

***UNITED STATES - SUNSET REVIEW OF ANTIDUMPING DUTIES
ON CORROSION-RESISTANT CARBON
STEEL FLAT PRODUCTS FROM JAPAN***

WT/DS244

**SECOND WRITTEN SUBMISSION
OF THE
UNITED STATES OF AMERICA**

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I. INTRODUCTION

1. The Panel's questions following the first meeting address most of the issues arising in this case, and the United States has provided answers to those questions in a document accompanying this submission. Given the comprehensive nature of the Panel's questions, the United States will use this submission to highlight the major legal and factual errors underlying Japan's claims. In addition, the United States will emphasize the significance of the Appellate Body's recent report in *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (“*Corrosion-Resistant Steel from Germany*”),¹ in which the Appellate Body rejected many of the same arguments Japan presents here.

2. At the outset, the United States reiterates that Japan has misconstrued the appropriate scope of review under WTO law and practice. Not content to challenge mandatory provisions of U.S. law as well as the application of such provisions in the sunset review conducted by the U.S. Department of Commerce (“Commerce”) and the U.S. International Trade Commission (“USITC”) of corrosion-resistant carbon steel flat products from Japan, Japan claims that review by this Panel “extends to administrative procedures that ignore relevant WTO obligations,”² including the *Statement of Administrative Action* (“SAA”)³ accompanying the Uruguay Round Agreements Act and the *Policies Regarding the Conduct of Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin* (“*Sunset Policy Bulletin*”).⁴ Japan calls these its “general practice” claims.⁵ Japan's arguments in this regard ignore the well-established principle that in order for a measure as such to breach an obligation of the *Marrakesh Agreement Establishing the World Trade Organization* and/or the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”), that measure must mandate WTO-inconsistent action or preclude WTO-consistent action.⁶ Japan has made no effort to demonstrate that the “general practices” it purports to identify mandate WTO-inconsistent action or preclude WTO-consistent action. Consequently, those claims cannot be sustained.

3. Most of the remainder of Japan's claims fail because they rely on obligations not found in Article 11.3 of the AD Agreement. Japan asserts that the following obligations must be read into Article 11.3 and applied in sunset reviews: (1) the initiation standards and *de minimis* requirement of Article 5 of the AD Agreement, (2) restrictions on the permissible methodology for calculating aggregate dumping margins found by the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (“*EC Bed Linen*”),⁷ and (3) the strict quantitative negligibility assessment that is required in investigations for the cumulation of imports. These assertions, however, find no support in the AD Agreement

¹ WT/DS213/AB/B, Report of the Appellate Body circulated on 28 November 2002 (unadopted).

² Japan First Oral Statement, para. 12.

³ H.R. Doc. No. 316, 103rd Cong., 2d sess., Vol. 1 (1994). Exhibit JPN-2.

⁴ 63 FR 18871 (April 16, 1998). Exhibit JPN-6.

⁵ Japan First Oral Statement, para. 12.

⁶ See United States First Submission, para. 104; see also *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 23 August 2001, paras. 8.126-32.

⁷ WT/DS141/AB/R, Report of the Appellate Body, adopted 12 March 2001.

and run afoul of basic principles of treaty interpretation as reflected in Article 31 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”), which “neither require nor condone the imputation into a treaty of words that are not there[.]”⁸ The Panel should reject Japan’s claims and refuse to impute into Article 11.3 of the AD Agreement “words that are not there.”

4. Japan is also wrong with respect to its claims that (1) Commerce’s regulations establish a “not likely” standard for likelihood of dumping determinations and (2) Commerce failed to apply the substantive and procedural requirements of the AD Agreement in the instant sunset review. In fact, the “likely” standard required under Article 11.3 of the AD Agreement is fully implemented under U.S. law. Moreover, in determining that dumping was likely to continue or recur in the event of revocation, Commerce followed the substantive and procedural requirements of the AD Agreement. Commerce found, based on the results of two completed assessment reviews,⁹ that Japanese producers/exporters had continued to dump throughout the life of the order and that import volumes were significantly lower than pre-order volumes.¹⁰

5. In sum, the United States followed a reasonable, appropriate approach in this case that fully complied with all applicable requirements. With this overview of the case as background, the United States will now briefly discuss some of the more specific issues raised by Japan.

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

6. Japan alleges that the provisions of U.S. law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with the AD Agreement.¹¹ The Appellate Body, however, recently affirmed a panel’s rejection of a similar claim by the EC that the provisions of U.S. law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).¹² Although that case, *Corrosion-Resistant Steel from Germany*, dealt with Article 21.3 and other provisions of the SCM Agreement, the relevant provisions of the AD Agreement are essentially identical to those of the SCM Agreement, and the Appellate Body’s reasoning is equally valid in this proceeding.¹³

⁸ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body adopted 16 January 1998, para. 45.

⁹ See also *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).

¹⁰ See *Commerce Issues and Decision Memorandum for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan, Final Results*, at 6 (August 2, 2000).

¹¹ See Japan First Oral Statement, para. 15.

¹² See *Corrosion-Resistant Steel from Germany*, paras. 98-118.

¹³ The language of Article 11.3 of the AD Agreement is, in all respects, parallel to the language of Article 21.3 of the SCM Agreement. The only differences involve changing “anti-dumping” to “countervailing duty,” and changing “dumping” to “subsidization.” Moreover, U.S. law is *uniform* regarding the initiation of antidumping duty and

7. In *Corrosion-Resistant Steel from Germany*, the Appellate Body affirmed the panel's finding that:

[N]o evidentiary standards are applicable to the self-initiation of sunset reviews under Article 21.3. We thus conclude that US CVD law and the accompanying regulations are consistent with the SCM Agreement in respect of the automatic self-initiation of sunset reviews, and accordingly reject the European Communities' claim in this regard.¹⁴

8. Specifically, the Appellate Body found that, "when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may be taken."¹⁵ The United States observes that both Article 21.3 of the SCM Agreement and Article 11.3 of the AD Agreement refer, without qualification, to the self-initiation of sunset reviews.

9. The Appellate Body also noted that Article 21.3 contains no explicit cross-reference to evidentiary rules relating to initiation and went on to say that, "[w]e believe the absence of any such cross-reference to be of some consequence given that, as we have seen [citation omitted], the drafters of the *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations to *investigations* to review proceedings."¹⁶ In other words, "the omission of any express cross-reference thus serves as a further indication that the negotiators of the *SCM Agreement* did not intend the evidentiary standards applicable to the self-initiation of *investigations* under Article 11 to apply to the self-initiation of *reviews* under Article 21.3."¹⁷ Once again, the same is true of Article 11.3 of the AD Agreement – it contains no explicit cross-reference to evidentiary rules relating to initiation, and the clear inference is that the negotiators of the AD Agreement did not intend to make such rules applicable to the self-initiation of reviews under Article 11.3.

10. Turning to the immediate context of Article 21.3 of the SCM Agreement, the Appellate Body examined Article 21.2, and found that Article 21.2 "contemplates that, for reviews carried out pursuant to that provision, the self-initiation by the authorities of a review is not governed by the same standards that apply to initiation upon request by other parties."¹⁸ Similarly, Article

countervailing duty sunset reviews. Section 751(c)(2) of the Act directs Commerce to publish a notice of initiation of an antidumping or countervailing duty sunset review no later than 30 days before, *inter alia*, the fifth anniversary of the date of publication of the relevant order. Exhibit JPN-1(e). *See also, Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures* (recognizing "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures").

¹⁴ *Corrosion-Resistant Steel from Germany*, paras. 98, 118 (citing Report of the Panel circulated on 3 July 2002, WT/DS213/R, para. 8.84).

¹⁵ *Id.*, para. 104.

¹⁶ *Id.*, para. 105 (emphasis in original).

¹⁷ *Id.* (emphasis in original).

¹⁸ *Id.*, para. 108.

11.2 of the AD Agreement does not incorporate for purposes of self-initiation the standards applicable to reviews upon request.

