan's oral statement, Japan states that "Article 11.3 first requires that the administering authority make a threshold decision as to whether to begin a sunset review". Indicate any textual or contextual support in Article 11.3 or elsewhere in the Agreement for the view that an investigating authority has to make a decision as to whether or not to initiate a sunset review. In your response, please comment on: (i) paragraph 7 of the EC third party oral statement (that the word "determine" in Article 11.3 indicates that the decision to initiate a sunset review requires that an evidentiary standard must be met); and (ii) paragraph 11 of Norway's third party oral statement (that under Article 11.3, it is

[25] *See German Steel*, para. 116.
[26] *German Steel*, para. 116, and discussion at paras. 114-115.

not simply a matter of analyzing whether continuation of the order is necessary, but also of determining whether "initiation" itself is necessary).

40. The only decision the administering authority need make is whether to self-initiate the sunset review. The word "determine" simply means that the administering authority must decide the issue of likelihood and that this determination must rest on a sufficient factual basis, namely on evaluation of the evidence that it has gathered during the original investigation, the intervening reviews, and the sunset review.[27] The drafters chose to provide an evidentiary standard in Article 11.3 for initiation of sunset reviews based upon a request from the domestic industry, but chose not to do so for cases of self-initiation by the administering authority.

41. To suggest that Article 11.3 requires a determination of whether initiation is "necessary" is counterintuitive because it presumes the outcome. In other words, in order to determine whether a sunset review is itself necessary, the administering authority would have to determine whether there was a likelihood of continuation or recurrence of dumping and injury. Article 11.3 does not require that the administering authority have a reason or reasons for its decision to self-initiate a sunset review.

III. DE MINIMIS STANDARD IN SUNSET REVIEWS

Q15. Article 11.9 of the *SCM Agreement* states that its *de minimis* standard applies "[f]or the purpose of this paragraph". This phrase is not, however, found in Article 5.8 of the *Anti-dumping Agreement*. How and to what extent is this relevant to determining whether or not the *de minimis* standard in Article 5.8 applies in AD sunset reviews?

42. The inclusion of the phrase for the purposes of this paragraph in Article 11.9 of the SCM Agreement is not relevant to the analysis under the AD Agreement. Article 5 is entitled "Initiation and Subsequent Investigation" and the *de minimis* standard for investigations is found in Article 5.8. There is no *de minimis* standard in Article 11 of the AD Agreement generally, and there is no *de minimis* standard in Article 11.3 of the AD Agreement specifically.

Q16. How do you respond to Brazil's argument in paragraph 13 of its oral statement that the application of two different *de minimis* standards under US law would give rise to inconsistent results whereby an exporter with a greater dumping margin would be able to escape the imposition of the original duty while another exporter with a dumping margin below *de minimis* could be subjected to the duty perpetually. Does that show that there is an internal inconsistency in the policy of the DOC or is there any other explanation?

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[27] *See German Steel*, para. 137.

43. Original investigation and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation. For example, in a sunset review, the administering authorities are called upon to focus their inquiry on what would happen if an existing antidumping duty were to be removed. In contrast, in an original investigation, the administering authorities must investigate the existence, degree, and effect of any alleged dumping in order ro determine whether dumping exists and whether such dumping is causing injury to the domestic industry so as to warrant the imposition of a duty in the first instance. As the Appellate Body in *German Steel* stated (discussing Article 21.3 of the SCM Agreement): "These qualitative differences may also explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review."[28]

44. The fact that the United States provided a *de minimis* standard for sunset reviews in its domestic legislation does not give rise to an obligation under Article 11.3 or the AD Agreement.

Q17. Would a reading of the *Anti-dumping Agreement* that imposed no *de minimis* standard in respect of sunset reviews lead to inconsistency that is repugnant to a coherent interpretation of the *Anti-dumping Agreement*? Why or why not?

45. No. The Members of the WTO agreed in the AD Agreement to *de minimis* standards for investigations and did not provide a *de minimis* standard for reviews. The purposes of an original investigation and a sunset review are different. The original investigation is to determine whether the discipline should be imposed in the first instance. The sunset review is to determine whether that discipline should continue. The analysis in an investigation is focused on whether there is dumping and injury presently; the present amount of dumping (*i.e.*, dumping during the period of investigation) is readily quantifiable. The analysis in a sunset review is necessarily forward-looking and predictive and is, therefore, inherently qualitative.[29]

IV. CUMULATION AND NEGLIGIBILITY IN SUNSET REVIEWS

Q22. What is the legal nature and role of the term "anti-dumping investigations" in the first sentence of Article 3.3 of the Agreement? Does it have the effect of limiting the scope of application of the provisions of Article 3.3 to investigations only? Please respond in detail, including, to the extent relevant, with reference to footnote 9 of Article 3 and the reference to "[a] determination of injury for the purposes of Article VI of GATT 1994" in Article 3.1. If Article 3.3 is only partially applicable to sunset reviews, then what are the specific elements of Article 3 (and Article 3.3) that apply?

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[28] *German Steel*, para. 89.
[29] *See id.*

46. As explained fully in the United States First Submission, the term "anti-dumping investigation" in the first sentence of Article 3.3 of the Agreement limits application of the requirements of Article 3.3 to original investigations only.

> Article 3.3 of the AD Agreement provides:
>
> Where imports of a product from more than one country are simultaneously subject to antidumping *investigations*, the investigating authority may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the *volume of imports from each country is not negligible* and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. (Emphasis added.)

47. On its face, Article 3.3 applies to investigations, not reviews. Indeed, Article 3.3 is the only provision in Article 3 that specifically refers to investigations. Moreover, Article 3.3, unlike Article 11, refers to the present ("*is* more than *de minimis"*; *"is* not negligible") (emphasis added). By contrast, Article 11 refers to "likely" or future events. Furthermore, Article 3.3 nowhere refers to Article 11.3 sunset reviews, or any other reviews under Article 11.

48. Quite simply, considering the ordinary meaning of the terms of Article 3.3, there is no support for the contention that Article 3.3 cumulation concepts apply beyond the context of an initial investigation.

49. Additionally, unlike other provisions in Article 3, Article 3.3 contains no reference to injury. Furthermore, negligibility and *de minimis* dumping standards contained in Article 3.3 are not referred to in defining injury in footnote 9 to Article 3. Indeed, the Appellate Body in *German Steel* recently concluded that injury is not defined with reference to the concept of subsidization, or by analogy dumping.

50. For a discussion of the legal significance of footnote 9 to Article 3, the United States refers the Panel to the Second Submission of the United States.

> **Q23. Why and in what way would an historical negligible import volume be relevant to the "determination" required to be made under Article 11.3? Please respond, in detail, in conjunction with Japan's allegations concerning the application of the negligibility standard in sunset reviews.**

51. As the United States has emphasized in its various submissions, the negligible imports criterion set forth in Article 3.3 of the Agreement does not apply in sunset reviews conducted pursuant to Article 11.3.

52. The sunset review now before the Panel involves an original investigation that was conducted prior to the effective date of the Uruguay Round agreements. Were a new investigation to be conducted now in 2002 and subject imports from Japan were negligible, the investigation would be terminated with respect to such goods. However, because Article 11.3 does not incorporate a negligibility criteria, there is no requirements that the order regarding imports from Japan be revoked on the basis of negligbility. Nonetheless, under U.S. law, the fact that imports from Japan are comparatively modest in volume would be a consideration under the discernible adverse impact analysis. In that analysis, the USITC evaluates whether imports from each country included in a sunset review are likely to have a discernible adverse impact on the domestic industry producing like products. If they do not, The USITC will not cumulate the impact of such imports in a sunset review with imports from other countries.

53. The United States has fully explained in its submissions that merely because import volume may have fallen below what would be the negligible threshold in an investigation following imposition of the orders, does not and should not result in the automatic termination of the review. Indeed, if Japan were correct that the authority is required to revoke an order based merely on the fact that current levels of imports may be considered negligible under Article 5.8, it would lead to a perverse result. The purpose of the antidumping duty order was to reduce injury caused by unfair acts in the market or to require adjustment of prices to eliminate dumping and injury. As a result of the order, dumped imports may have decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. Under Japan's argument, because certain imports cannot compete in the marketplace under the constraints of the order, *i.e.,* without dumping and are at low levels, the order should then be revoked so as to allow for dumping again.

