

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

WT/DS244

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

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I. INTRODUCTION

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

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

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

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

5. Japan's concerns are nothing more than attempts to read obligations into the agreements that are not there, and to seek to obtain through the dispute settlement process results which may only be obtained at the negotiating table. That, however, is not the function of the dispute resolution process as established by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). As is made clear in Article 3.2 of the DSU, recommendations and rulings of a panel "cannot add to or diminish the rights and obligations provided in the covered agreements." This Panel should reject Japan's effort to add to its rights at the expense of the United States.

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

II. PROCEDURAL BACKGROUND

7. On February 4, 2002, Japan requested consultations with the United States on Commerce's and the USITC's final results of the full sunset review of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan. Japan indicated that it considered Commerce's and the USITC's determinations to be "inconsistent with the obligations of the United States under the WTO Agreement," including, but not limited to, obligations under Articles VI and X of GATT 1994; Articles 2, 3, 5, 6, (including Annex II), 11, 12, and 18.4 of the AD Agreement; and Article XVI:4 of the WTO Agreement.¹ Consultations were held on March 14, 2002.

8. On April 4, 2002, Japan requested the establishment of a panel. Japan indicated that it considered Commerce's and the USITC's sunset determinations, and relevant provisions of U.S. legislation and regulations, to be inconsistent with the United States' obligations under the GATT 1994, the AD Agreement and Article XVI:4 of the WTO Agreement.²

9. On July 17, 2002, the Dispute Settlement Body ("DSB") established a panel with standard terms of reference.

III. FACTUAL BACKGROUND

10. Japan's claims relate to certain procedural aspects of the U.S. sunset review system, as well as the specific sunset review determination by Commerce and the USITC regarding corrosion-resistant carbon steel flat products from Japan. In order to facilitate the Panel's understanding of the issues raised by Japan, the United States first will provide an overview of the U.S. sunset review system, followed by a discussion of the specific sunset review

¹ WT/DS244/1 (4 February 2002).

² WT/DS244/2 (4 April 2002).

determination at issue.

A. Sunset Reviews Under U.S. Law

1. The Statute

11. In 1995, the United States amended its antidumping duty statute to include provisions for the conduct of five-year, or so-called “sunset,” reviews of antidumping duty measures, including antidumping duty orders.³ As amended, Commerce and the USITC each conduct sunset reviews pursuant to sections 751(c) and 752 of the Act.⁴ Commerce has the responsibility for determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping. The USITC conducts a review to determine whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of material injury.⁵

12. Pursuant to section 751(d)(2) of the Act, an antidumping duty order must be revoked after five years unless Commerce and the USITC make affirmative determinations that dumping and injury would be likely to continue or recur.⁶

a. Statutory Provisions Related to Commerce’s Determination

13. Under the statute, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of an antidumping duty order.⁷ Thereafter, a review can follow one of three basic paths.

14. First, if no domestic interested party responds to the notice of initiation, Commerce will

³ The U.S. antidumping duty and countervailing duty statute is found in title VII of the Tariff Act of 1930, as amended (“the Act”), 19 U.S.C. 1671 *et seq.* Title II of the Uruguay Round Agreements Act (“URAA”), Pub. L. No. 103-465, 108 Stat. 4809 (1994), amended title VII in order to bring it into conformity with U.S. obligations under and the AD Agreement and the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”). Concurrent with the passage of the URAA, Congress approved and published a “Statement of Administrative Action” (or “SAA”). H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994) (Exhibit JPN-2). The SAA is a type of legislative history which, under U.S. law, provides authoritative interpretative guidance in respect of the statute. *See United States - Measures Treating Export Restraints as Subsidies* (“U.S. Export Restraints”), WT/DS194/R, Report of the Panel, adopted 23 August 2001, paras. 8.99-100 (discussing the status in U.S. law of the SAA). The United States also notes that the term “antidumping duty order” is the U.S. law equivalent of the term “definitive duty” in the AD Agreement.

⁴ Sections 751(c) and 752 of the Act (Exhibit JPN-1(d) & 1(e)).

⁵ Under the U.S. antidumping duty law, the term “revocation” is equivalent to the concept of “expiry of the duty” as used in Article 11.3 of the AD Agreement.

⁶ Section 751(d)(2) of the Act (Exhibit JPN-1(d)).

⁷ Sections 751(c)(1) and (2) of the Act (Exhibit JPN-1(d)); *see also* 19 CFR 351.218(c)(1) (Exhibit JPN-3).

revoke the order within 90 days after the initiation of the review.⁸

15. Second, if the responses to the notice of initiation are “inadequate,” Commerce will conduct an expedited sunset review and issue its final determination within 120 days after the initiation of the review.⁹

16. Third, if the responses to the notice of initiation are adequate, Commerce will conduct a full sunset review and issue its final determination within 240 days after the initiation of the review.¹⁰ Commerce normally will consider the response to the notice of initiation to be adequate if it receives complete responses from a domestic interested party and respondent interested parties accounting on average for more than 50 percent of the total exports of subject merchandise.¹¹

17. In both expedited and full sunset reviews, respondent interested parties may elect to waive participation in the sunset review conducted by Commerce, without prejudice to participation in the sunset review conducted by the USITC.¹² The purpose of this procedure is to avoid forcing respondent interested parties to incur the time and expense of participating in the Commerce side of a sunset review when they wish only to contest the likelihood of continuation or recurrence of injury.