11. The Appellate Body further noted that Article 21.4 of the SCM Agreement explicitly applies the rules in Article 12 regarding evidence and procedure in the conduct of investigations to Article 21.3. “However, the rules on evidence and procedure contained in Article 12 do not relate to the *initiation* of such investigations.”¹⁹ Further, “the rules relating to evidence needed to *initiate* an investigation are set out in Article 11, which is not referred to in Article 21.4.”²⁰ This led to the conclusion that, “[t]he fact that the rules in Article 11 governing such matters are not incorporated by reference into Article 21.3 suggests that they are not, *ipso facto*, applicable to sunset reviews.”²¹ Once again, there is a precise parallel in the AD Agreement. The rules of evidence and procedure contained in Article 6 of the AD Agreement are incorporated by reference for purposes of sunset reviews by means of Article 11.4. Those rules of evidence and procedure, however, do not relate to *initiation*. On the other hand, the rules relating to evidence necessary to initiate an investigation in Article 5 are not incorporated by reference for purposes of sunset reviews. Consequently, the latter rules are not applicable to sunset reviews.

12. The Appellate Body then turned to Article 22 of the SCM Agreement, entitled “Public Notice and Explanation of Determinations,” and found that neither Article 22.1 (establishing notification and public notice obligations) nor Article 22.7 (stating that the provisions of Article 22 apply “*mutatis mutandis*” to the initiation and completion of reviews pursuant to Article 21 and to decisions to apply duties retroactively) establishes any evidentiary standards applicable to the initiation of sunset reviews.²² The United States notes that Article 12 of the AD Agreement is perfectly analogous to Article 22 of the SCM Agreement. Neither Article 12.1 (establishing notification and public notice requirements) nor Article 12.3 (stating that the provisions of Article 12 apply “*mutatis mutandis*” to the initiation and completion of reviews pursuant to Article 11 and to decisions to apply duties retroactively) of the AD Agreement establishes any evidentiary standards applicable to the initiation of sunset reviews.

13. Finally, the Appellate Body turned to Article 11 of the SCM Agreement (entitled “Initiation and Subsequent Investigation”), and found that Article 11 sets out evidentiary requirements for the initiation of countervailing duty investigations, but that there is no indication of an intent to apply those requirements to the ability of authorities to self-initiate sunset reviews.²³ The analogous provision in the AD Agreement, Article 5, is equally bereft of any indication that its evidentiary requirements for the initiation of antidumping investigations apply to the ability of authorities to self-initiate sunset reviews.

14. Japan argues that the authorities should not be able to self-initiate reviews unless they

¹⁹ *Id.*, para. 109 (emphasis in original).

²⁰ *Id.* (emphasis in original).

²¹ *Id.*

²² *Id.*, paras. 110-112.

²³ *Id.*, paras. 113-115.

have first satisfied the evidentiary requirements for the initiation of an investigation under Article 5, citing Article 12.1, footnote 1, and what makes “sense.”²⁴ As pointed out above, however, Article 12.1 concerns the notice to be provided to interested parties and to the public upon the initiation of investigations; it does not concern any initiation standard.²⁵ Further, footnote 1, which has a precise analogue in footnote 37 of the SCM Agreement, merely defines the term “initiated.” It does not purport to incorporate by reference any provisions into Article 11.3. There is, thus, no textual link between Article 11.3 and the initiation standards in Article 5. Moreover, as the Appellate Body found in *Corrosion-Resistant Steel from Germany*, there is no other link, express or implied, to any standard that might limit the ability of authorities to self-initiate sunset reviews.

15. Japan posits that the AD Agreement *indirectly* incorporated a link between the investigation and sunset review provisions. The Members, however, found it necessary to provide a *direct and explicit* link in Article 11.4 between Article 6 and the conduct of sunset reviews. Plainly, the Members chose not to incorporate by reference into Article 11.3 the initiation requirements of Article 5.

16. In sum, the Panel should decline Japan’s request to create an evidentiary obligation for self-initiation in sunset reviews conducted pursuant to Article 11.3 that has no basis in the text of the AD Agreement.

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

17. The statutory language governing the obligation to determine likelihood of dumping in sunset reviews is found in section 751(c) of the Tariff Act of 1930, as amended (the “Act”).²⁶ That language is essentially identical to the language in Article 11.3 of the AD Agreement and is therefore consistent with Article 11.3. In addition, U.S. sunset review regulations, as such, provide for a determination of “likelihood” of continuation or recurrence of dumping.²⁷

18. The Appellate Body in *Corrosion-Resistant Steel from Germany* found that the EC did not satisfy its burden of showing that U.S. law mandates Commerce to act inconsistently with Article 21.3 of the SCM Agreement, or that such law restricts in any way Commerce’s discretion to make a determination consistent with Article 21.3. The Appellate Body, therefore, concluded

²⁴ Japan First Oral Statement, paras. 18-19.

²⁵ See *Corrosion-Resistant Steel from Germany*, para. 112 (“Similarly, in the same way that Article 22.1 does *not* itself establish evidentiary standards applicable to the initiation of an *investigation*, it does *not* itself establish evidentiary standards applicable to the initiation of sunset reviews.”). (Emphasis in original.)

²⁶ Exhibit JPN-1(e).

²⁷ See 19 C.F.R. § 351.218(b) (“The Secretary will . . . determine whether revocation of an antidumping or countervailing duty order or termination of a suspended investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy.”) Exhibit JPN-3.

that, “United States law has not been shown to be inconsistent with Article 21.3 of the *SCM Agreement*.”²⁸ Accordingly, the Appellate Body upheld the panel finding that,

US law is not inconsistent with Article 21.3 of the *SCM Agreement* with respect to the obligation that the investigating authorities determine the likelihood of continuation or recurrence of subsidisation in a sunset review.²⁹

19. As explained above, although *Corrosion-Resistant Steel from Germany* dealt with Article 21.3 and other provisions of the *SCM Agreement*, the relevant provisions of the *AD Agreement* are essentially identical, and the Appellate Body’s reasoning is equally valid in this proceeding. Accordingly, the Panel should likewise find that U.S. law is consistent with Article 11.3 of the *AD Agreement*.

A. Commerce’s Sunset Regulations Do Not Set A “Not Likely” Standard For Likelihood Of Dumping Determinations

20. Japan, citing Commerce’s regulations at 19 C.F.R. § 351.222(i)(1)(ii), claims that U.S. law in regard to sunset reviews requires the application of a “not likely,” as opposed to a “likely,” standard.³⁰ As demonstrated below, while it is true that § 351.222(i)(1)(ii) provides for revocation “where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of . . . dumping,”³¹ the provision is purely procedural in nature and does not in any way alter the substantive requirements of the statute and regulations.

21. First, the regulation in question does not, as Japan claims, set out a substantive obligation to make a “not likely” determination. Rather, the term “not likely” in the regulation is intended to mean “negative likelihood determination.” This is evident from the procedural nature of § 351.222 as a whole, which is indicated by the title of the notice in which the regulation was promulgated (“Procedures for Conducting Five-year (‘Sunset’) Reviews of Antidumping and Countervailing Duty Orders”)³² as well as the explanatory material at the beginning of that notice (“The regulations provide, in particular, for procedures for conducting [sunset reviews] of antidumping and countervailing duty orders and suspended investigations[.]”).³³ The procedural nature of the regulation at issue contrasts with the regulation considered in *United States – Antidumping Duty on Dynamic Random Access Memory Semiconductors (“DRAMs”) of One Megabit or Above from Korea (“DRAMs”)*,³⁴ a case cited by Japan.³⁵ *DRAMs* dealt with a regulation that

²⁸ *Corrosion-Resistant Steel from Germany*, para. 162.

²⁹ *Id.* at 163 (citing Panel Report, para. 9.1(d)).

³⁰ Japan First Oral Statement, para. 28.

³¹ Exhibit JPN-3.