V. BASIS FOR DETERMINATION OF DUMPING IN SUNSET REVIEWS (ORDER-WIDE OR COMPANY-SPECIFIC)

Q25. Article 11.4 of the *Anti-dumping Agreement* stipulates that "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under [Article 11]."

(a) How do you interpret the language "regarding evidence and procedure" in Article 11.4? Does this language simply repeat the content of Article 6? Why, in your view, did the drafters in some other instances only refer to the number of the particular provision that is cross-referenced, while in Article 11.4 they appear to mention at least some of the content of Article 6 in the cross-reference?

54. Article 11.4 of the AD Agreement stipulates that the Article 6 provisions "regarding evidence and procedure" shall apply to reviews under Article 11. Thus, not all of the provisions of Article 6 are applicable to Article 11 reviews; rather, only the provisions of Article 6 regarding

evidence and procedure are so applicable. This incorporation by reference was clearly intended to preclude reliance on Article 6 to mandate substantive criteria of decision in Article 11 reviews, precisely what Japan is urging on the Panel in this case.

(b) Do all provisions contained in Article 6 concern evidence and procedure? If not, which provisions of Article 6 do not fall within this category, and for what reason? What criteria may guide the Panel in distinguishing between evidentiary/procedural provisions and other provisions (if any) of Article 6?

55. Individual paragraphs in Article 6 may be comprised solely of evidentiary/procedural provisions or may be comprised of both substantive and evidentiary/procedural provisions. The key in determining whether there are substantive aspects to a paragraph in Article 6 is whether it includes or delimits the criteria that may be employed in the proceedings to which Article 6 applies. Thus, for example, Article 6.2 contains the substantive provision that, "failure to [attend a meeting] shall not be prejudicial to that party's case," and Article 6.5.2 provides that, under certain circumstances, "the authorities may disregard [certain] information."

(c) What are the textual and contextual considerations that would support or undermine the proposition that all provisions of Article 6 concern evidence and procedure? In this respect, in particular, what is the legal nature and role of the Title of Article 6 ("Evidence"), and the role of the reference in Article 6.14 to "procedures"? Is there negotiating history that would suggest that all provisions of Article 6 concern evidence and procedure, or that would suggest that certain of those provisions may not be evidentiary or procedural?

56. As indicated above, while all of the individual paragraphs in Article 6 have some evidentiary/procedural component, several of them also have a substantive component. What is of paramount importance is that substantive criteria may not be incorporated into Article 11.4 as a consequence of the reference there to Article 6. To the best of our knowledge, we are unaware of any negotiating history that illuminates this issue.

(d) Is there any interpretative guidance to be derived from the fact that Article 11 specifically refers to the provisions of Articles 6 and 8?

57. No. The language in Article 11 incorporating by reference Article 6 is substantially different from the language in Article 11 that incorporates Article 11 by reference into Article 8.

Q26. US states in paragraph 162 of its first written submission that US law requires that dumping determinations in sunset reviews be made on an order-wide basis. However, the United States also seems to submit, in paragraph 167 of its first written submission, that the dumping determinations in the instant sunset review

were made on a company-specific basis.

(a) How does the United States reconcile these two propositions?

58. Likelihood of dumping in the event of revocation was determined by Commerce in the instant sunset review on an order-wide basis. Margins likely to prevail in the event of revocation, however, were reported to the USITC on a company-specific basis for its consideration in making the likelihood of injury determination.

(b) Assume *arguendo* that the Agreement requires investigating authorities in sunset reviews to make their dumping determinations on a company-specific basis. Does the United States consider that DOC's reporting to the ITC the dumping margins calculated in the original investigation would suffice to fulfil that requirement?

59. As stated above, margins likely to prevail in the event of revocation were reported to the USITC on a company-specific basis.

(c) Do the dumping margins reported by the DOC to the ITC in the instant sunset review reflect the result of individual likelihood determinations carried out by the DOC with respect to each Japanese exporter during the course of the instant sunset review? Or, did the DOC carry out its likelihood determinations on an order-wide basis but nevertheless report the individual dumping margins to the ITC? Please cite the relevant portions of the record.

60. Reporting of dumping margins is purely a function of US law. There is no requirement to quantify dumping margins likely to prevail in a sunset review under the AD Agreement. As stated above, likelihood of dumping in the event of revocation was determined by Commerce in the instant sunset review on an order-wide basis. *See* Final Results of Sunset Review, 65 Fed. Reg. at 47381.

VI. DUMPING MARGINS IN SUNSET REVIEWS

Q27. What methodology formed the basis for the calculation of the dumping margins in the original investigations and in the subsequent administrative reviews? Please indicate the relevant portions of the record to substantiate your response. What is the legal basis in the Agreement that permits or precludes the use of such methodology(y)(ies), or that governs certain aspects of these methodologies, in a sunset review?

61. The only paragraph of the Agreement governing the criteria to be employed in sunset reviews is Article 11.3. That paragraph does not dictate the methodology or methodologies to be

employed in such reviews. Under the AD Agreement, the administering authority is not required to calculate a margin of dumping. The analysis is necessarily a qualitative, rather than quantitative, one.

62. In U.S. antidumping investigations initiated on the basis of petitions filed prior to the effective date of the URAA, Commerce's standard methodology was to make dumping comparisons between average foreign market values and individual U.S. transaction prices (*i.e.,* "average-to-transaction").[30] Under that methodology, no dumping duty – positive or negative – was computed for U.S. sales made at non-dumped prices.[31] The antidumping investigation in this case was initiated on the basis of a petition filed prior to the effective date of the URAA,[32] *i.e.*, prior to January 1, 1995 (which was also the date the WTO Agreement entered into force with respect to the United States). Commerce, therefore, utilized average-to-transaction comparisons in calculating the dumping margins for the final less-than-fair-value determination. In administrative reviews under the URAA, section 777A(d)(2) of the Tariff Act of 1930, as amended, requires that Commerce compare "export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product...."[33] Consequently, the margins determined in the two completed administrative reviews in this case were based on average-to-transaction comparisons.[34]

Q28. Article 18.3 of the Agreement states, in part:

> **"...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 the WTO Agreement. ...**
>
> > **18.3.2 For the purposes of paragraph 3 of Article 11, existing anti-dumping measures shall be deemed to be imposed on a date not later than the date of entry into**

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[30] *See* 19 C.F.R. 353.44 (1994).

[31] This practice was entirely consistent with the agreements in effect at that time. In *EC - Audio Tapes*, paras. 347 - 366, Japan challenged under Articles 2.1 and 2.6 of the Antidumping Code the average-to-transaction approach employed at that time by the EC on the grounds that it involved "zeroing." The *EC -Audio Tapes* panel rejected Japan's challenge, pointing out that the Antidumping Code permitted the collection of dumping duties with respect to each dumped transaction.

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

[33] 19 U.S.C. § 1677f-1

[34] *See Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 12951 (March 16, 1999)*; Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 8935 (February 23, 2000).

force for a Member of the WTO Agreement, except in cases in which the domestic legislation of a Member in force on that date already included a clause of the type provided for in that paragraph."

(a) Given that the original dumping margins are used by the DOC as a basis for the determination of likelihood of continuation or recurrence of dumping in US sunset reviews, on what legal basis does the United States argue that the provisions of the present Agreement are not applicable to the dumping component of this sunset review, but that the Agreement is applicable to other aspects of the review?

63. The United States disagrees with the premise of the question. The original dumping margins were not a basis for the determination of the likelihood of continuation or recurrence of dumping in the instant sunset review. Rather, Commerce found likelihood of continuation or recurrence of dumping based on the existence of dumping and the significant decline in imports of the subject merchandise after imposition of the order. Under Article 11.3, Commerce is not required to (1) conduct a new investigation, (2) quantify current or past dumping margins, or (3) apply any particular methodology to the consideration of dumping margins. Accordingly, and consistent with its obligations under the Agreement, Commerce in this case reasonably relied on evidence of dumping and import volumes over the life of the order.