18. As mentioned above, Commerce has the responsibility of determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping.¹³ If Commerce’s determination is negative – *i.e.*, if Commerce finds that there is no such likelihood – Commerce must revoke the order.¹⁴ If Commerce’s determination is affirmative, however, Commerce transmits its determination to the USITC, along with a determination regarding the magnitude of the margin of dumping that is likely to prevail if the order is revoked.¹⁵

19. Under the statute, the applicable *de minimis* standard in sunset reviews is the same as the

⁸ Section 751(c)(3)(A) of the Act (Exhibit JPN-1(d)). The term “domestic interested parties” is a shorthand expression for the interested parties defined in section 771(9)(C)-(G) of the Act. These are the types of interested parties who are eligible to file a petition for the imposition of antidumping duties.

⁹ Section 751(c)(3)(B) of the Act (Exhibit JPN-1(d)).

¹⁰ Section 751(c)(5)(A) of the Act (Exhibit JPN-1(d)).

¹¹ 19 CFR 351.218(e)(1) (Exhibit JPN-3). The term “respondent interested parties” is a shorthand expression for the interested parties defined in section 771(9)(A)-(B) of the Act. These parties typically consist of foreign manufacturers, producers or exporters, or the U.S. importer of subject merchandise, or an association of such persons.

¹² Section 751(c)(4)(A) of the Act (Exhibit JPN-1(d)).

¹³ Section 752(c) of the Act (Exhibit JPN-1(e)).

¹⁴ Section 751(d)(2) of the Act (Exhibit JPN-1(d)).

¹⁵ Section 752(c) of the Act (Exhibit JPN-1(e)).

standard in reviews conducted pursuant to sections 751(a) and section 751(b)(1) of the Act.¹⁶ The statute itself does not set forth the *de minimis* standard for reviews,¹⁷ but the SAA clarifies the intent of Congress and the Administration that Commerce continue to apply to reviews the pre-URAA standard of 0.5 percent *ad valorem*. As discussed below, Commerce has fulfilled this intent through its regulations.

b. Statutory Provisions Related to the USITC's Determination

20. Section 751(c) of the Act, which the URAA added to the Act, requires the USITC to conduct a review no later than five years after issuance of an order or finding or the suspension of an investigation or a prior review, and to determine whether revocation of the order or finding or termination of the suspended investigation would likely lead to the continuation or recurrence of material injury.¹⁸ Section 752 of the Act establishes the standards to be applied by the USITC in conducting five-year or "sunset" reviews. Section 752 specifies several factors for the USITC's consideration in making determinations in five-year reviews, including likely volume, likely price effects and likely impact on the domestic industry. Section 752(a)(1) of the Act specifically addresses the USITC's determination in a section 751(c) review. This provision states that "the USITC shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time."¹⁹

21. Section 752(a)(7) grants the USITC discretion to engage in a cumulative analysis if: (1) reviews are initiated on the same day; and (2) imports would compete with one another and with the domestic like product in the United States market. It further provides that the USITC may cumulate imports from the countries if the conditions for cumulation are otherwise satisfied. Finally, it states that the USITC shall not cumulate imports from a country if those imports are likely to have no discernible adverse impact.

2. The Regulations

a. Commerce Regulations

¹⁶ Section 752(c)(4)(B) of the Act (Exhibit JPN-1(e)); the parallel provision with respect to sunset reviews involving countervailing duty orders appears at section 752(b)(4)(B). A review under section 751(a) is typically referred to as an "administrative review." An administrative review has aspects of the review contemplated by Article 11.2 of the AD Agreement, as well as the "assessment proceeding" referred to in footnote 22 of the AD Agreement. A review under section 751(b)(1) of the Act is typically referred to as a "changed circumstances" review, and corresponds to the review contemplated by Article 11.2.

¹⁷ There is no dispute in this case regarding the statutory *de minimis* standard applicable to antidumping duty investigations.

¹⁸ Section 751(c) (Exhibit JPN-1(e)).

¹⁹ Section 752(a)(1) (Exhibit JPN-1(e)).

22. Following completion of the Uruguay Round and enactment of the URAA, Commerce commenced a rulemaking proceeding with the objective of revising its antidumping (“AD”) and countervailing duty (“CVD”) regulations so as to bring them into conformity with the URAA.²⁰ The rulemaking proceeding began on January 3, 1995, when Commerce published a notice requesting public suggestions as to what Commerce’s new AD/CVD regulations should contain.²¹

23. On May 19, 1997, Commerce published final AD/CVD regulations.²² The regulations contain substantive provisions with respect to antidumping proceedings, as well as procedural provisions applicable to both antidumping and countervailing duty proceedings. These regulations, however, contained minimal guidance with respect to sunset reviews, essentially setting forth only the time frame for initiation and completion of such reviews.²³

24. In 1998, Commerce issued additional regulations addressing in greater detail the procedures for participation in, and conduct of, sunset reviews,²⁴ in anticipation of the over 300 pre-URAA orders (referred to as “transition orders”)²⁵ eligible for revocation by January 1, 2000. These *Sunset Regulations* created a framework both to implement statutory requirements and to provide a clear, transparent process. *Inter alia*, they specified the information to be provided by parties participating in a sunset review²⁶ and the deadlines for required submissions.²⁷

25. The *Sunset Regulations* describe specifically the information required to be provided by all interested parties in a sunset review.²⁸ In addition, the regulations invite parties to submit, with the required information, “any other relevant information or argument that the party would like [Commerce] to consider.”²⁹ These regulations constitute the standard request for information in sunset reviews and function as the standard questionnaire.