³² *Interim final rules; request for comments*, 63 FR 13516 (March 20, 1998).

³³ *Id.*

³⁴ WT/DS99/R, Report of the Panel adopted 19 March 1999.

³⁵ Japan First Oral Statement, para. 29.

set forth substantive criteria for revocation.³⁶

22. Further confirmation of the procedural nature of § 351.222(i)(1)(ii) can be found in the regulation itself. The regulation indicates that where Commerce, *pursuant to the statute*, does not find likelihood of continuation or recurrence of dumping, it shall revoke an order or terminate a suspended investigation “not later than 240 days (or 330 days where a full sunset review is fully extended) after the date of publication in the *Federal Register* of the notice of initiation[.]” Both the incorporation by reference of the statute and the emphasis on the timing of revocation are consistent with the fact that the regulation is not intended to modify the statutory standard for revocation. The procedural nature of § 351.222(i)(1)(ii) is also confirmed by the fact that § 351.222(i)(1)(iii) contains procedural requirements in the event of a “not likely” determination by the USITC. These regulations, however, were promulgated by Commerce,³⁷ and Commerce has no authority to promulgate regulations creating substantive obligations for the USITC, which, under U.S. law, is an agency independent of the executive branch of government. As a final point of confirmation regarding the nature of both § 351.222(i)(1)(ii) and § 351.222(i)(1)(iii), the United States observes that Commerce cites to these provisions only in reference to the timing of revocation, not in reference to the criteria governing revocation determinations.³⁸

23. Second, even assuming, *arguendo*, that the regulation were considered to set forth a substantive “not likely” standard, this would make the regulation – on its face – inconsistent with the controlling statute, which requires that Commerce make a determination regarding the *likelihood* of continuation or resumption of dumping in the event of revocation. Under U.S. law, the dictates of a statute take precedence over those of a contrary regulation.³⁹ Finally, as indicated above, the Appellate Body in *Corrosion-Resistant Steel from Germany* found U.S. law to be consistent with the WTO obligation to determine likelihood. And again, although that finding was under the SCM Agreement, the relevant provisions of the AD and SCM Agreements are essentially identical, and the Appellate Body’s reasoning is equally valid in this proceeding.

³⁶ See *Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders*, 64 FR 51236 (September 22, 1999). As stated therein, “[o]n January 29, 1999, the Panel determined that the Department’s standard for revoking an antidumping duty order contained in 19 CFR 353.25(a)(2) . . . was inconsistent with the United States’ obligations under Article 11.2 of the WTO Antidumping Agreement [citing *DRAMs*.]”

³⁷ See *Procedures for Conducting Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders*, 63 FR 13516 (March 20, 1998). Exhibit JPN-5.

³⁸ See, for example, *Revocation of Antidumping Duty Order on Aramid Fiber Formed of Poly Par-Phenylene Terephthalamide from the Netherlands*, 66 FR 14540 (March 13, 2001) (“As a result of the determination by the Commission that revocation of this antidumping duty order is not likely to lead to continuation or recurrence of material injury to an industry in the United States, the Department, pursuant to section 751(d)(2) of the Act and 19 CFR 351.222(i)(1), is revoking the antidumping duty order[.]”).

³⁹ See *FAG Italia v. United States*, 291 F.3d 806 (Fed. Cir. 2002) (finding that certain antidumping duty absorption inquiries, authorized by regulation, were not within the statutory authority granted Commerce). As previous WTO panels have recognized, decisions of the Court of Appeals for the Federal Circuit represent binding interpretations of U.S. law. See *United States – Countervailing Measures Concerning Certain Products from the European Commission*, WT/DS212/R, Report of the Panel circulated 31 July 2002, para. 7.150 (“[T]he current state of the law in the United States today is that expressed by the US Court of Appeals for the Federal Circuit in *Delverde III*.”).

B. Commerce Properly Found Likelihood Of Continuation Or Recurrence Of Dumping In This Case

24. The final sunset determination in this case applied the principle set forth in the *Sunset Policy Bulletin* that Commerce will normally determine that revocation of an antidumping order is likely to lead to continuation or recurrence of dumping where:

- a. dumping continued at any level above *de minimis* after the issuance of the order;
- b. imports of the subject merchandise ceased after issuance of the order; or
- c. dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.⁴⁰

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

26. In the instant case, Commerce conducted two assessment reviews in the five-year period prior to the sunset review. In both of those reviews, the Japanese producers/exporters subject to review were found to be dumping. In the sunset review, Commerce examined the final results of the assessment reviews as well as information submitted by the parties. In addition, Commerce examined import data from several sources and found that U.S. imports of Japanese corrosion-resistant steel had declined substantially shortly after the order was imposed and remained at depressed levels for the entire period prior to the sunset review. Based on these findings, Commerce reasonably concluded that dumping by Japanese producers and exporters was likely to continue or recur in the event of revocation of the order.⁴¹

27. Commerce's final sunset determination that it was likely that dumping would continue or recur in this case is supported by the evidence. Even though the continued dumping in itself would be enough, normally, to support an affirmative likelihood determination, Commerce also found depressed import volumes in the period prior to the sunset review. Consequently, in accordance with the obligations of Article 11.3, Commerce drew a reasonable and logical inference that this evidence was indicative of likely continuation or recurrence of dumping in the absence of the antidumping duty.

⁴⁰ *Sunset Policy Bulletin*, 63 FR 18871, 18872-73 (April 16, 1998). Exhibit JPN-6.

⁴¹ *Commerce Sunset Preliminary Decision Memorandum*, p. 29. Exhibit JPN-8(c). *Commerce Sunset Final Decision Memorandum*. Exhibit JPN-8(e).

28. Japan argues that Commerce makes a retrospective, rather than a prospective, likelihood determination and that the “good cause” standard for consideration of “other factors”⁴² in the likelihood analysis precludes a prospective analysis.⁴³ Neither of these statements is an accurate representation of the facts. Commerce considers the behavior of producers/exporters and whether that behavior is likely to continue or recur. In the instant case, Japanese producers/exporters have continued to dump since the imposition of the antidumping order. Japan does not dispute this fundamental fact. Furthermore, there was no evidence to support an inference that Japanese producers/exporters would stop dumping if the discipline of the order were removed. No such evidence was offered by any party, and none was apparent to Commerce. Japan’s arguments as to the “good cause” standard cannot obscure this fundamental deficiency in the evidence presented to Commerce by the Japanese companies, nor can they obscure the relevance of the evidence relied upon by Commerce, especially the evidence of continued dumping over the life of the order.

29. During the course of the sunset review proceeding, Nippon Steel Corporation (“NSC”), one of the Japanese producers/exporters, did provide Commerce with evidence regarding the reduced import volumes. This evidence was not, however, presented in NSC’s substantive response. Rather, NSC waited until it submitted its case brief to present the evidence and never explained a “good cause” basis for consideration, thus violating both of the requirements of 19 C.F.R. § 351.218(d)(3)(iv).⁴⁴ Moreover, as Commerce determined, even if it had considered NSC’s evidence, that evidence did not support a conclusion that Japanese producers/exporters would cease dumping in the event of revocation.⁴⁵

30. Japan suggests that there was some other evidence in Commerce’s records that Commerce should have considered in connection with the likelihood determination.⁴⁶ The United States, and the Panel, should not be left to guess as to what that evidence might be. The Japanese producers/exporters did not point to any such evidence during the sunset review, and Japan has not pointed to any such evidence during this proceeding.

31. Japan also suggests that whether dumping is likely to continue or recur in the event of revocation is necessarily dependent on the magnitude or level of dumping.⁴⁷ This is not, in fact, the case. Commerce’s approach to the likelihood of dumping determination is qualitative, not quantitative. A qualitative approach is entirely consistent with the requirements of Article 11.3. In *Corrosion-Resistant Steel from Germany*, the Appellate Body observed that there are significant differences between investigations and sunset reviews:

For example, in a sunset review, the authorities are called upon to focus their inquiry on

⁴² 19 C.F.R. § 351.218(d)(3)(iv). Exhibit JPN-3.