VII. OBLIGATION TO DETERMINE LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

A. "Likely" and "Not Likely"

Q35. Pursuant to Article 11.3 of the *Anti-dumping Agreement*, any definitive anti-dumping duty shall be terminated not later than five years from its imposition unless the investigating authority determines that the expiry of the anti-dumping duty would be "likely" to lead to continuation or recurrence of dumping and injury in a review initiated before that date.

(a) Does the concept of "likely" or "likelihood", as it appears in Article 11.3, refer to a range of probability?

64. The term "likely" must be considered using the ordinary meaning of the term. As the dictionary definitions illustrate, the term "likely" has varying common meanings, including "plausible" as well as "probable." The negotiators purposely chose the word "likely" rather than "probable" or "range of probability." This deliberate choice of this term cannot be considered inadvertent. Whereas, the term "likely" refers to something within the realm of credibility or

plausibility,[35] the English term "probable" may have a connotation of a degree of mathematical certainty,[36] particularly when used in the phrase "range of probability."

65. Read in light of the object and purpose of Article 11.3, the term "likely" cannot be read to mean "a range of probability." In determining the likelihood of continuation or recurrence of dumping or injury, the authorities must engage in a counterfactual analysis – they must decide the likely impact in the future based on an important change in the status quo – the revocation of the order and the elimination of the restraining effects of the order. The goal of Article 11.3 is thus to set a framework for an evaluation that is inherently prospective and incapable of reduction to meaningful mathematical definition. This goal would be compromised if the term "would be likely" were remolded to require reduction to a mathematical number.

(b) On the basis of a probability scale from 0 to 100, do you agree with the proposition that "not likely" means between 0 and 50, whereas "likely" falls between 50 and 100?

66. No. For the reasons explained in the answer to question 35(a), whether something is likely to occur, particularly in the context of a sunset review, cannot be reduced to mathematical numbers.

(c) Does the word "likely" simply mean something that is more likely than not, and "unlikely", something that is less likely than not to occur?

67. No. The concept of "likely" as used in Article 11.3 does not contemplate a comparative analysis.

(d) Can there be any future event whose probability of happening can be classified as being neither "likely" nor "unlikely"? Can there be a future event whose probability of happening is both "likely" and "unlikely"? Do you agree with the proposition that if a state of affairs is judged to be likely, it cannot simultaneously be judged to be unlikely?

68. "Likely" must be considered using the ordinary meaning of the term and dictionary definitions. The term "likely" could have meanings ranging from the "possible" to the "probable." Thus, "likely" may mean something more than a mere possibility, but something less than a "probability." In other words, "likely" falls between "possible" and "probable" on a continuum of relative certainty.

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[35] *Webster's II New Riverside University Dictionary* (1994).
[36] S*ee id.*

Q36. Pursuant to Article 11.3 of the *Anti-dumping Agreement*, any definitive anti-dumping duty *shall be terminated* not later than five years from its imposition *unless* the investigating authority determines that the expiry of the anti-dumping duty would be "likely" to lead to continuation or recurrence of dumping and injury in a review initiated before that date, whereas the US Sunset Regulations state that the Secretary will *revoke* an order *only where* the Secretary determines that revocation is *not likely to* lead to continuation or recurrence of dumping. Does the United States agree with this characterization? Does the use of the unlikely standard to trigger revocation place a more onerous burden of proof upon exporters that is inconsistent with the requirements of Article 11.3?

69. No. The use of the term "not likely" in the regulations does not provide a substantive obligation. It is a reference to a negative likelihood determination. As discussed above, the regulations using the term "not likely" are procedural in nature and the references to the negative likelihood determination are to denote when the time line for publication of the revocation notice begins to run and when it ends in accordance with the regulations. The antidumping statute, at section 751(c)(1), provides the substantive obligation in sunset reviews and states that Commerce shall conduct a sunset review to determine whether revocation of the order "would be likely to lead to continuation or recurrence of dumping."

Q37. In what sense do the United States Sunset Regulations and the Policy Bulletin use the terms "not likely" while the statute uses the term "likely"? On the basis of the legal relationship under US law between the statute and the regulation, how does the DOC apply both of these standards?

70. In both the regulations and the *Sunset Policy Bulletin*, the term"not likely" is used in the context of a sunset determination to refer to a negative likelihood determination. Neither the regulations nor the *Sunset Policy Bulletin* use the term "not likely" to set out any standard to be used in making sunset determinations. The likelihood standard for sunset reviews is found in the antidumping statute at section 751(c)(1). As such, there is no conflict between the likelihood standard as set out in the statute and the term"not likely" as used in the regulations and the *Sunset Policy Bulletin* when referencing a negative likelihood determination.

Q40. Article 11.3 requires that any definitive anti-dumping duty shall be terminated not later than five years from its imposition unless the investigating authority "determines" that the expiry of the anti-dumping duty would be likely to lead to continuation or recurrence of dumping and injury in a review initiated before that date. What is the meaning and content of the word "determine" in Article 11.3? Which, if any, obligations does it cast upon an investigating authority in a sunset review? More specifically, does it carry with it any obligations on the part of the authority investigating authority as to what steps it needs to take to inform itself in order to make a determination?

71. The meaning given to the word "determine" in Article 11.3 is its ordinary meaning - "to decide" something. In the context of Article 11.3, the administering authority must decide whether there is a likelihood of continuation or recurrence of dumping and injury if the duty were removed. The only obligation is that there must be sufficient evidence in the record to support the administering authority's decision.

Q41. In paragraphs 34 and 35 of its oral submission, Japan argues that an investigating authority in a sunset review should consider certain additional positive evidence to carry out a prospective analysis. Which "other factors" should or must an investigating authority consider beyond historical facts? Where in the Agreement do you find the legal basis for your view?

72. The analysis conducted in a sunset review must perforce be forward-looking because the purpose of an 11.3 review is to predict the future behavior of exporters subject to an antidumping duty if the discipline of the order were removed. Thus, consideration of factors which served to advance this predictive analysis may be relevant to the inquiry. Other factors which may be considered are cost, price, market or economic data that the administering authority deems relevant to the likelihood inquiry.

Q49. The United States addresses, in paragraph 25 of its oral statement, its view of the qualitative nature of DOC's determination of likelihood of continuation or recurrence of dumping in sunset reviews.

(a) Does the United States view the likelihood analysis concerning the dumping component in a sunset review as solely a qualitative -- as opposed to a quantitative -- one? If the US views this as solely qualitative, how does it make the distinction between "likely" and "not likely"?

73. The analysis in a sunset review is inherently a qualitative one - whether there is a likelihood of continuation or recurrence of dumping in the future. The amount or magnitude of dumping is not material to the issue of whether dumping will continue or recur in the absence of the discipline. As the Appellate Body concluded in *German Steel*, there is no *de minimis* requirement in the context of a sunset reviews.[37] There is then no necessity to quantify the margin of dumping for this reason, and Article 11.3 contains no language to indicate that quantification of the margin of dumping is necessary for any other reason. Article 11.3 only requires a determination as to whether dumping is likely to continue or recur, not a determination that dumping is likely to continue or recur at a particular level, in order to make an affirmative likelihood determination.

[37] *German Steel*, para. 92.

74. Regarding whether "likelihood," as that term is used in Article 11.3, is based on probabilistic concepts, the United States has pointed out the distinction between the notions of likelihood and probability. Moreover, even if the Panel were to find probabilistic concepts to be built into "likelihood," this would not imply any obligation to quantify a precise level of dumping for purposes of sunset reviews. Indeed, it would not even imply an obligation to quantify precise probabilities for such purposes. The United States is unaware of efforts by any Member to quantify precise probabilities in the context of sunset likelihood determinations.

(b) If so, how does the United States reconcile this view with the phrase "to the extent necessary" in Article 11.1 of the *Anti-dumping Agreement*, which might be taken to require that some sort of quantitative criterion must apply to the determination of the likelihood of dumping?