26. With respect to deadlines for required submissions, the *Sunset Regulations* provide that substantive responses to a notice of initiation are due 30 days after the date of publication in the

²⁰ Where, as in the case of the U.S. antidumping duty law, Congress entrusts an administrative agency with the administration of a statute, it is common for the agency to promulgate regulations that elaborate on, or clarify, the statute. While regulations are subordinate to the statute, they typically have the force of law if validly promulgated and consistent with the statute.

²¹ *Advance Notice of Proposed Rulemaking and Request for Public Comment*, 60 FR 80 (Jan. 3, 1995) (Exhibit US-1).

²² *Antidumping Duties; Countervailing Duties; Final Rule (“AD/CVD Final Rule”)*, 62 FR 27296 (May 19, 1997) (codified at 19 CFR 351.218) (Exhibit JPN-4).

²³ *AD/CVD Final Rule*, 62 FR at 27397 (Exhibit JPN-4).

²⁴ *Procedures for Conducting Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders (“Sunset Regulations”)*, 63 FR 13516 (March 20, 1998) (codified at 19 CFR part 351) (Exhibit JPN-5).

²⁵ Section 751(c)(6)(C) of the Act (Exhibit JPN-1(d)).

²⁶ 19 CFR 351.218(d)(3) (Exhibit JPN-3).

²⁷ 19 CFR 351.218(d)(3)-(4) (Exhibit JPN-3).

²⁸ 19 CFR 351.218(d)(1)-(4) (Exhibit JPN-3).

²⁹ 19 CFR 351.218(d)(3)(iv)(B) (Exhibit JPN-3).

Federal Register of the notice of initiation.³⁰ Rebuttals to substantive responses are due five days after the date the substantive response is filed.³¹ The regulations also state that Commerce normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired.³²

b. USITC Regulations

27. The USITC has its own set of regulations pertaining to sunset reviews. With respect to institution of a sunset review, the USITC initially determines whether to conduct a full review (which would generally include a public hearing, the issuance of questionnaires, and other procedures) or an expedited review. First, the USITC determines whether individual responses to the notice of institution are adequate. Second, based on those responses deemed individually adequate, the USITC determines whether the collective responses submitted by two groups of interested parties – domestic interested parties (producers, unions, trade associations, or worker groups), and respondent interested parties (importers, exporters, foreign producers, trade associations, or country governments) – demonstrate a sufficient willingness among each group to participate and provide information requested in a full review.³³ In this case, the USITC conducted a full review.

28. The USITC Rules of Practice and Procedure for sunset reviews are at 19 CFR 200-99.³⁴ None of these regulations are in dispute.

3. The Schedule for Sunset Reviews of Pre-URAA Orders

29. Article 18.3.2 of the AD Agreement provides that in the case of Members, such as the United States, whose pre-URAA antidumping duty law did not include a sunset review procedure, pre-URAA antidumping duty measures shall be deemed to be imposed on a date not later than the date of entry into force for that Member of the WTO Agreement. The United States implemented Article 18.3.2 in part through section 751(c)(6) of the Act, which establishes special scheduling rules for transition orders.³⁵

30. To manage the large number of transition orders – including the order on certain corrosion-resistant carbon steel flat products from Japan – eligible for a sunset review by January 1, 2000, Commerce and the USITC jointly developed a sunset review initiation schedule. In developing the schedule, the USITC, in consultation with Commerce, grouped antidumping and

³⁰ 19 CFR 351.218(d)(3)(i) (Exhibit JPN-3).

³¹ 19 CFR 351.218(d)(4) (Exhibit JPN-3).

³² 19 CFR 351.218(d)(4) (Exhibit JPN-3).

³³ 19 CFR 207.62(a) (Exhibit US-2).

³⁴ *Id.*

³⁵ Because the date of entry into force of the WTO Agreement for the United States was January 1, 1995, a transition order is an antidumping duty order in effect as of January 1, 1995.

countervailing duty orders, findings, and suspended investigations involving the same domestic like product or involving related like products. The groups were then placed in chronological sequence based on the average date of the group,³⁶ and the list was divided to provide for monthly initiations beginning in July 1998.

31. After considering comments on a proposed initiation schedule, Commerce published the final sunset initiation schedule on May 14, 1998.³⁷ The final schedule identifies qualifying antidumping and countervailing duty orders, findings, and suspended investigations by product, country, USITC case number, Commerce case number, and effective date, and indicates the month of initiation of a sunset review for specific groups of transition orders.³⁸

32. The final sunset initiation schedule indicated that the sunset review of the antidumping duty order on corrosion-resistant steel would be initiated in September 1999.³⁹

4. Commerce's *Sunset Policy Bulletin*

33. In April 1998, Commerce issued a policy bulletin related to sunset reviews.⁴⁰ Commerce issued the policy bulletin to apprise interested parties of its anticipated methodologies and to assist Commerce in determining whether revocation is likely to lead to continuation or recurrence of dumping. Commerce will normally determine that revocation of an antidumping order is likely to lead to continuation or recurrence of dumping where (1) dumping continued at any level above *de minimis* after the issuance of the order; (2) imports of the subject merchandise ceased after issuance of the order; or (3) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.