⁴³ Japan First Oral Statement, paras. 30, 39.

⁴⁴ Exhibit JPN-3.

⁴⁵ *Commerce Sunset Final Decision Memorandum*. Exhibit JPN8-(e).

⁴⁶ Japan First Oral Statement, paras. 35-36.

⁴⁷ *Id.*, para. 38.

what would happen if an existing countervailing duty were to be removed. In contrast, in an original investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry so as to warrant the imposition of a countervailing duty.⁴⁸

Thus, the task for the administering authority in a sunset review is inherently more forward-looking and less quantitative than the task in an investigation. The more forward-looking focus of sunset reviews lends itself to the qualitative approach used by Commerce with respect to the likelihood determination.

32. Finally, Commerce's qualitative approach to likelihood is consistent with the holding in *Corrosion-Resistant Steel from Germany* that Article 21.3, the provision of the SCM Agreement that is parallel to Article 11.3 of the AD Agreement, does not incorporate a *de minimis* threshold for sunset reviews (*see below*). In the absence of a required *de minimis* threshold, there is simply no reason to believe that the magnitude of post-order dumping margins is necessarily relevant to the likelihood of dumping determination.

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

33. There is no dispute that the procedural and evidentiary provisions of Article 6 of the AD Agreement apply to sunset reviews under Article 11.3. Thus, each of the procedural and evidentiary requirements of Article 6 is reflected in U.S. sunset review requirements. For instance, the United States gives interested parties ample opportunity to make written submissions of evidence (Article 6), gives exporters notice of the information required by the authorities and ample opportunity to make written submissions of evidence (Article 6.1), and gives exporters who are sent questionnaires at least 30 days in which to reply (Article 6.1.1). In particular, section 751(c)(2) of the Act provides that a detailed notice of initiation be published by Commerce for each sunset review and that such notice include instructions as to the information required for the review.⁴⁹ Moreover, under 19 C.F.R. § 351.218(d)(3)(iv)(B), in addition to the information required by the authorities, "[a] substantive response from an interested party under paragraph (d)(3) of this section also may contain any other relevant information or argument that the party would like the Secretary to consider."⁵⁰

34. On May 14, 1998, Commerce published in the *Federal Register* the final schedule for

⁴⁸ *Corrosion-Resistant Steel from Germany*, para. 87.

⁴⁹ Exhibit JPN-1(d).

⁵⁰ Exhibit JPN-3.

sunset reviews of “Transition Orders,” *i.e.*, orders which pre-dated the WTO Agreement.⁵¹ That notice indicated that 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 relevant prior proceedings. One Japanese producer, NSC, participated fully in the sunset review proceeding, submitting a substantive response and a rebuttal to the substantive response submitted by the domestic interested parties. NSC also submitted a case brief, after requesting and being granted an extension to the deadline for that submission.

35. Japan maintains that Commerce violated Article 6 by imposing unfair procedural burdens on NSC. Japan challenges, in particular, Commerce’s rejection of a claim by NSC regarding “other factors” that allegedly accounted for, *inter alia*, the reduction in import levels since the imposition of the antidumping duty order. Japan maintains that the 30-day rule for substantive responses is unnecessarily restrictive and that foreign interested parties do not know until after initiation whether domestic interested parties intend to participate – and thus have no reason to fully prepare detailed review submissions until after initiation.⁵² In addition, according to Japan, the “good cause” standard for the consideration of “other factors” is unclear.⁵³ As demonstrated below, Japan’s challenge is without merit.

36. First, Commerce’s promulgation of a 30-day deadline for the submission of substantive responses is entirely consistent with the AD Agreement. Nothing in Articles 6.1, 6.2, or 6.6 requires that Members provide a broader opportunity to present evidence than the requirements of those provisions themselves.

37. Second, rather than discussing “other factors” in its substantive response and explaining why “good cause” existed for their consideration – as is required under 19 C.F.R. § 351.218(d)(3)(iv)⁵⁴ – NSC waited until the filing of its case brief to bring its evidence to Commerce’s attention and, even at that late date, failed to provide a “good cause” basis for consideration of that evidence. 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. This is a much greater period of time than the 15 days, emphasized by Japan, from the deadline for domestic interested parties to indicate their intentions to the deadline for the substantive response. Moreover, if, as Japan intimates,⁵⁵ NSC chose to limit its preparation for the review during the period prior to initiation, on the assumption that domestic interested parties would decline to participate, Japan should not be permitted to use this proceeding to undo the consequences of NSC’s conscious decision to pursue such a risky course of action.

⁵¹ *Sunset Initiation Schedule*, 63 FR 29372. Exhibit JPN-18.

⁵² Japan First Oral Statement, paras. 40-42.

⁵³ *Id.*, paras. 43-44.

⁵⁴ Exhibit JPN-3.

⁵⁵ Japan First Oral Statement, para. 41.

38. Third, and finally, even if NSC had been uncertain as to what constitutes “good cause,” the facts of this case are that it made *no effort* to establish grounds for considering its “other factors” submission. Japan’s reliance on *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*⁵⁶ in this regard is misplaced. In that case, the authority requested certain information from a party but did not describe the requested information with a sufficient degree of specificity; under such circumstances, the party could not be faulted for failing to provide the requested information. In the instant case, Commerce did not request the “other factors” information. If NSC wanted Commerce to consider that information, it was NSC’s responsibility to explain why Commerce should do so, and NSC failed to provide any such explanation. In any event, Commerce found that, even if it had considered the information, the result on the likelihood issue would have been the same.⁵⁷

39. In sum, there is no basis for Japan’s claim that Commerce impermissibly limited NSC’s ability to present its case in the instant sunset review.

V. CONSISTENT WITH THE AD AGREEMENT, COMMERCE REPORTS THE MAGNITUDE OF THE DUMPING MARGIN LIKELY TO PREVAIL IN THE EVENT OF REVOCATION TO THE USITC FOR USE IN ITS INJURY ANALYSIS

40. In accordance with U.S. law, in making its sunset injury determination, the USITC “may consider the magnitude of the margin of dumping.”⁵⁸ In order for the USITC to have the option of doing this, Commerce must report the margin(s) likely to prevail in the event of revocation. The margin likely to prevail in the event of revocation generally plays no role in Commerce’s likelihood analysis. Indeed, as discussed above, the likelihood of dumping determination under U.S. law is qualitative, not quantitative, and the qualitative approach to that determination is entirely consistent with the text of Article 11.3, the purposes served by sunset reviews, and the AD Agreement as a whole. In other words, there is no requirement to quantify a precise level of dumping for purposes of the likelihood of dumping determination.

41. Regarding how the margin likely to prevail in the event of revocation is determined, the *SAA* explains that the “Administration intends that Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of the exporters and foreign governments without the discipline of an order . . . in place.”⁵⁹ The *Sunset Policy Bulletin* provides that, “[e]xcept as provided in paragraphs II.B.2 and II.B.3, the Department normally will provide to the Commission the margin that was determined in the final determination in the original investigation,” and that, “the Department normally will provide the

⁵⁶ WT/DS189/R, Report of the Panel adopted on 28 September 2001, para. 6.54.

⁵⁷ *Commerce Sunset Final Decision Memorandum*. Exhibit JPN8-(e).

⁵⁸ See 19 U.S.C. § 1675a(a)(6).