75. There is no obligation in Article 11.1 to quantify the level of dumping when making a determination whether an antidumping duty should remain in force. Article 11.1 merely sets forth the general obligation that, after the imposition of the antidumping duty, the continued application of that duty is subject to certain disciplines. The general rule of Article 11.1 underlines the requirement for the periodic review of dumping duties and highlights the factors that must inform such reviews.[38] Like Article 11.1, Article 11.3 does not contain any substantive obligation to make a determination on a quantitative basis. Rather, Article 11.3 requires that the administering authority make a determination based on the likelihood of future dumping, an inherently predictive and qualitative analysis.

(c) How does the United States reconcile its qualitative view with its use of quantitative factors such as changes in import volumes and the existence of dumping margins?

76. Commerce uses the *existence* of dumping margins in making its qualitative analysis, but does not consider the *magnitude* of the margins in making that analysis. The focus of Commerce's qualitative analysis is on factors that indicate whether it is likely dumping will continue or recur in the future. The main elements in Commerce's analysis of past behavior - whether dumping exists or exporters are able to ship at pre-order quantities - are highly probative indicators of an exporters' future behavior. These indicators are qualitative in nature.

77. Commerce does impose its own *de minimis* standard in sunset reviews, but this *de minimis* standard is not imposed pursuant to any international obligation. The present magnitude of the dumping is not material as to whether dumping will continue or recur in the future. Article 11.3 provides that the administering authorities must determine whether dumping is likely to continue or recur. A present margin of dumping at zero is not necessarily dispositive of whether

[38] *See German Steel*, para. 70.

dumping will recur. Indeed, the AD Agreement recognizes this fact by virtue of footnote 22.

78. Import volumes are important because they can be probative of the ability of an exporter to sell with the discipline of an order in place and the effect that order may have on future behavior. If an exporter cannot sell in the United States at pre-order volumes with an order in place, even if the exporter is not dumping, this fact may indicate that the exporter cannot sell at the pre-order volumes without dumping if the discipline were removed. The magnitude of the changes in the import volumes is not the focus of Commerce's analysis, rather it is the fact that the volumes have decreased significantly and remained at the depressed levels since the imposition of the duty. In other words, the absence of dumping may be possible only because the import volumes are small, and thus import volumes may be expected to increase to pre-order levels after the order is revoked.

(d) The United States also points out that, in its view, the existence of present dumping is highly probative of the fact that it will continue. Could the United States identify and explain the qualitative factors, if any, that the DOC considers in its dumping determinations in sunset reviews?

79. Commerce primarily relies on evidence of the existence of dumping in the period prior to the sunset review and the effects that the order has had on import levels since the imposition of the order. Where probative and where "good cause" is shown, production capacity, market and cost factors, and other economic data are also considered. Commerce may also consider other evidence that would be relevant to its likelihood determination, such as public announcements by exporters of future plans.

80. An exporter is the only party that can shed light on what the exporter believes will be its pricing behavior in the future, because only the exporter is in possession of the knowledge of its future plans. If the exporter is dumping with the discipline of an order in place, only the exporter can explain how this behavior would change if the order were removed. The exporter may submit any evidence in a sunset review it believes demonstrates whether dumping by that exporter is likely to continue or recur.

(e) The Panel notes that changes in import volumes are a factor used by DOC to make its determination of likelihood of continuation or recurrence of dumping. Does DOC consider that it is carrying out an analysis of the likelihood of dumped imports or the likelihood of dumping, or both, and what are the reasons for this view? Does DOC agree that the likelihood of dumping in a sunset review is governed generally by Article 2, which involves a quantitative assessment of the difference between export price and normal value? If so, how does it reconcile this with the view - if that is DOC's view-- that the Article 11.3 assessment of likelihood is a qualitative assessment?

81. Commerce is analyzing whether dumping is likely to continue or recur in the absence of the discipline. An analysis of the likelihood of dumping under Article 11.3 does not require a determination of the magnitude of the margin of dumping because the amount of dumping is not relevant to the issue of whether dumping will continue or recur if the discipline is removed. In other words, the issue in an Article 11.3 sunset review is not *how much* the exporters may dump in the future, but simply *whether* they will dump in the future if the order were to be revoked. Given that there is no obligation under Article 11.3 to calculate a margin of dumping, the provisions of Article 2 relevant to the calculation of a margin of dumping are not applicable to sunset reviews.

(f) Please clarify whether this view concerning the nature of the determination concerns the dumping component of a sunset review only, or, does it also apply to the injury component in sunset reviews?

82. The likelihood analysis required by Article 11.3 of the AD Agreement is essentially a qualitative analysis, given the prospective and predictive nature of the inquiry. Although the likelihood analysis is a qualitative one, it is not devoid of certain quantitative elements. Under Article 11.3, the investigating authority must determine the likelihood of the continuation or recurrence of material injury if the orders are revoked, which requires the assessment of likely volume, price effects as well as relevant industry factors. In so doing, the authority considers statistical information on such factors as import volumes, price effects, and financial indicators for the domestic industry prior to and after imposition of the orders.

Q50. In paragraph 42 of its oral statement, Japan argues that in the instant sunset review the Japanese respondents were effectively given only 15 days to submit their substantive responses. How does the United States respond to this assertion?

83. On May 14, 1998, Commerce published in the *Federal Register* the final schedule for sunset reviews of "Transition Orders," or orders which pre-dated the WTO Agreement.[39] This notice indicated the sunset review of corrosion-resistant steel from Japan was scheduled to be initiated in September 1999. Subsequently, Commerce sent pre-initiation letters to all parties on record who had participated in prior proceedings concerning corrosion-resistant steel from Japan in order to provide advance notice of the initiation of the sunset review. Thus, Japan and Japanese producers, including NSC, knew over 15 months prior to the scheduled date for initiation when the sunset review on corrosion-resistant steel from Japan was to be initiated.

84. Japan's claim in its oral statement that it only had 15 days "after it knew" that it was required to file a substantive response is incorrect. The Japanese exporters knew they would have to file a substantive response when Commerce published its schedule of sunset reviews 15 months before initiation of the instant review. Japan claims that it did not know until day 15

[39] *Sunset Initiation Schedule*, 63 FR 29372. Exhibit JPN-18.

because that is when the U.S. domestic industry filed its notice of intent to participate. Thus, it appears that the Japanese exporters gambled on the participation of the U.S. domestic industry to determine whether they would prepare a substantive response. Nothing in Commerce's regulations required the Japanese exporters to wait until the U.S. producers filed their notice of intent. The obligation of the Japanese exporters under Commerce's regulations to file a substantive response in the instant review arose not later than the date Commerce initiated the sunset review. The Japanese exporters' failure to prepare their substantive response until day 15 after initiation was each individual company's choice.

Q51. Please indicate the rules regarding deadlines for the submission of information in a sunset review under US law, and explain whether NSC complied with those deadlines in the instant sunset review.

85. The procedural deadlines for sunset reviews are found in Commerce's regulations at sections 351.218, 351.309, and 351.310. NSC submitted their substantive and rebuttal responses, as well as their case and rebuttal briefs in a timely manner. In the instant sunset review, NSC requested an extension for submission of its case brief and Commerce granted extensions for all parties' case and rebuttal briefs.

Q52. Under US law, does the notice of intent to be filed by domestic producers in sunset reviews contain any substantive argumentation in relation to dumping, or does it only contain the intent of domestic producers? If the latter, when during the sunset review do the domestic producers have to submit their substantive submissions to the DOC?

86. Section 351.218(d)(1)(ii) of Commerce's regulations contains the requirements for a notice of intent from domestic interested parties. Both domestic interested parties and respondent interested parties must submit their substantive submissions on day 30 after initiation in accordance with section 351.218(d)(3)(i) of Commerce's regulations.

Q53. Under US law, if an interested party in a sunset review wants to submit additional substantive information in addition to the information submitted in its substantive response to the questionnaire, does it have to show "good cause" before those issues are to be considered?

87. Commerce's regulations at section 351.218(d)(3)(iv)(B) provide parties the opportunity to submit any information they wish for the Secretary to consider in the sunset review. The statute at section 752(c)(2) and Commerce's regulations at section 351.218(d)(3)(iv) require a demonstration of "good cause" by the party submitting the information concerning "other factors" before DOC considers such information in a sunset review.