34. Commerce's policy bulletin also provides guidance as to what the magnitude of the dumping margin would likely be if the antidumping order were revoked. Commerce will normally select the margins from the investigation because these margins are the only calculated rates that reflect the behavior of exporters without the discipline of an order in place.⁴¹ Commerce may select a more recently calculated margin for a particular company if dumping margins declined or dumping was eliminated after the issuance of the order and import volumes

³⁶ The average date of the group was determined based on the effective date (month and year) of each order within a group.

³⁷ *Transition Orders; Final Schedule and Grouping of Five-Year Reviews*, 63 FR 26779 (May 14, 1998). Commerce republished the notice two week later due to typesetting errors. See 63 FR 29372 (May 29, 1998) ("*Sunset Initiation Schedule*") (Exhibit JPN-18).

³⁸ Commerce makes information related to sunset reviews available to the public on the internet at http://www.ita.doc.gov/import_admin/records/sunset/; the USITC also makes information related to sunset reviews available to the public on the internet at <http://info.usitc.gov/oinv/sunset.nsf>.

³⁹ *Sunset Initiation Schedule*, 63 FR at 29387 (Exhibit JPN-18).

⁴⁰ *Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin ("Sunset Policy Bulletin")*, 63 FR 18871 (April 16, 1998) (Exhibit JPN-6).

⁴¹ *Sunset Policy Bulletin*, 63 FR at 18873 (Exhibit JPN-6).

remained steady or increased.⁴²

35. The *Sunset Policy Bulletin* provides a sketch of what Commerce, given certain factual scenarios, will “normally” do. It establishes how Commerce anticipates acting on a regular, standard or ordinary basis. The *Sunset Policy Bulletin* does not suggest that Commerce will *always* find a likelihood of continuation or recurrence given the factual scenarios above.

B. Certain Corrosion-Resistant Carbon Steel Flat Products from Japan

1. The Antidumping Duty Investigation and Order

36. On July 9, 1993, Commerce published its final affirmative antidumping duty determination on certain steel products from Japan, including corrosion-resistant carbon steel flat products.⁴³

37. In its final determination, Commerce found that both of the Japanese producers of corrosion-resistant carbon steel flat products it had investigated – Kawasaki Steel Corporation (“Kawasaki”) and Nippon Steel Corporation (“NSC”) – were dumping the subject merchandise in the United States.

38. For NSC, Commerce calculated a dumping margin of 40.19 percent based on NSC’s sales to the United States during the period of investigation. For Kawasaki, Commerce assigned a dumping margin based entirely on best information available (“BIA”) because Kawasaki failed to respond to significant portions of Commerce’s questionnaires. Commerce found Kawasaki to be an uncooperative respondent and, consequently, Commerce assigned Kawasaki the highest dumping margin calculated for any exporter in the investigation in accordance with Commerce’s BIA practice at that time. Thus, Commerce assigned Kawasaki as BIA the 40.19 percent dumping margin calculated for NSC. Commerce also calculated an “all others” duty rate of 40.19 percent for corrosion-resistant steel based on the Kawasaki and NSC dumping margins.⁴⁴

39. On August 9, 1993, the USITC notified Commerce of its final affirmative determination that imports of certain corrosion-resistant carbon steel flat products from Japan were causing injury to the U.S. domestic industry.⁴⁵

40. On August 17, 1993, Commerce issued the antidumping duty order on certain corrosion-

⁴² *Id.*

⁴³ *Final Determination of Sales At Less Than Fair Value: Certain Steel Products from Japan*, 58 FR 37154 (July 9, 1993) (“*Commerce Investigation Final*”) (Exhibit JPN-12(d)).

⁴⁴ *Commerce Investigation Final*, 58 FR at 37175 (Exhibit JPN-12(d)).

⁴⁵ *Certain Flat-Rolled Carbon Steel Products from Japan, et al.*, USITC Pub. 2664, Inv. No. 731-TA-617 (Exhibit JPN-13).

resistant carbon steel flat products from Japan.⁴⁶ In the antidumping duty order, Commerce adjusted the dumping margins for Kawasaki and NSC, as well as the “all others” rate, because of the USITC’s negative determination for one product, clad plate. The resulting dumping margin for NSC, Kawasaki and “all others” was 36.41 percent *ad valorem*.⁴⁷

2. The Sunset Review and Determination

a. Commerce’s Determination of Likelihood of Continuation or Recurrence of Dumping

41. On May 14, 1998, Commerce announced its intent to initiate the sunset review of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan in September 1999.⁴⁸

42. On August 26, 1999, Commerce notified Kawasaki and NSC that the sunset review of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan would be initiated on or about September 1, 1999. In its letter, Commerce informed the parties of the applicable information requirements and the 30-day deadline from the date of publication in the *Federal Register* of the sunset initiation notice for submissions.⁴⁹ In addition, Commerce suggested that parties consult the *Sunset Policy Bulletin* for guidance on methodological or analytical issues related to Commerce’s conduct of sunset reviews.⁵⁰

43. On September 1, 1999, Commerce published its notice of initiation of the sunset review of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan.⁵¹ In the published initiation notice, Commerce again highlighted the deadline for filing a substantive response in the sunset review and the information to be contained in the response.⁵² Commerce also explicitly referred parties to the applicable regulation for seeking an extension of filing deadlines.⁵³

⁴⁶ *Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 58 FR 44163 (Aug. 19, 1993) (“*Antidumping Duty Order*”) (Exhibit JPN-12(e)).