⁵⁹ *SAA* at 890 (220).

company-specific margin from the investigation for each company[.]”⁶⁰ Commerce may report a lower, more recently calculated margin for a particular company if “dumping margins declined or dumping was eliminated after the issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased.”⁶¹

42. In the instant case, Commerce found that, while dumping had continued throughout the life of the order, import volumes had decreased. This pattern indicated that changing prices in response to the dumping order had likely harmed the exporters’ sales volume – a burden that rational exporters presumably would not voluntarily endure if the dumping order did not exist. Consequently, there was no basis to report lower, more recently calculated margins to the USITC, and Commerce therefore reported the margins from the original investigation. This action was consistent with the obligations of the AD Agreement. Specifically, there is no provision of the Agreement that requires or precludes the USITC from considering the magnitude of the margin of dumping likely to prevail in the event of revocation, and there is no provision of the Agreement that limits how such a margin might be determined. Rather, under Article 11.3, the authorities must simply determine whether “expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury.” Commerce’s identification of the margin of dumping likely to prevail in the event of revocation in this case was consistent with the obligations of Article 11.3.

43. If Japan believed that Commerce’s identification of the margin of dumping likely to prevail in the event of revocation caused a distortion in the USITC’s injury analysis in this case, Japan should have challenged the sunset injury determination in this regard. Japan did not do so.

44. Japan suggests – without providing any supporting basis – that there is an obligation in sunset reviews under the AD Agreement to report a dumping margin.⁶² Regardless of whether Japan’s suggestion concerns a new margin or an old margin,⁶³ there is no such obligation. Article 11.3 plainly does not require the quantification of a dumping margin in sunset reviews and does not include any specifications regarding the methodology or methodologies that must be employed in such reviews. Commerce reports the margin likely to prevail in the event of revocation to the USITC purely as a matter of U.S. domestic law.

45. Japan’s fallacious claim regarding the quantification of dumping margins forms the basis of its claim regarding “zeroing.” Relying on the finding of the Appellate Body in *EC Bed Linen*, Japan argues that Article 2.4 of the AD Agreement required, for purposes of the instant sunset review, an offset for negative differences between the normal value and export price of individual transactions in the investigation and the two completed administrative reviews.⁶⁴

⁶⁰ *Sunset Policy Bulletin*, 63 Fed. Reg. at 18873.

⁶¹ *Id.*

⁶² Japan First Oral Statement, para. 46.

⁶³ *Id.*, paras. 49-52.

⁶⁴ The language in Article 2.4 relied upon by Japan reads as follows: “A fair comparison shall be made between the export price and the normal value.”

Japan's reliance on *EC Bed Linen* is unpersuasive for three reasons.

46. First, and most importantly, Japan ignores the fact that Article 11.3 of the AD Agreement does not require administering authorities to calculate or recalculate dumping margins in sunset reviews. Second, Japan assumes that the *magnitude* of the dumping margins in the original investigation and over the life of the antidumping order had an impact on Commerce's analysis of the likelihood of continuation or recurrence of dumping in this case. In fact, however, the original dumping margins were not a basis for the likelihood of dumping determination.⁶⁵ And while the findings in post-order assessment reviews were indeed a basis for that determination, the magnitude of the post-order dumping margins played no role whatsoever in the analysis. Finally, *EC Bed Linen* involved (1) an *investigation* subject to the AD Agreement, (2) average-to-average price comparisons under Article 2.4.2 of the AD Agreement, and (3) consideration of the EC's dumping calculation methodology. *None* of those circumstances was present in the case at hand.⁶⁶

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

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

48. Japan claims that the *de minimis* standard for antidumping investigations found in Article 5.8 of the AD Agreement is also applicable to sunset reviews under Article 11.3.⁶⁷ In *Corrosion-Resistant Steel from Germany*, the Appellate Body recently rejected a similar claim by the EC that the *de minimis* standard for countervailing duty investigations is also applicable to countervailing duty sunset reviews.⁶⁸ As noted several times before, although *Corrosion-*

⁶⁵ Moreover, Article 18.3 makes clear that provisions of the AD Agreement apply only to investigations initiated after entry into force of the WTO Agreement. Accordingly, contrary to Japan's suggestion, the AD Agreement expressly precludes a finding that dumping margins calculated before passage of the URAA are WTO-inconsistent. See Japan First Oral Statement, para. 48. And even if the validity of pre-WTO dumping margins could be measured by obligations that ensued only after entry into force of the WTO Agreement, there is no basis to assume that a dumping margin calculated prior to entry into force of the WTO Agreement runs afoul of AD Agreement rules.

⁶⁶ Even if this Panel were to conclude that "zeroing" is prohibited under Article 2.4 in some circumstances, it cannot – contrary to Japan's claim – be prohibited under that provision *as a general matter, i.e.*, regardless of the type of comparisons made by the authorities. To find otherwise would put Article 2.4 in conflict with the explicit permission under Article 2.4.2 to make comparisons on a transaction-to-transaction basis; an *inherent* feature of such a comparison is that it does not permit negative differences between normal value and export price to be used to offset dumping. See *EC – Antidumping Duties on Audio-Tapes in Cassettes Originating in Japan*, ADP/136, Report of GATT Panel circulated on April 28, 1995 (unadopted), para. 353. Moreover, as noted above, the reasoning offered by the Appellate Body in support of its decision in *EC Bed Linen* is limited to cases in which the authorities rely on average-to-average comparisons. See *EC Bed Linen*, para. 55.

⁶⁷ Japan First Oral Statement, para. 61-68.

⁶⁸ See *Corrosion-Resistant Steel from Germany*, paras. 58-93.

Resistant Steel from Germany dealt with Article 21.3 and other provisions of the SCM Agreement, the relevant provisions of the AD Agreement are essentially identical to those of the SCM Agreement, and the Appellate Body's reasoning is equally valid in this proceeding.

49. In *Corrosion-Resistant Steel from Germany*, the Appellate Body reversed the panel on this point because a finding that "the *de minimis* standard of Article 11.9 is implied in sunset reviews under Article 21.3 would upset the delicate balance of rights and obligations attained by the parties to the negotiations, as embodied in the final text of Article 21.3."

50. Specifically, the Appellate Body found that the task of interpreting a treaty provision must begin with its terms. The Appellate Body then observed that Article 21.3 of the SCM Agreement imposes an explicit temporal limitation on the maintenance of countervailing duties. For countervailing duties that have been in place for at least five years, Article 21.3 requires their termination unless certain specified conditions are met: the Member must conduct a review and, in that review, determine that the expiry of the duty would likely lead to continuation or recurrence of subsidization and injury.⁶⁹ The United States notes that Article 11.3 of the AD Agreement contains precisely the same requirements.

51. The Appellate Body next pointed out that the text of Article 21.3 of the SCM Agreement does not mention any *de minimis* standard to be applied in sunset reviews, nor does it refer to the *de minimis* standard set forth in Article 11.9 of the SCM Agreement. Once again, the same is true of Article 11.3 of the AD Agreement; it neither mentions any *de minimis* standard nor refers to the *de minimis* standard set forth in Article 5.8 of the AD Agreement.

52. The Appellate Body recognized that "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning.'"⁷⁰ Thus, the lack of any indication in the text of Article 21.3 that a *de minimis* standard must be applied in sunset reviews serves, at least at first blush, to indicate that no such requirement exists. Nevertheless, "[s]uch silence does not exclude the possibility that the requirement was intended to be included by implication."⁷¹

53. The Appellate Body next considered Article 11.9 of the SCM Agreement, the provision that establishes the *de minimis* standard for countervailing duty investigations, finding that "[a]lthough the terms of Article 11.9 are detailed as regards the obligations imposed on the authorities thereunder, none of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable *beyond* the investigation stage of a countervailing duty proceeding."⁷² The same is true of Article 5.8 of the AD Agreement, which establishes a *de minimis* standard for antidumping investigations and does not suggest applicability beyond the investigation stage of an antidumping proceeding.

⁶⁹ *Id.*, para. 63.

⁷⁰ *Id.*, para. 65.

⁷¹ *Id.*

⁷² *Id.*, para. 68.