Q54. Is the Panel correct in understanding that, generally under US law and also in the instant sunset review, both domestic producers and the Japanese respondents

submitted simultaneously their substantive submissions on day 30 of the sunset review and that none of these interested parties had the opportunity to comment on substantive issues after that date in the absence of "good cause"?

88. The Panel's understanding is not correct. After the filing of substantive responses by day 30, parties may subsequently submit substantive rebuttal comments by day 35. Both the U.S. domestic producers and NSC did so in the instant review. In addition, parties may submit case briefs and rebuttal briefs to comment on any and all issues raised during the sunset review, and may request a public hearing. NSC and the domestic producers submitted case and rebuttal briefs in the instant review. Finally, Commerce's regulations at section 351.302 provide that a party may request an extension of any deadline.

Q55. In your view, is it reasonable to expect an interested party to be aware of all substantive issues that may affect the outcome of the sunset review within the first 30 days of a sunset review and in the absence of knowing what the domestic producers might present to the DOC so that they can submit relevant substantive information to the DOC?

89. The statute, Commerce's sunset regulations, and the *Sunset Policy Bulletin* are all public, published documents. These documents contain all of the information parties need to know with respect to Commerce's conduct of a sunset review and the substantive issues that may affect the outcome of a sunset review. In addition, interested parties have an opportunity to rebut submissions filed by other parties. Moreover, Commerce's regulations provide for extension of any deadline upon request.[40]

Q56. Considering the length of time of a sunset review and the prospective nature of the analysis that it may involve, is it possible that during the review certain issues may arise that can be relevant to the DOC's likelihood determinations regarding dumping? In such cases, under US law, do the interested parties have to show good cause so that those issues are taken into account by the DOC or will the DOC take these events into account on its own initiative?

90. Yes, it possible that during a sunset review certain issues may arise that can be relevant to the Commerce's likelihood determinations regarding dumping. Generally, a party must demonstrate "good cause" before issues or information regarding other price, cost, market or economic factors are considered. "Good cause," however, can be demonstrated by a showing that the issue is "relevant to Commerce's likelihood determinations." In addition, Commerce may consider issues and information it has determined are relevant to the sunset review without a demonstration of "good cause" from an interested party. Whether Commerce will consider an issue or information is dependent on the facts in each case.

[40] *See* section 351.302 of Commerce's regulations.

Q57. Article 6.2 of the *Anti-dumping Agreement* requires that: "*Throughout* the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests" (emphasis added).

(a) Does Article 6.2 of the Agreement apply to sunset reviews, in light of the cross-reference to Article 6 in Article 11.4?

91. Yes.

(b) Assume *arguendo* that Article 6.2 applies to sunset reviews. The Panel understands that, under US law, substantive responses to the questionnaires in a sunset review need to be submitted within the first 30 days of the review. Given that the duration of a full sunset review is much longer than that, does this approach comply with Article 6.2 of the Agreement?

92. Article 6.1.1 requires that parties be given 30 days to respond to a questionnaire. DOC has published its "questionnaire" in the regulations at section 351.218 generally and provides the full 30 days for response to this questionnaire in accordance with Article 6.1.1. DOC's regulations also provide that parties, in addition to their substantive responses, may submit substantive rebuttal responses, case briefs, rebuttal briefs, and request a public hearing. In addition, parties may request an extension of any deadline.[41]

Q58. With respect to the legal nature and content of the "good cause" standard applied by the United States in sunset reviews:

(a) In which US legal instrument(s) is this standard contained? How and to what extent is it a mandatory or discretionary standard?

93. The "good cause" standard is contained in the statute at section 752(c)(2) and DOC's regulations at section 351.218(d)(3)(iv). The standard is both mandatory and discretionary in nature. The statute provides that Commerce is required to consider "other factors", such as other price, cost market, or other conditions, where "good cause is shown." The statute also provides that Commerce will determine when "good cause" exists or the other factors are relevant to the likelihood determination. Thus, while the statute makes it mandatory for Commerce to consider other factors where good cause is shown, it leaves to Commerce's discretion to determine whether "good cause" has been demonstrated in the first instance.

(b) Please explain the concept of "good cause" and how it may be shown in practice under US law. Refer to any relevant legal instruments on

[41] *See* section 351.302 of Commerce's regulations.

this issue.

94. Pursuant to section 752(c)(2) of the Act, "good cause" is a threshold requirement that a party must meet for Commerce to consider other factors in making the likelihood determination. The statute leaves the determination of whether "good cause" has been shown to the discretion of Commerce. In sunset reviews, Commerce determines "good cause" on a case-by-case basis. The "other factors" information must be directed to or explain how the elements that Commerce "normally" considers in a sunset review (existence of dumping and depressed import levels) may not be dispositive in a particular case.

95. For example, in *Sugar & Syrups from Canada*,[42] Commerce initially determined that the U.S. domestic industry had failed to demonstrate "good cause" for Commerce to consider a pricing issue in the sunset review. Commerce reconsidered and found "good cause" to examine the issue because both the U.S. domestic industry and the Canadian exporter argued convincingly that the issue of current market pricing and costs for the subject merchandise was relevant to the issue of the likelihood of future dumping. Also, in *Brass Sheet & Strip from the Netherlands*,[43] Commerce determined that "good cause" was shown because the exporter argued convincingly that information concerning its position in the U.S. market was unique and could serve to explain why the exporter did not have pre-order levels of imports since imposition of the order. Thus, Commerce determines that "good cause" exists where a party can demonstrate that the information submitted addresses or explains that the existence of dumping or depressed import levels are not necessarily dispositive of the issue of likelihood of continuation or recurrence of dumping.

(c) Is the Panel correct in considering that the requirement of good cause under US law is not a standard that applies independently? Rather, the primary standard is the determination of likelihood of continuation or recurrence of dumping, on the basis of past dumping margins and import volumes, and the "good cause" standard is an additional limited or conditional standard which applies only in relation to secondary considerations of possible "other factors" that might be relevant to this primary determination?

96. Yes; the requirement of good cause contained in section 752(c)(2) is not a standard that applies independently. Rather, any showing of "good cause" for consideration of other factors in a sunset review must be directed to the elements Commerce considers highly probative to making the likelihood determination, namely the existence of dumping margins and depressed import levels.

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[42] 64 Fed. Reg. 48362 (September 3, 1999). Exhibit JPN 25(m).
[43] 65 Fed. Reg. 735 (January 6, 2000). Exhibit JPN-25(l).

(d) How does the US respond to Japan's argument that the requirement of good cause effectively limits the interested parties' ability to fully defend their interests in sunset reviews?

97. As fully discussed in the *Sunset Policy Bulletin*, Commerce normally will make its likelihood determination based on the existence of dumping margins and depressed import volumes. The "good cause" standard simply requires parties to make a threshold showing that their submissions concerning "other factors" are likely necessary for and relevant to Commerce's reasoned consideration of the likelihood issue, given the statutory elements Commerce considers. Consequently, although parties may submit any information they wish, consideration of the "other factors" information is required only to the extent the information is relevant to an explanation that the existence of dumping or depressed import volumes is not indicative of the likelihood of continuation or recurrence of dumping.

(e) Subsection 2 of section 1675(c) of the US Statute, under the heading "consideration of other factors" states that if good cause is shown the investigating authority shall also consider other factors as it deems relevant. Do you think this language is restrictive in the sense that it does not comport with the requirement to "determine" in Article 11.3 because it requires that good cause must be shown to take into account those other matters and because it may create an artificial constraint on the consideration of other factors that might have a bearing on the determination of likelihood?

98. Neither Article 11.3, nor any other provision of the AD Agreement provides the factors that an administering authority must consider in making the likelihood determination. Nevertheless, if the "other factors" have a bearing on the likelihood determination, *i.e.*, they are likely necessary for a reasoned consideration of the likelihood issue, then "good cause" will have been shown and the information will be considered.

(f) Why does the US law contain a threshold requirement of "good cause" to entertain certain factors which in certain circumstances on their faces may appear to be relevant without showing good cause?