⁴⁷ *Antidumping Duty Order*, 58 FR at 44163 (Exhibit JPN-12(e)).

⁴⁸ *Sunset Initiation Schedule* (Exhibit JPN-18).

⁴⁹ 19 CFR 351.218(d)(3)(i) (Exhibit JPN-3).

⁵⁰ “Letters from Commerce to Interested Parties,” dated Aug. 26, 1999 (Exhibit US-3).

⁵¹ *Initiation of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products (“Sunset Initiation”)*, 64 FR 47767, 47787 (Sept. 1, 1999) (Exhibit JPN-8(a)).

⁵² The information provisions with respect to substantive responses are set forth at 19 CFR 351.218(d)(3) (Exhibit JPN-3).

⁵³ 19 CFR 351.302(c) provides that a party may request an extension of a specific time limit. 19 CFR 351.302(b) provides that unless expressly precluded by statute, Commerce may, for good cause, extend any time limit established by its regulations. The U.S. antidumping duty statute does not contain deadlines for submission of information in a sunset review. (Exhibit JPN-3.)

44. On September 24, 1999, Commerce received a request for an extension to file rebuttal comments from domestic interested parties. Pursuant to its regulations, Commerce extended the deadline for all participants eligible to file rebuttal comments until October 15, 1999.

45. On October 4, 1999, NSC and domestic interested parties⁵⁴ filed their substantive responses.

46. In its substantive response, NSC argued that a declining trend in dumping margins accompanied by steady or increasing imports is sufficient to support a determination that dumping is not likely to continue or recur in the absence of the duty.⁵⁵ NSC asserted that evidence from the prior administrative review indicated that import levels had remained steady and dumping margins had declined over the preceding five years.⁵⁶ NSC also suggested that a margin calculated in a more recent administrative review would be a better indicator of future trends than the margin from the investigation.⁵⁷ NSC did not provide any additional evidence or argument for Commerce's consideration on the likelihood issue in its substantive response.

47. On October 20, 1999, Commerce determined to conduct a full sunset review based on its receipt of a complete substantive response from NSC, which accounted for a significant portion of Japanese exports to the United States.⁵⁸

48. On March 27, 2000, Commerce published its preliminary sunset determination finding likelihood of continuation or recurrence of dumping.⁵⁹ In analyzing likelihood, Commerce considered the existence of dumping throughout the history of the order as well as the volume of imports before and after issuance of the order.⁶⁰

49. Commerce considered that two administrative reviews of the order on certain corrosion-resistant carbon steel flat products from Japan had been conducted and completed prior to the sunset review. In the first administrative review, Commerce found that NSC was dumping corrosion-resistant steel in the United States and calculated a dumping margin for NSC of 12.51 percent.⁶¹ Kawasaki did not request to be part of the administrative review. In the second administrative review, Commerce found that both NSC and Kawasaki were dumping subject

⁵⁴ The domestic interested parties, Bethlehem Steel Corporation and U.S. Steel Group, a unit of USX Corporation, participated jointly.

⁵⁵ NSC Substantive Submission, p. 6 (Exhibit JPN-19(a)).

⁵⁶ NSC Substantive Submission, p. 7-8 (Exhibit JPN-19(a)).

⁵⁷ NSC Substantive Submission, p. 9 (Exhibit JPN-19(a)).

⁵⁸ "Commerce Memorandum on Adequacy of Response to Notice of Initiation," dated 20 October 1999 (Exhibit US-4); *see also* 19 CFR 351.218(e)(1)(ii)(A)-(B) (Exhibit JPN-3).

⁵⁹ *Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Sunset Review* ("Commerce Sunset Preliminary"), 65 FR 16169 (March 27, 2000) (Exhibit JPN-8(b)), and accompanying Decision Memorandum ("Commerce Sunset Preliminary Decision Memorandum") (Exhibit JPN-8(c)).

⁶⁰ *Commerce Sunset Preliminary Decision Memorandum*, p.11-13 (Exhibit JPN-8(c)).

⁶¹ 64 FR 12951(March 16, 1999) (POR - Aug. 1, 1996 though July 31, 1997) (Exhibit JPN-15(e)).

merchandise in the United States and calculated a dumping margin for NSC of 2.47 percent and a dumping margin for Kawasaki of 1.61 percent.^{62 63}

50. Based on its findings that dumping had continued since the imposition of the order and that the volume of imports had decreased after issuance of the order and remained at below pre-order levels, Commerce preliminarily determined there was likelihood of continuation or recurrence of dumping.⁶⁴ The facts tended to indicate that the existence of the dumping order had constrained exporters' ability to sell, and that, to the extent exporters could sell, they continued to dump. This led to the reasonable conclusion that if the discipline of the dumping order were removed, exporters could only increase their sales by dumping.