54. The Appellate Body also pointed out that the technique of cross-referencing is frequently used in the SCM Agreement, and that the cross-references suggest that “when the negotiators of the *SCM Agreement* intended that the disciplines set forth in one provision be applied in another context, they did so expressly.”⁷³ Moreover, “we attach significance to the absence of any textual link between Article 21.3 reviews and the *de minimis* standard set forth in Article 11.9 . . . having regard to the fact that both the adoption of a *de minimis* standard for investigations, and the introduction of a ‘sunset’ provision, were regarded as important additions to the Tokyo Round Subsidies Code for improving GATT disciplines on subsidies and countervailing duties.”⁷⁴ Each of these observations is equally true of Article 11.3 of the AD Agreement, and of the AD Agreement as a whole.

55. Turning to the immediate context of Article 21.3 of the SCM Agreement, the Appellate Body found that “the general rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews. This does not, however, assist us in determining whether a specific *de minimis* standard is intended to be applied in an Article 21.3 review.”⁷⁵ The general rule of Article 21.1 of the SCM Agreement has a precise parallel in the general rule of Article 11.1 of the AD Agreement. Analogously, then, the latter rule does not have any bearing on the *de minimis* issue in this case.

56. The Appellate Body found that Article 21.2 of the SCM Agreement establishes the requirement of a rigorous review mechanism, but does not expressly establish a *de minimis* standard.⁷⁶ Similarly, in the AD Agreement, Article 11.2 establishes the requirement of a rigorous review mechanism but does not expressly establish a *de minimis* standard.

57. The Appellate Body further found that Article 21.4 of the SCM Agreement incorporates by reference into Article 21 the provisions of Article 12 regarding evidence and procedure.⁷⁷ Article 12 sets out obligations “primarily of an evidentiary and procedural nature, that apply to the conduct of an *investigation*.”⁷⁸ The Appellate Body found that Article 12 comes immediately after Article 11, “which sets forth a number of procedural, evidentiary as well as substantive rules related to the initiation and conduct of an *investigation*.”⁷⁹ The Appellate Body read the “express reference in Article 21.4 to Article 12, but not to Article 11, as an indication that the drafters intended that the obligations in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3.”⁸⁰ The United States observes that, similarly in the AD Agreement, Article 11.4 incorporates by reference the provisions of Article 6 regarding evidence and procedure; it does not incorporate by reference the provisions of Article 5. Each of these

⁷³ *Id.*, para. 69.

⁷⁴ *Id.*

⁷⁵ *Id.*, para. 70.

⁷⁶ *Id.*, para. 71.

⁷⁷ *Id.*, para. 72.

⁷⁸ *Id.* (emphasis in original).

⁷⁹ *Id.* (emphasis in original).

⁸⁰ *Id.*

provisions of the AD Agreement is parallel to the SCM provisions cited by the Appellate Body. Consequently, there is an indication that the drafters intended the obligations of Article 6, but not those of Article 5, to apply in reviews carried out under Article 11.3.

58. The Appellate Body went on to consider the object and purpose of the SCM Agreement. It noted that the SCM Agreement contains no preamble to guide interpreters and that Part V of the SCM Agreement “conditions the right to apply [countervailing] duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link between the two) and on compliance with its procedural and substantive rules, notably that the requirement of the countervailing duty cannot exceed the amount of the subsidy.”⁸¹ The Appellate Body concluded that, “[t]aken as a whole, the main object and purpose of the *SCM Agreement* is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.”⁸² Similarly, the AD Agreement contains no preamble, and conditions the right to apply antidumping duties on the demonstrated existence of three substantive conditions (dumping, injury, and a causal link between the two) and on compliance with certain procedural and substantive rules. Consequently, parallel to the object and purpose of the SCM Agreement, it may be concluded that an object and purpose of the AD Agreement is to increase and improve GATT disciplines related to the use of antidumping duties.

59. The Appellate Body then found that Part V of the SCM Agreement is aimed at striking a balance between the right to impose countervailing duties and the obligations that Members must respect in order to do so, but that this objective did not assist in resolving the *de minimis* issue.⁸³ The same is true of the AD Agreement: although it can be said that the AD Agreement is aimed at striking a balance between the right to impose antidumping duties and the obligations that Members must respect in order to do so, this understanding of the purpose of the Agreement does not help in resolving the *de minimis* issue.

60. Turning to the reasoning of the panel in *Corrosion-Resistant Steel from Germany*, which found that the *de minimis* rule for investigations was based on the desire to establish a threshold below which subsidization would be deemed non-injurious, the Appellate Body considered whether there was a clear rationale for the *de minimis* standard in the SCM Agreement. The Appellate Body found that “the *SCM Agreement* does not, in our view, support the ‘rationale’ attributed by the Panel to the *de minimis* standard in Article 11.9.”⁸⁴ In the Appellate Body’s judgment, “the terms ‘subsidization’ and ‘injury’ each have an independent meaning in the *SCM Agreement* which is not derived by reference to the other. It is *unlikely* that very low levels of subsidization could be demonstrated to *cause* ‘material’ injury. Yet such a possibility is not, *per se*, precluded by the Agreement itself, as injury is not defined in the *SCM Agreement* in relation

⁸¹ *Id.*, para. 73.

⁸² *Id.*

⁸³ *Id.*, para. 74.

⁸⁴ *Id.*, para. 79.

to any specific level of subsidization.”⁸⁵ It is equally true that the terms “dumping” and “injury” each have an independent meaning in the AD Agreement that is not derived by reference to the other. In addition, injury in the AD Agreement is not defined by reference to any specific level of dumping.

61. The Appellate Body stated that it does “not believe that there is a clear ‘rationale’ behind the 1 percent *de minimis* rule of Article 11.9 that must also apply in the context of reviews carried out under Article 21.3.”⁸⁶ The Appellate Body also rejected the panel’s finding that it would yield irrational results if the *de minimis* standard applied to investigations but not to sunset reviews, pointing out that the countervailing duty reviewed will normally have been imposed based upon an investigation that was subject to WTO requirements. As the Appellate Body further stated:

It is not inconceivable that the negotiators of the *SCM Agreement* took the view that when a subsidy, originally found to be in excess of the *de minimis* level and to be causing injury, has fallen below the *de minimis* level subsequent to the investigation stage, authorities conducting a sunset review should nevertheless determine whether revocation of the duty is still likely to lead to continuation or recurrence of the injury to the domestic industry. The automatic termination of the countervailing duty may not have been considered desirable in such a situation.⁸⁷

Underlying this inference is a fundamental contrast between the purpose of an original investigation and the purpose of a sunset review:

We further observe that original investigations 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 authorities are called upon to focus their inquiry on what would happen if an existing countervailing duty were to be removed. In contrast, in an original investigation, the authorities must investigate the existence, degree and effect of any alleged subsidy in order to determine whether a subsidy exists and whether such subsidy is causing injury to the domestic industry so as to warrant the imposition of a countervailing duty.⁸⁸

62. Precisely the same analysis is applicable to the AD Agreement. There is no clear rationale behind the *de minimis* rule of Article 5.8 that must also apply in the context of sunset reviews; no irrational results follow from interpreting Article 11.3 according to its plain meaning

⁸⁵ *Id.*, para. 81 (emphasis in original).

⁸⁶ *Id.*, para. 84.

⁸⁷ *Id.*, para. 86.

⁸⁸ *Id.*, para. 87.

and not interpolating a *de minimis* standard; and the determination required under Article 11.3 differs in certain essential respects from the nature of the determination to be made in an original investigation (wherein the authorities must investigate whether dumping exists and, if so, whether it is causing injury to the domestic industry so as to warrant the imposition of an antidumping duty).

63. Finally, while it did not consider it strictly necessary to address the issue, the Appellate Body noted that the final texts of Articles 11.9 and 21.3 of the SCM Agreement “were the result of a carefully negotiated compromise that drew from a number of different proposals, reflecting divergent interests and views.”⁸⁹ The Appellate Body further noted that “none of the participants in this appeal pointed to any document indicating that the inclusion of a *de minimis* threshold was ever considered in the negotiations on sunset review provisions leading to the text of Article 21.3.”⁹⁰ Both of these points apply fully to the *de minimis* issue in the instant proceeding.