99. Neither Article 11.3, nor any other provision of the AD Agreement provides the factors to be considered in making a likelihood determination. The "good cause " requirement is intended to limit consideration of "other factors" to those cases wherein it is determined that the factors are relevant to the likelihood determination.

Q59. What was the nature and content of the additional information provided by NSC in its 11 May 2000 case brief? Did NSC present arguments in support of the DOC accepting that information under the "good cause" standard? If so, what was the nature of these arguments?

100. NSC attempted to explain the depressed import levels of the subject merchandise since the imposition of the order by asserting that the existence of the reduced levels was not a material factor for consideration in Commerce's likelihood determination. NSC explained that it had a steady U.S. customer base and had a controlling interest in a U.S. galvanizing company which made the subject merchandise. NSC argued that this U.S. subsidiary would be servicing the U.S. customers of NSC and that NSC would not need to increase its imports in the event the order were revoked.

101. NSC submitted the information and the argument for the first time in its rebuttal case brief. NSC did not provide any arguments in support of consideration of this information under the "good cause" standard either at the time the information was submitted or later. NSC also did not request an extension of time for submission of the information at that time or later. In addition, NSC neither explained why this information and argument were being submitted at such a late point in the sunset review, nor how this information would counteract the fact that NSC continued to dump after the imposition of the order.

Q60. The Final Sunset Determination in the instant sunset review indicates that the additional information submitted by NSC on 11 May 2000 would not change the DOC's ultimate conclusion regarding the likelihood of continuation. Why and how did the DOC extend its determination to encompass consideration of the "even if" scenario, considering that the good cause criterion was already in place under US law and assuming that the DOC was relying upon that criterion? What weight, if any, should the Panel attach to this "even if" proposition?

102. Commerce made the determination that, even had the information been considered, it would not have affected the final affirmative sunset determination. This alternative determination was made to address any potential adverse decision by a reviewing court or panel stating that Commerce should have accepted this information and considered it for the final sunset determination. Were a reviewing court or panel to find that Commerce's determination to reject the information was not in accordance with law or supported by substantial evidence, Commerce has already indicated the determination it would make on remand after consideration of the information, and the reviewing court or panel should consider the alternative determination as Commerce's determination.

Q61. Once the DOC decided that it was not going to accept the information supplied by NSC in its case brief on 11 May 2000, when and how did the DOC inform NSC of that fact?

103. Commerce informed NSC in the Final Sunset Determination and the accompanying Decision Memorandum issued on July 27, 2000, and published in the *Federal Register* on August 2, 2000.

Q62. What was the legal basis for the DOC to decline to consider the additional

information submitted by NSC on 11 May 2000?

(a) Did the DOC refuse to consider that information because NSC missed the deadline? Or, is the Panel to understand that although the deadline for the submission of such information was missed, the DOC nevertheless applied the good cause standard to this information and found that good cause did not exist?

104. In the Final Decision Memorandum, Commerce determined that NSC did not submit evidence of "good cause" in its substantive response as required by section 351.218(d)(3)(iv) of Commerce's regulations. In fact, NSC did not make any arguments at any time in support of the submission of the information during the sunset review. As a consequence, Commerce determined that "good cause" did not exist to examine NSC's other factors.

(b) Was the DOC required to explain *why* the submission was out of time (i.e. rather than simply that it was out of time)? If so, on what legal basis?

105. Yes; Commerce explained in the Final Decision Memorandum that NSC failed to provide the relevant information in its substantive response, as required by Commerce's regulations.

(c) Is there a possibility under US law for the DOC to accept additional information beyond Day 30 of a sunset review? If so, please cite to the relevant legal instrument.

106. Yes; parties may request an extension of any deadline contained in Commerce's regulations.[44] For example, in the instant review, NSC requested an extension of the deadline for submission of the case briefs on May 5, 2000. Commerce granted the request and extended the deadlines for both the case and the rebuttal briefs.

107. Furthermore, section 351.301 of Commerce's Regulations provides that Commerce can request information at any time during an administrative proceeding, including a sunset review.

(d) Do you agree with the proposition that there is a difference between deciding that a particular piece of information is not relevant to the determination of continuation, and deciding that the information is relevant to the determination, but that the information is not determinative of the outcome of the determination?

108. Yes.

[44] *See* section 351.302 of Commerce's Regulations.

(e) Do you agree that although an investigating authority may believe that the information submitted cannot outweigh the evidence before the authority, this does not determine the relevance of that information?

109. Yes.

(f) Do you agree that by relating the good cause requirement to the timeliness of the substantive submission the DOC effectively may make determinations that do not take into account certain facts that may be relevant to the sunset review?

110. In this case, NSC first submitted its information and argument concerning "other factors" in its case rebuttal brief. Section 351.218(d)(3)(iv) of Commerce's regulations require that such information and argument must be provided in a party's substantive response. NSC did not do so. In any event, the question of whether timeliness precluded consideration of NSC's other factors is moot in this case because NSC failed to request an extension of time or to make any arguments concerning "good cause" during the sunset review.

111. It is possible that Commerce could make a sunset determination without consideration of certain relevant facts because the party submitting the certain facts did so in an untimely fashion. Nevertheless, as a practical matter, administering authorities must be able to establish and enforce deadlines if they are to finish sunset reviews in accordance with the obligations of the AD Agreement. Under U.S. law and regulations, interested parties have all the opportunities to defend their interests required by the obligations of the AD Agreement. In addition, section 351.302 of Commerce's regulations provides that a party may request an extension of any deadline and section 351.301 of Commerce's regulations provides that Commerce may request information at any time during an administrative proceeding.

(g) Suppose that in a given sunset review the DOC considered that a particular piece of information would be relevant to its determinations but that information was submitted in an untimely manner. Would the DOC be obliged to decline to consider that information under US law, or, would it have the discretion to still use it?

112. Section 351.302 of Commerce's regulations provides that Commerce has the discretion to waive or extend any of its procedural regulatory deadlines. Section 351.302(c) provides that a party may request an extension of a specific time limit and section 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations.

(h) If there are certain cases in which the DOC considered information

although it was submitted after the deadline could you please provide copies of the relevant documents that show that the DOC did so?

113. In general, Commerce may accept submissions after regulatory deadlines in administrative proceedings and has done so. For example, in the antidumping investigation of *Certain Hot-Rolled Carbon Steel from Ukraine* (66 Fed. Reg. 50401, October 3, 2001), Commerce accepted additional factual information from an exporter which was submitted three days after the deadline established by Commerce for submitting a response to a supplemental questionnaire. Commerce allowed this information on the record because Commerce did not believe it to be unreasonable to consider in light of the deadline for completing the investigation.

114. In the antidumping investigation of *Certain Hot-Rolled Carbon Steel from South Africa* (66 Fed Reg. 37002, 37004, July 16, 2001), the majority of an exporter's questionnaire responses were submitted after the applicable deadlines. In that case, Commerce received the exporter's submissions anywhere from one to eighteen days late. These responses and accompanying data were similarly served late on other parties to the proceeding. Nonetheless, on numerous occasions, Commerce accepted such submissions and allowed the exporter to correct the deficiencies in its questionnaire responses.

115. In the instant sunset review, NSC submitted information more than seven months after the deadline, unlike the cases cited above where the submitters were days or weeks untimely. In addition, NSC had 15 months to prepare their substantive response, including the untimely submitted information.

Q63. By refusing to consider the information submitted by NSC on 11 May 2000, did the DOC effectively resort to "facts available" within the meaning of Article 6.8 of the Agreement? If so, did the DOC take into account the provisions of 6.8 and those of Annex II to the Agreement?

116. No, Commerce did not resort to "facts available" because Commerce had all the information on the record necessary to make the final sunset determination.

Q64. The Panel notes that the United States has referred to the 30-day requirement as being consistent with Article 6.1.1 of the *Anti-dumping Agreement.* Please explain the similarities and differences, if any, as to requirements for the submission of information in US sunset reviews, administrative reviews and investigations. Are parties in administrative reviews and investigations allowed to provide information other than (additional to) the substantive information provided only in the first 30 days? Does a "good cause" standard apply in administrative reviews and investigations? If so, is it the same as the standard applied in sunset reviews? If not, please explain any differences.