51. As required under U.S. law, Commerce also reported to the USITC the magnitude of the margin of dumping likely to prevail if the order were revoked.⁶⁵ In deciding the magnitude of the margin likely to prevail to report to the USITC, Commerce considered the fact that NSC and Kawasaki had continued to dump in the seven years since imposition of the order and the fact that import volumes had declined over that period. Commerce preliminarily determined to report to the USITC margins of 36.41 percent calculated in the original investigation for NSC, Kawasaki, and "all others", because they were the only margins indicative of exporter behavior without the discipline of an order in place.⁶⁶

52. On May 12, 2000, NSC filed its case brief with Commerce. In its brief, NSC stated that the order should be revoked because the record indicated that import volumes remained steady and dumping margins decreased over the life of the order.⁶⁷ Although import volumes did decrease shortly after imposition of the order, NSC explained that this decline was due to factors other than the imposition of the order and should be considered by Commerce in its likelihood analysis.⁶⁸ In addition, NSC stated that the margin likely to prevail if the order were maintained should be a margin determined in the most recently completed administrative review.⁶⁹

⁶² 65 FR 8935 (Feb. 23, 2000) (POR - Aug. 1, 1997 though July 31, 1998) (Exhibit JPN-16(e)).

⁶³ Commerce also conducted three changed circumstances reviews, one circumvention inquiry, and made one scope determination. Changed circumstances reviews: 62 FR 66848 (Dec. 22, 1997) (revoked order with regard to certain electrolytic zinc-coated steel coiled rolls); 64 FR 14862 (March 29, 1999) (revoked order with regard to certain products used in the manufacturer of rubber seals and metal inserts for ball bearings); and 64 FR 57032 (Oct. 22, 1999) (revoked order with regard to certain products meeting certain SAE standards). Circumvention inquiry: 63 FR 58364 (Oct. 30, 1998) (found boron-added corrosion-resistant carbon steel products to be subject merchandise; issue currently pending before the U.S. courts). Scope determination: 63 FR 6722 (Feb. 24, 1998) (found certain steel coils within scope of order).

⁶⁴ *Commerce Sunset Preliminary Decision Memorandum*, p. 12-13 (Exhibit JPN-8(c)).

⁶⁵ *Id.*, p. 13-15 (Exhibit JPN-8(c)); Section 752(c)(3) of the Act (Exhibit JPN-1(e)).

⁶⁶ *Commerce Sunset Preliminary Decision Memorandum*, p.13-15 (Exhibit JPN-8(c)).

⁶⁷ NSC Case Brief, p. 14-18 (Exhibit JPN-19(c)).

⁶⁸ NSC Case Brief, p. 16 (Exhibit JPN-19(c)).

⁶⁹ NSC Case Brief, p. 19-21 (Exhibit JPN-19(c)).

53. On August 2, 2000, Commerce published its final sunset determination, finding that continuation or recurrence of dumping was likely.⁷⁰ Commerce addressed the parties' arguments, but did not change the basis for its likelihood determination from its preliminary determination, nor did it change its decision regarding what to report to the USITC as the magnitude of the dumping margins likely to prevail. In addition, Commerce explained that it had rejected NSC's request to consider "other factors" because NSC had not submitted evidence of its "other factors" in its substantive response. Notwithstanding its decision not to consider NSC's "other factors," Commerce also concluded that consideration of those factors would not have affected its final sunset determination in light of the existing dumping margins.⁷¹

b. The USITC's Determination of Likelihood of Continuation or Recurrence of Injury

54. The USITC also began its portion of the sunset review on September 1, 1999.⁷² On December 1, 2000, the USITC determined to conduct full reviews for all the orders in question⁷³ to promote administrative efficiency.⁷⁴ During the course of these reviews, the USITC obtained evidence as to the likely effect of revocation through staff research, as well as from party submissions and testimony offered during a hearing held September 18, 2000.

55. On November 13, 2000, after considering all the record evidence, the USITC found that revocation of the countervailing and antidumping duty orders on subject imports of corrosion-resistant steel would likely lead to the continuation or recurrence of material injury within a reasonably foreseeable time to an industry in the United States.⁷⁵

56. Before reaching the issue of whether revocation of the orders would likely result in the continuation or recurrence of material injury, the USITC considered whether to exercise its discretion to cumulate the subject imports for purposes of assessing the likelihood of recurrence or continuation of material injury. First, the USITC found that the statutory requirement that all

⁷⁰ *Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order* ("Commerce Sunset Final"), 65 FR 47380 (Aug. 2, 2000) (Exhibit JPN-8(d)), and accompanying Decision Memorandum ("Commerce Sunset Final Decision Memorandum") (Exhibit JPN-8(e)).

⁷¹ *Commerce Sunset Final Decision Memorandum*, p.10 (Exhibit JPN-8(e)).

⁷² *Certain Carbon Steel Products from Japan, et al.*, Inv. No. 731-TA-617 (Review), USITC Pub. No. 3364 (Nov. 2000) ("USITC Pub. 3364"), Appendix A (Exhibit JPN-9(b)). In this dispute, Japan challenges only the determination concerning continuation of the antidumping order.

⁷³ The orders in question were imposed following the USITC's determinations in August 1993 that an industry in the United States was materially injured or threatened with material injury by reason of subsidized imports of corrosion-resistant steel from France, Germany, and Korea and was materially injured or threatened with material injury by reason of less than fair value ("LTFV") imports of corrosion-resistant steel from Australia, Canada, France, Germany, Japan, and Korea.

⁷⁴ USITC Pub. 3364, p. 4-5 (Exhibit JPN-9(b)).