64. Japan maintains by reference to Article 3 that “the purpose of a *de minimis* standard designates an amount of dumping that is factually and economically insignificant.”⁹¹ As discussed above, the Appellate Body in *Corrosion-Resistant Steel from Germany* rejected similar arguments, concluding that, “we do not believe there is a clear ‘rationale’ behind the 1 percent *de minimis* rule of Article 11.9 that must also apply in the context of reviews carried out under Article 21.3.”⁹² Moreover, Japan’s argument ignores the fact, also discussed above, that the purpose of an investigation is entirely different from the purpose of a sunset review.⁹³ Thus, the function of the *de minimis* standard in Article 5.8 is to determine whether dumping warrants the imposition of antidumping duties in the first instance, not to regulate likelihood determinations in sunset reviews.

65. In sum, Japan’s claim that a *de minimis* standard exists for sunset reviews under Article 11.3 of the AD Agreement is without merit. Applying the customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the AD Agreement.

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

66. As the United States explained in its first written submission, Commerce makes the likelihood of dumping determination on an order-wide basis. This approach is entirely consistent with the requirements for sunset reviews under Article 11.3 of the AD Agreement. The text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, makes

⁸⁹ *Id.*, para. 90.

⁹⁰ *Id.*

⁹¹ Japan First Oral Statement, para. 64.

⁹² *Corrosion-Resistant Steel from Germany*, para. 84.

⁹³ *Id.*, para. 87 (“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.”).

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

67. Japan argues that one cannot make a clear distinction between the procedural/evidentiary obligations and the substantive obligations of Article 6.⁹⁴ Japan's argument, however, is at odds with the Appellate Body's findings in *Corrosion-Resistant Steel from Germany*. In that case, the Appellate Body made the distinction relied upon here by the United States, albeit in the context of interpreting Article 12 of the SCM Agreement (which is parallel to Article 6 of the AD Agreement). As the Appellate Body found, "Article 12 sets out obligations, *primarily* of an evidentiary and procedural nature, that apply to the conduct of an *investigation*."⁹⁵

68. The same is true of Article 6 of the AD Agreement. While the obligations set forth therein are *primarily* of a procedural/evidentiary nature, they are not entirely so. Article 11.4 of the AD Agreement is only intended to incorporate for purposes of Article 11 reviews those provisions of Article 6 that are of a procedural/evidentiary nature, not those of a substantive nature. Japan's request to have Article 6.10 incorporated by reference into Article 11.4 *for substantive purposes* should therefore be rejected by this Panel.

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

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

70. In its oral statement at the first meeting with the Panel, Japan repeated its assertion that

⁹⁴ Japan First Oral Statement, paras. 69-70.

⁹⁵ *Corrosion-Resistant Steel from Germany*, para. 72 (emphasis changed).

the AD Agreement requires the same strict quantitative assessment in sunset reviews as it does in original investigations. In so doing, Japan relies on an interpretation of Articles 3, 5.8, and 11 of the AD Agreement that cannot be reconciled with the text of these provisions. In addition, Japan offers unpersuasive reasons as to why it believes the U.S. position is incorrect. Specifically, Japan contends that the United States has argued that no quantitative analysis for injury determinations is necessary. It also asserts that, in deciding whether to cumulate imports from Japan with other imports, the USITC considered neither (1) the negligibility of imports nor (2) volume. Not only has Japan misinterpreted the Agreement, it has misunderstood both the arguments presented by the United States and the USITC's cumulation determination.

A. The Negligibility Standards of Article 5.8 Do Not Apply to Article 11.3 Reviews

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

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

73. Following the principles set out in the Appellate Body's finding in *Corrosion-Resistant Steel from Germany*, the starting point of the analysis of whether the Article 5.8 negligibility inquiry applies to Article 11.3 reviews is the text of the Agreement. As the United States explained in its first submission, Article 11.3, on its face, does not contain a negligibility standard. There are no references to the negligibility concepts anywhere in Article 11. Furthermore, the plain terms of Article 11 neither implicitly nor explicitly incorporate the negligibility provisions of Article 3.3 or Article 5.8. Similarly, neither Article 3.3 nor Article 5.8 contains any cross-reference to Article 11.3.

74. As noted earlier, the Appellate Body found that, with respect to Articles 21.3 and 11.9 of the SCM Agreement, the absence of cross-references is significant.⁹⁶ Applying this finding here, and given that cross-referencing is also frequently used in the AD Agreement, had the negotiators wished to apply the negligibility requirement to sunset reviews in the antidumping context, they would have expressly cross-referenced Article 3.3 or 5.8 in Article 11.3. They did not.

⁹⁶ *Id.*, at para. 82.

75. Another Appellate Body finding in *Corrosion-Resistant Steel from Germany* relevant here is the Appellate Body's conclusion that the absence of cross-references in Articles 21.3 and 11.9 of the SCM Agreement is has further significance because both the adoption of a *de minimis* standard for investigations and the introduction of a sunset provision were regarded as important Uruguay Round additions to the Tokyo Round Subsidies Code for improving GATT disciplines on subsidies and countervailing duties.⁹⁷ Likewise, the adoption of a negligibility standard for original investigations and sunset provisions in the antidumping duty context were regarded as important additions by the Uruguay Round. Accordingly, as the Appellate Body concluded with respect to Articles 21.3 and 11.9 of the SCM Agreement, the lack of any textual link between Articles 11.3, 5.8 and 3.3 of the AD Agreement has added significance.

76. The Appellate Body also observed in its report that Article 21.4 of the SCM Agreement includes a cross-reference to Article 12, which sets out the obligations regarding evidence and procedure that apply to the conduct of an *investigation*. In light of the consecutive placement of Articles 11 and 12, as well as the fact that both Articles set out obligations relating to *investigations*, the Appellate Body read the express cross-reference in Article 21 to Article 12, and the lack of cross-reference to Article 11, as indicating that the drafters intended that the obligations of Article 12, but not those of Article 11, would apply to Article 21.3 reviews.⁹⁸

77. Analogously, Article 11 of the AD Agreement includes a cross-reference to Article 11.4, which provides that “[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article.” Article 6 comes immediately after Article 5, which, like Article 11 of the SCM Agreement, sets forth a number of procedural and evidentiary as well as substantive rules relating to the conduct of an investigation. Following the reasoning of the Appellate Body, the consequential placement of Articles 5 and 6, the fact that both Articles expressly set out obligations in relation to *investigations*, the express reference in Article 11.4 to Article 6, and the lack of an express reference to Article 5, indicate that the negotiators intended that certain obligations in Article 6, but not those in Article 5, apply to Article 11.3 reviews.

78. Japan, in the alternative, contends that the negligibility standards of Article 5.8 are incorporated into Article 11.3 reviews via footnote 9 to Article 3. According to Japan, footnote 9 specifically provides that any reference to “injury” throughout the AD Agreement incorporates the definition in Article 3 and all Article 3 requirements. Therefore, Japan continues, “injury” determinations under Article 11.3 are also subject to the provisions of Article 3, in particular the conditions for cumulation under Article 3.3 and, by incorporation, the negligibility requirement under Article 5.8. Following this line of reasoning, Japan is effectively contending that the negligibility assessment is an inherent element of every injury determination. In so doing, Japan implies that negligible levels of imports mandate a finding of non-injury under the AD Agreement.

⁹⁷ *Id.*

⁹⁸ *Id.*, at para. 72.

79. Reference to the Appellate Body's findings in *Corrosion-Resistant Steel from Germany* regarding footnote 45 to Article 15 of the SCM Agreement, which is identical to footnote 9, quickly dispatches this argument. In rejecting the identical contention that a *de minimis* subsidy is inherently non-injurious, the Appellate Body examined the text of the SCM Agreement. In finding that the terms of the SCM Agreement do not support the conclusion that a *de minimis* subsidy is inherently non-injurious, the Appellate Body examined Article 15 of the SCM Agreement, which deals with injury and how it is to be determined. It stressed that Article 15, in its paragraph 3, refers to the *de minimis* standard in Article 11.9 only for the purpose of cumulation of imports, and not in reference to injury.