117. Under the U.S. system, a "proceeding" begins on the date of the filing of a petition and

ends on, *inter alia*, the revocation of an order.[45] A antidumping duty proceeding consists of one or more "segments".[46] A "segment" refers to a portion of the proceeding that is separately judicially reviewable. For example, an antidumping duty investigation, an administrative review, or a sunset review each would constitute a segment of a proceeding.[47]

118. Each segment has a beginning (initiation) and an end (final determination or final results). Each segment contains its own discrete administrative record. Each segment of the proceeding has different deadlines for submissions of factual information and for argument. Each final determination is based solely on the information placed upon and contained in the administrative record for that segment. The final determination, and the discrete record upon which it is based, is subject to judicial review.

119. In any proceeding conducted by Commerce, whether an investigation, administrative review, or sunset review, parties may submit any information they believe relevant for the Secretary's consideration in that proceeding. Extensions of Commerce's regulatory deadlines may be requested.

120. Parties in investigations and annual administrative reviews generally may submit additional information after the first 30 days provided for questionnaire responses. Although Commerce has a generic form questionnaire for investigations and annual administrative reviews, this questionnaire is significantly modified in each case depending on the complexity of the product and other factors.

121. Deadlines are specifically designed to allow a respondent sufficient time to prepare responses to detailed requests for information, and to allow Commerce sufficient time to analyze and verify that information, within the statutorily-mandated time lines for completing investigations and annual administrative reviews. Commerce recognizes that parties may encounter difficulties in meeting certain deadlines in the course of any investigation or review and Commerce established a specific regulation which governs requests for extensions of specific time limits (*i.e.*, 19 CFR 351.302(c)).

122. In addition, Commerce normally sends one or more additional, supplemental questionnaires in each investigation or annual administrative review to afford parties an opportunity to remedy deficiencies in the original questionnaire responses. The complexity of the issues and the work required for an investigation or an annual administrative review in collecting and analyzing data (*e.g.*, cost and pricing information and company financial records) and calculating dumping margins necessitates broader submission time lines than one would find necessary in the sunset review context.

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[45] 19 CFR 351.102 (definition of "proceeding").
[46] 19 CFR 351.102 (definition of "segment of proceeding").
[47] *See* 19 CFR 351.102 (definition of "segment of proceeding", examples under para. 2).

123. The "good cause" standard is required by statute only for sunset reviews.

Q65. The Panel understands that in this sunset review because the DOC found that there was dumping and that import volumes had declined following the imposition of the measure, it concluded that dumping was likely to continue. In this process did the DOC also consider possible "other factors" on the basis of its own experience or on the basis of the information submitted by interested parties?

124. In the final sunset determination, Commerce did not consider "other factors." Nevertheless, Commerce also determined that, had it considered NSC's "other factors" claim concerning import volumes, it would not have affected the ultimate outcome because Commerce determined there was a likelihood that dumping would continue or recur based on the existence of dumping since the imposition of the order.

Q66. The Sunset Policy Bulletin indicates that the DOC will normally determine that revocation of the duty is likely to lead to continuation or recurrence of dumping where certain patterns are evident with respect to dumping and import volumes. Do you agree with the proposition that, if an investigating authority revokes an anti-dumping duty after five years, exporters of the subject product may increase their export price so that perhaps there would be no more dumping? Why or why not?

125. The reasons an exporter may or may not raise its export price are known only to the exporter. The exporter also may be inclined to increase the level of dumping without the discipline of the order in place. While, theoretically, an exporter may raise its price if an antidumping duty is removed, Commerce determined in this case that such an effect was not likely because the Japanese exporters have continued dumping despite the imposition of the order.

Q67. Is the Panel to understand that, in the view of the United States, once the investigating authority has found that dumping continued and import volumes decreased after the imposition of the duty, this established sufficient grounds to conclude that dumping is likely to continue? Or is there some further analysis that the DOC carries out beyond these two past facts?

126. Pursuant to the statute and as described in the *Sunset Policy Bulletin*, once Commerce has found that dumping has continued and import volume remained depressed in the period following imposition of the duty, Commerce *normally* will determine that there is a likelihood that dumping will continue or recur. Explanations and arguments concerning these elements are considered and "other factors" also may be considered. The final sunset determination in each sunset review, however, is made on the facts in that particular case.

127. In this case, Commerce found that the Japanese exporters had been dumping and that import volumes declined and remained depressed since the imposition of the order. Despite

NSC's late attempt to explain how the depressed import volumes were not indicative of its future behavior, no other information was presented during the sunset review concerning the future behavior of the Japanese exporters. Consequently, Commerce determined that the existence of dumping by the Japanese producers and the significant decline in the import volumes since the imposition of the order demonstrated that it was likely they would dump if the order were removed.

Q68. In making its likelihood determination, does the DOC inquire whether there is a causal relationship between the disciplining measure and the behaviour of the exporters? Does it consider whether there is any other reason that would explain the exporters' behaviour? Does the DOC in this respect carry out a "but for" test (i.e. import volume would not decrease but for the continuation of the measure, or "but for" the continuation of the measure there would be a recurrence or continuation of dumping) to understand whether it is the duty that brought about the conduct or some other factor? What, in your view, is the proper test, and where in US law is the test contained?

128. Commerce does not conduct a counterfactual inquiry in making the likelihood determination. An exporter is the only party that can explain its pricing behavior and the exporter is provided the opportunity to explain present and possible future behavior in the sunset review proceeding if it chooses to do so. In this case, NSC attempted to explain why its import volumes remained depressed and why these lesser levels were not probative of future behavior. Significantly, however, NSC never explained or attempted to explain why, despite the fact that it has been dumping since the imposition of the order, it would stop dumping if the order were removed.

Q69. What factors relating specifically to the imposition of an *ad valorem* anti-dumping duty determine the exporters' behaviour in terms of their pricing, and therefore in terms of the dumping margin after a percentage anti-dumping duty has been applied (which presumably is paid for by importers at the time of importation)? What is the reason for the DOC's belief that it is the imposition of the duty that determines the behaviour of the exporters after the imposition of the duty and not some other factors? In this case, although it was found that the dumping margins of the Japanese exporters had decreased significantly after the imposition of the measure, the DOC nevertheless reported the original dumping margins to the ITC. Does that not reflect the DOC's assumption that the rates determined in administrative reviews do not apply because imposition of the duty has affected administrative review rates? If that is not so, then why did the DOC not report to the ITC the most recent rate?

129. Only the individual exporters know why they price as they do. Commerce begins with the guideline that imposition of the duty affects the behavior of the exporters and that, if the exporters are dumping with an order in place, they will dump without an order in place. In a

sunset review, parties may submit information and argument that this guideline is unfounded and is inapplicable in that particular case because other factors demonstrate that the exporter will stop dumping once the order is revoked.

130. Sunset analysis is, as explained above, a qualitative analysis rather than a quantitative one. The focus of the inquiry in a sunset review is on future behavior of the exports without the discipline of the order. The current magnitude of the margin of dumping is not material to the inquiry of whether the exporters are likely to dump, at any level, in the event the order is revoked. Indeed, the issue of *why* exporters dump is neither required nor examined in any type of proceeding, whether original investigation, annual administrative review, or sunset review because either an exporter is dumping or it is not. Consequently, the mere existence of dumping after the imposition is highly probative of an exporter's behavior, absent some other explanation known only to the exporter itself, absent the discipline of an order.

131. Commerce *normally* reports to the ITC the dumping margin from the original investigation because this rate most reasonably reflects the behavior of the exporters without the discipline in place. Where dumping margins have declined and import levels have increased or remained steady after imposition of the order, however, Commerce may conclude that exporters are likely to continue dumping at the lower rates found in a more recent administrative review.

132. In the instant sunset review, Commerce reported the dumping margins from the original investigation because import volumes declined significantly after issuance of the order, continued to decline over the life of the order, and decreased in both administrative review. Thus, the rates for the original investigation were more probative of exporter behavior without the discipline of the order than more recently determined dumping margins.