⁷⁵ The USITC's determination and Staff Report are found in *Certain Carbon Steel Products from Japan, et al.*, Inv. No. 731-TA-617 (Review), USITC Pub. No. 3364 (Exhibit JPN-9(b)).

reviews be initiated on the same day was satisfied.⁷⁶ The USITC next determined that subject imports from each of the individual countries would not be likely to have no discernible adverse impact if the orders were revoked and, therefore, should not be excluded from possible cumulation.⁷⁷

57. In determining whether it should cumulate subject imports, the USITC next found that, although price and volume trends of the subject imports of the six countries varied, none were sufficiently distinct from the others as to preclude any country's subject imports from cumulation.⁷⁸ The USITC then determined that a reasonable overlap of competition would likely exist between and among subject imports and the domestic like product if the orders were revoked.⁷⁹ The USITC based this decision on evidence obtained in the reviews and its findings in the 1993 determinations showing that the domestic product and subject imports were interchangeable, that both have common or similar channels of distribution, and that, given the presence of subject imports in the U.S. market throughout the period of review (albeit in small quantities from Australia and France), they are sold in the same geographic markets and are simultaneously present in the U.S. market.⁸⁰

58. In light of its findings of a reasonable overlap of competition, the varied but unremarkable price and volume trends, and other significant conditions of competition, the USITC concluded that subject imports from Australia, Canada, France, Germany, Japan, and Korea would likely compete under similar conditions of competition.⁸¹ The USITC, therefore, exercised its discretion to cumulate subject imports from all six countries in assessing whether there was a likelihood of the continuation or recurrence of material injury or threat of material injury if the orders were revoked.⁸²

59. The USITC next found several conditions of competition relevant to its determination in this review. Notably, the USITC found that: (1) both imported and domestic corrosion-resistant steel are broadly interchangeable and, as a result, price is an important factor in purchasing decisions; (2) since the original investigations, price competition has increased due to the consolidation of purchasing power in the automotive industry, the reduced number of service centers, and the application and adoption of international standards, all of which increase the ease with which imports compete with the domestic product; and (3) as corrosion-resistant steel production is technologically complex and capital intensive, the high costs associated with

⁷⁶ USITC Pub. 3364, p. 71 (Exhibit JPN-9(b)).

⁷⁷ *Id.*

⁷⁸ *Id.*, p. 71.

⁷⁹ *Id.*, p. 73.

⁸⁰ *Id.*, p. 72-3.

⁸¹ *Id.*, p. 73.

⁸² *Id.*, p. 74.

operating and maintaining corrosion-resistant steel plants require manufacturers to sustain high capacity-utilization rates to remain profitable.⁸³

60. Turning to likely volume effects, the USITC concluded that the volume of the cumulated subject imports would likely increase to a significant level and regain significant market share if the orders were revoked.⁸⁴ The USITC noted that there was considerable production capacity in the subject countries, which cumulatively exceeded U.S. apparent consumption.⁸⁵ The USITC also found that 5.1 million short tons of capacity currently used to produce non-subject corrosion-resistant steel (such as microalloy), could be used to produce the subject imports.⁸⁶ The USITC further noted that there was substantial excess capacity to produce subject imports despite reported high capacity utilization rates, and that inventories were fairly substantial.⁸⁷ The USITC found that, given the high costs associated with corrosion-resistant steel production, producers of the subject product had an incentive to maximize the utilization of available capacity.⁸⁸ Additionally, the USITC indicated that producers of the subject imports had an incentive to produce and sell more corrosion-resistant steel because it is among the highest value-added carbon steel products and, therefore, can earn higher returns than many other carbon steel products.⁸⁹

61. Apart from its findings concerning production capacity, the USITC also found that subject imports would likely increase significantly due to the subject producers' heavy reliance on their export markets, which was true both at the time of the original investigations and during the period of review.⁹⁰ The dependence on export markets was reflected in the increasing share of the U.S. market captured by the subject imports during the period of review notwithstanding the imposition of the orders.⁹¹

62. The USITC also found that revocation of the orders would likely lead to significant underselling by the cumulated subject imports of the domestic like product, as well as significant price depression and suppression within a reasonably foreseeable time.⁹² In reaching this determination, the USITC observed that in the original investigation, it had found price suppression and depression based on import prices which were falling at a greater rate than domestic prices, together with increasing import volumes and confirmed lost sales and revenue

⁸³ *Id.*, p. 74-7.

⁸⁴ *Id.*, p. 78-9.

⁸⁵ *Id.*, p. 79.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*, p. 79-80.

⁹¹ *Id.*, p. 80.

⁹² *Id.*, p. 83.

allegations.⁹³ As for the current period of review, the USITC found that, although subject imports pricing trends differed, import prices were lower in 1999 than in 1997, and there was a mixture of underselling and overselling of imports.⁹⁴ This mixture notwithstanding, given the interchangeability of the subject and domestic products, the USITC stressed that price remained an important factor in purchasing decisions.⁹⁵ Therefore, on balance, the USITC determined that adverse price effects on the domestic industry from subject imports were likely to recur.⁹⁶

63. Finally, the USITC determined that the domestic industry was in a vulnerable state based on such factors as declining operating income, capacity utilization levels, and unit sales values.⁹⁷ In the context of the domestic industry's weakened condition and the likely significant subject import volume increases and adverse price effects, the USITC determined that revocation of the antidumping duty and countervailing orders would likely result in a significant adverse impact on the domestic industry.⁹⁸ Accordingly, the USITC determined that revocation of the orders on Australia, Canada, France, Germany, Japan, and Korea would likely result in the continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time.⁹⁹

c. Notice of Continuation of the Order

64. On December 15, 2000, the United States published notice of the continuation of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan based on the decisions by Commerce and the USITC finding likelihood of continuation or recurrence of dumping and injury.¹⁰⁰

IV. STANDARD OF REVIEW

65. Article 17.6(i) of the AD Agreement provides that:

in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion, the evaluation shall not be overturned.* (Emphasis added.)