80. The Appellate Body also observed that footnote 45 to Article 15 of the SCM Agreement contains a definition of injury.⁹⁹ However, it found that the footnote defining the word injury did not refer to the amount of subsidy involved. Based on this latter finding, together with the fact that none of the provisions of the SCM Agreement confines the meaning of subsidization to a subsidization rate equal to or in excess of 1 percent *ad valorem*, or any other *de minimis* threshold, the Appellate Body found that the terms "subsidization" and "injury" "each have an independent meaning in the *SCM Agreement*, which is not derived by reference to the other."¹⁰⁰

81. Like Article 15 of the SCM Agreement, Article 3 of the AD Agreement contains a definition of injury and provides guidance as to how an injury analysis is to be conducted. Footnote 9 to Article 3, which is virtually identical to footnote 45 to Article 15, indicates that in the AD Agreement, the term injury is "unless otherwise specified" to:

be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

Thus, in defining the concept of injury, footnote 9 does not make any reference to any specific level of dumped imports.

82. Similarly, none of the other provisions in the AD Agreement limits injury to import volume levels equal to or above a certain percent. Moreover, the text of the AD Agreement as a whole provides no support for the view that a negligibility assessment is an interpretation of injury or that negligible imports are equivalent to no injury. Indeed, since Article 5.8 provides that an investigation will be terminated if there is negligible injury, the reference to negligible imports in the same paragraph cannot be construed to mean "no injury" without making the reference to negligible injury meaningless. Such a construction would be contrary to the customary rules of treaty interpretation. Thus, footnote 9 does not provide support for Japan's argument that an Article 5.8 negligibility assessment is required in sunset reviews.

⁹⁹ *Id.*, at para. 79.

¹⁰⁰ *Id.*, at para. 81.

83. The Appellate Body also rejected the panel's conclusion that an interpretation that the same *de minimis* rate could be considered injurious in the original investigation stage but not at the sunset review stage would lead to irrational results. The Appellate Body stressed that it was not inconceivable that the negotiators believed that when a subsidy, found to be above the *de minimis* level in an original investigation, had fallen below that level at the time of a sunset review, the authorities in a sunset review should nevertheless determine whether revocation of the duty is still likely to lead to the continuation or recurrence of injury to domestic industry. In such a case, it reasoned that automatic termination of the order may not be viewed as desirable.¹⁰¹ This reasoning holds true with respect to import levels that have fallen to negligible levels following imposition of an order. Under such circumstances, it is equally conceivable that the negotiators intended the authorities in a sunset review to determine whether revocation of the order is still likely to lead to the continuation or recurrence of injury. Indeed, in such a situation termination of the order may not be desirable, particularly since dumped imports may have decreased or exited the market altogether because they were unable to compete under the constraints of the order.

84. Finally, and again noted earlier, the Appellate Body observed that original investigations and sunset reviews are distinct processes with different purposes, and concluded that these qualitative differences between the two types of proceedings may explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.¹⁰²

85. As the United States fully explained in its first written submission, and above, the focus of a review under Article 11.3 of the AD Agreement also differs from that of an original antidumping investigation under Article 3. The differences in the nature and practicalities of the inquiry in an original investigation and in a sunset review demonstrate that the requirements for the two inquiries cannot be identical. It would not serve the distinct purpose of each type of inquiry to impose negligibility requirements applicable in original investigations upon sunset reviews, which start from the premise that the volume of subject imports may have decreased and injury eliminated as a result of the dumping order.

86. Accordingly, applying the rationales followed by the Appellate Body to the instant matter, it becomes clear that the negligibility standard in Article 5.8 simply is an agreed rule that if imports are found to be negligible in an *original investigation*, authorities are obliged to terminate their investigation, with the result that no antidumping duty be imposed on such imports. Japan's argument that the Article 5.8 negligibility requirements are applicable to Article 11.3 sunset reviews should be rejected by the Panel.

B. The USITC Sunset Review, While Based on a Qualitative Assessment, Involves Analysis of Quantitative Data

¹⁰¹ *Id.*, at para. 86.

¹⁰² *Id.*, at para. 87.

87. Japan also contends that because the USITC does not make a quantitative negligibility assessment in sunset reviews, the USITC does not engage in any quantitative analysis in sunset reviews.¹⁰³ Japan's contention is misplaced.

88. As an initial matter, in the context of this dispute, Japan has raised a challenge to the USITC's decision to cumulate Japanese imports with imports from other subject countries in the circumstances of its corrosion-resistant sunset review.¹⁰⁴ Japan specifically faults the USITC's failure to engage in any negligibility analysis. Japan has not challenged any provision of U.S. law, but rather has limited its claim to the USITC's decision to *cumulate* imports in the corrosion-resistant case. Any claims that Japan raises generally with respect to the conduct of sunset reviews by the USITC, or specifically with respect to the corrosion-resistant sunset review, that go beyond the decision to *cumulate* are simply outside the Panel's terms of reference and should not be substantively decided by this Panel.

89. Moreover, as a factual matter, Japan is incorrect that the USITC does not engage in any quantitative negligibility analysis in deciding whether to cumulatively assess the likely impact of dumped imports in sunset reviews. Under U.S. law, the USITC "shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry."¹⁰⁵ As the USITC explained in its determination, with respect to the "no discernible adverse impact" provision, it considers both "the likely *volume* of the subject imports and the likely impact of those imports on the domestic industry."¹⁰⁶ In deciding that imports from Japan and other subject countries were likely to have "discernible adverse impact" on the domestic industry, the USITC discussed the volume of subject imports and cited to a table that identified the *quantity* of subject imports for the original investigation period and the years leading up to the sunset review.¹⁰⁷ Thus, Japan's argument that the USITC does not consider import volume in determining whether to cumulate imports from various countries is without merit.

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

¹⁰³ Japan Oral Statement, para. 74.

¹⁰⁴ Request for the Establishment of a Panel by Japan, WT/DS244/4, 5 April 2002, at 4:

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

¹⁰⁵ 19 U.S.C. § 1675a(a)(7).

¹⁰⁶ USITC Pub. at 15.

¹⁰⁷ USITC Pub. at 47.

90. The United States' actions in this case were consistent with GATT Article X:3(a) because, as the United States established in its first written submission and as underscored in the present submission, Commerce and the USITC implemented *by its terms and provisions* the U.S. sunset review regime.

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

92. Japan's specific arguments here are that U.S. conduct was inconsistent with Article X:3(a) in regard to automatic self-initiation, deadlines for submission of factual information, and the differences between reviews under Article 11.2 and 11.3.¹⁰⁸ The first two of these claims are merely restatements of Japan's arguments on the substantive and procedural requirements of the AD Agreement with respect to sunset reviews, and have been dealt with above.

93. Regarding the distinction between Article 11.2 and Article 11.3, Japan suggests that Commerce handles sunset determinations based on three years without dumping under 19 C.F.R. § 351.222(b) in a manner substantively different, and less favorable, than the manner in which it handles determinations in five-year sunset reviews. Japan, however, has presented no evidence to support this claim. In addition, Japan's claim is certainly inapposite with respect to the instant sunset review. As discussed above, Japanese producers/exporters in this case were found to be dumping in the only two completed assessment reviews conducted by Commerce, in the years immediately preceding the five-year sunset review. Thus, they would not have qualified for revocation based on three years without dumping.¹⁰⁹

X. CONCLUSION

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

¹⁰⁸ Japan First Oral Statement, paras. 76-81.

¹⁰⁹ See § 351.222(b)(1)(i)(A) ("Whether all exporters and producers covered at the time of revocation by the order ... have sold the subject merchandise at not less than normal value for a period of at least three consecutive years...").