Q70. Section 1675(c) of the US Statute states that the administering authority should consider the weighted average dumping margins determined in the investigation and the subsequent reviews. Please explain what is meant by subsequent reviews and what binds you in respect of what you are required to consider under that provision.

133. Section 752(c) of the Act (19 U.S.C. §1675(c)) requires Commerce to consider the dumping margins determined in the investigation and the subsequent administrative reviews. The subsequent reviews are the administrative reviews of the antidumping duty order, if any, conducted after the issuance of the order. The provision simply requires Commerce to consider dumping margins found in the those proceedings in making its likelihood determination. In the instant sunset review, Commerce considered the fact that Japanese exporters were found to be dumping in the administrative reviews covering the 1996-1997 and 1997-1998 periods.

Q71. Under US law, is the ITC allowed to disregard or alter the dumping margin reported by the DOC in a sunset review? How does the margin reported by DOC affect the ITC's injury determinations?

134. The "magnitude of dumping" to be used by the Commission in five-year review investigations is defined by the Act as "the dumping margin or margins determined by the administering authority under section 1675a(c)(3) of this title."[48] The ITC cannot alter the dumping margin reported by the DOC.

135. Section 752(a)(6) of the Act states that "the Commission *may* consider the magnitude of the margin of dumping" in making its determination in a five-year review.[49] As such, the magnitude of the margin of dumping is one of a list of factors that the ITC may consider in determining the likely impact of subject merchandise on domestic producers of like products.

Q72. Article 3.5, first sentence, of the *Anti-dumping Agreement* states that: "It must be demonstrated that the dumped imports are, *through the effects of dumping* ... causing injury..." (emphasis added). Does the USITC regard dumping as a quantitative matter in its injury analysis, including in its consideration as to whether prices are likely to be undercut, depressed or suppressed? How does the ITC use the dumping margins reported by the DOC in its analysis of injury and whether dumping is causing or likely to cause injury?

136. Article 3.5 of the AD Agreement provides with respect to investigations: "[i]t must be demonstrated that the *dumped imports* are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the means of this Agreement." (Emphasis added). Based on the plain text of Article 3.5, it is, thus, the dumped imports that must be shown to be causing injury before an antidumping duty may be imposed. The Agreement, moreover, gives specific direction by reference to paragraphs 2 and 4 of Article 3.5 pertaining to the manner in which effects of the dumped imports are to be assessed. Paragraph 3.2 instructs the investigating authorities to consider the volume and price effects of the dumped imports. Paragraph 3.4 specifies relevant economic factors that an investigating authority must consider in assessing the impact of dumped imports. The Agreement's focus on the volume and price effects of the dumped imports for the purposes of determining material injury is underlined by Article 3.1 itself, which mandates the determination of injury "shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of dumped imports on the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

137. In sunset reviews, U.S. law provides that the USITC may consider the magnitude of the dumping margin in assessing whether injury is likely to continue or recur. The focus remains, nonetheless, on the likely volume and likely price effects of the dumped imports. Nothing in the AD Agreement directs the authority to consider the size of the dumping margin, if any, in conducting a sunset review.

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[48] 19 U.S.C. § 1677(35)(C)(iv).
[49] 19 U.S.C. § 1675a(a)(6) (emphasis added).

Q73. In sunset reviews, how does the United States treat the concepts of "dumping that is causing injury" and "likely dumping that is likely to lead to a continuation or recurrence of injury"? Is a causal link analysis required? If so, what is the nature of the causal link analysis carried out by the USITC in a sunset review?

138. The exact phrase "likely dumping that is likely to lead to a continuation of recurrence of injury" does not appear in Article 11. The Panel's language appears to be a paraphrase of next the last sentence of Article 11.3, which states that an antidumping duty order shall be terminated unless "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." As such, Article 11.3 requires the conditions necessary for the continued imposition of the antidumping order, namely likely dumping and likely injury if the order was lifted.

139. While there is only a subtle difference between the language employed by the Panel in its question and the text used in the Agreement, the difference is important. The Panel's language presumes that the elimination of dumping as such is the appropriate focus of the likelihood determination pertaining to injury conducted as part of a sunset review under Article 11.3. In fact, it is the expiry of the duty or antidumping duty order and its effect that the Agreement directs the investigatory authority to consider in determining whether injury is likely to continue or recur. Dumping may well continue after the expiry of the duty. Under U.S. law, the USITC only reaches its likelihood of injury determination after Commerce makes its determination that there is a likelihood of the continuation or recurrence of dumping.

Q74. Do the obligations in Article 3, including those in Article 3.3, 3.4 and 3.5, apply in sunset reviews?

140. As the United States explained in its response to Panel Question 22 and in earlier submissions, the obligations set forth in Article 3.3 of the AD Agreement do not extend to sunset reviews conducted under Article 11.3 of the Agreement.

141. The Article 11.3 injury standard is not the same as the standard for injury in original investigations, although they contain some of the same elements. The injury determinations in original investigations are governed by the provisions of Article 3 of the Agreement. Article 3.1 of the AD Agreement further specifies the factors that investigating authorities must consider in reaching "[a] determination of injury for purposes of Article VI of GATT 1994."

142. The aim of the Article 11.3 review is to determine whether revocation of the countervailing duty would be likely to lead to continuation or recurrence of injury. Footnote 9 to Article 3 indicates that the term *injury* as used throughout the Agreement "shall be interpreted in accordance with the provisions of this Article." In turn, Article 3 specifies three general criteria – volume, price effects and impact on the domestic industry – that are pertinent to any *injury* determination under the Agreement.

143. The focus of a review under Article 11.3, however, differs from that of an original

investigation under Article 3. The nature and practicalities of the two types of inquiries demonstrate that the tests for the two cannot be identical. In an original investigation, the investigating authorities examine the condition of an industry that has been exposed to the effects of the dumped imports. In that investigation, an authority examines the relationship between import-related factors (such as relative and absolute increases in import volumes and underselling and other price effects) to industry-related factors (such as trade, financial and employment data that have a bearing on the state of the industry and that may be indicative of present injury or imminent threat of injury).[50] Five years later, as a result of the countervailing duty order, dumped imports may have either decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties.

144. Thus, the inquiry contemplated in a review conducted pursuant to Article 11.3 is counterfactual in nature, and entails application of a different standard with respect to the volume, price and relevant industry factors. An authority must decide the likely impact of a prospective change in the status quo, *i.e.*, the revocation of the dumping duty order and the elimination of its restraining effects on volumes and prices of imports.

VIII. OTHER

Q76. Taking into account the complexities of what is raised by the domestic industry in a sunset review, does providing five days for rebuttals meet the "reasonableness" standard referred to in Article X:3 of the GATT 1994?

145. 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.[51] Article X:3(a) requires uniformity of treatment with respect to persons similarly situated.[52] Section 351.218(d)(4) of Commerce's regulations provide that all parties must submit rebuttals to substantive responses within five days of the filing of the substantive responses (with the opportunity for extensions pursuant to section 351.302). Commerce has uniformly and consistently applied this provision in the administration of its sunset reviews.

146. Prior to implementation of Commerce's Sunset Regulations, parties commented on the proposed five-day limit for rebuttal case briefs in Commerce's regulations at section 351.218(d)(4). There was some concern that the five-day period was insufficient. Consequently,

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[50] *See* Articles 3.2 and 3.4 of the AD Agreement.

[51] *United States - Anti-Dumping Measures On Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, Report of the Panel, adopted 23 August 2001 ("*Japan Hot-Rolled Steel*"), para. 7.267.

[52] *United States- Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*, WT/DS179/R, Report of the Panel, adopted 1 February 2001 ("*Korea Stainless Steel*").

every sunset initiation notice, including the initiation notice for the instant sunset review,[53] provides explicit notice that requests for extension of the five-day deadline would be considered from interested parties pursuant to section 351.218(d)(4) of Commerce's regulations.

[53] *See Initiation of Five Year Sunset Reviews of Antidumping and Countervailing Duty Orders*, 64 Fed. Reg.47767, 47769 (September 1, 1999).