⁹³ *Id.*, p. 81-2.

⁹⁴ *Id.*, p. 82.

⁹⁵ *Id.*

⁹⁶ *Id.*, p. 82-3.

⁹⁷ *Id.*, p. 84-5.

⁹⁸ *Id.*, p. 85-6.

⁹⁹ *Id.*, p. 86.

¹⁰⁰ *Continuation of Antidumping and Countervailing Duty Orders on Certain Carbon Steel Products from Japan, et al.*, 65 FR 78469 (Dec. 15, 2000) (Exhibit US-5).

66. In other words, panels may not conduct their own *de novo* evaluation of the facts if the domestic administering authority's establishment of the facts is proper and if its evaluation of the facts is unbiased and objective. This applies even if the panel – had it stood in the shoes of that authority originally – might have decided the matter differently. The above emphasized phrase represents a core principle of this provision: that panels should not re-evaluate the relative weight which the domestic fact-finder, in its discretion, decides to accord to particular pieces of evidence.¹⁰¹ This reflects the fact that the investigating authority is the entity which gathers, hears, and weighs the evidence in the first place; it is thus best positioned to evaluate this evidence.

67. Moreover, it is well-established that panel review is not a substitute for proceedings conducted by national investigating authorities. Numerous panels have recognized that the role of panels is not to conduct a *de novo* review of the factual findings of a national investigating authority. For example, in *HFCS*,¹⁰² the panel stated that when reviewing an antidumping determination, a panel's proper role is to examine whether the evidence before the investigating authority was such that an unbiased and objective investigating authority evaluating that evidence could properly have made the same determination. In its reasoning, the panel quoted the following language from an earlier report:

[T]he Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities.¹⁰³

68. Similarly, with respect to disputes involving a determination made by a domestic

¹⁰¹ Japan apparently believes that this phrase is irrelevant because it intends to prove that all of the USITC's and Commerce's factual determinations were improper, biased, and non-objective. *Id.*, para. 28. It errs, as the remainder of this brief demonstrates.

¹⁰² *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("HFCS"), WT/DS132/R, Report of the Panel, adopted 21 November 2001, paras. 7.94-95 (quoting *Guatemala - Anti-Dumping Investigation Regarding Portland Cement From Mexico* ("*Guatemala Cement*"), WT/DS60/R, Report of the Panel, adopted 25 November 1998, paras. 7.54-57). Moreover, the *HFCS* panel noted that, while the Appellate Body reversed the *Guatemala Cement* panel report on other grounds, the *Guatemala Cement* panel report set out a standard of review that was "instructive." *HFCS*, para. 7.94.

¹⁰³ The quoted language is from *United States - Measures affecting Import of Softwood Lumber from Canada* ("*Softwood Lumber*"), SCM/162, BISD40S/358, adopted 27-28 October 1993, para. 335, as quoted in *Guatemala Cement*, para. 7.56. In fact, the *Guatemala Cement* panel, in a section of its report quoted in *HFCS*, stated that, "We believe that the approach taken by the Panel in the *Softwood Lumber* dispute is a sensible one and is consistent with the standard of review under Article 17.6(i)." *HFCS*, para. 7.94 (quoting *Guatemala Cement*, para. 7.57). See also *United States - Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea* ("*Korea DRAMs*"), WT/DS99/R, Report of the Panel, adopted 19 March 1999, para. 4.443 (refusing to perform a *de novo* review of evidence before the U.S. Commerce Department with regard to an econometric study which Commerce determined was based on unrealistic assumptions and contradictory evidence).

authority based upon an administrative record, the Appellate Body, in *Cotton Yarn*, summarized:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.¹⁰⁴

69. Therefore, in interpreting subparagraph (i) as to factual determinations, Article 17.6 of the AD Agreement makes clear that the matter before the Panel is not whether there was injury or dumping, but rather whether the investigating authority properly established the facts and evaluated them in an unbiased and objective way.

70. In addition to establishing the standard of review for factual issues, the AD Agreement also establishes the “scope” of that review. Specifically, Article 17.5(ii) of the AD Agreement directs a panel to limit its review to the facts that were before the investigating authority when it made its determination (*i.e.*, the evidence contained in the administrative record).¹⁰⁵ This concept is consistent with the fact that a panel may not act as a trier-of-fact in the first instance.

V. SUBSTANTIVE ARGUMENT

A. Japan Bears the Burden of Proving Its Claims

71. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation.¹⁰⁶ If the balance of evidence and argument is inconclusive with respect to a particular claim, the Panel must find that the complaining party, Japan, failed to establish that claim.¹⁰⁷

72. For the reasons discussed below, the United States believes that Japan has failed to meet

¹⁰⁴ *United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* (“*Cotton Yarn*”), WT/DS192/AB/R, Report of the Appellate Body, adopted 5 November 2001, para. 74.

¹⁰⁵ *HFCS*, para. 7.43 (“[W]e are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement.”).

¹⁰⁶ See, e.g., *United States - Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, p. 14; *EC Measures Concerning Meat and Meat Products* (“*EC Hormones*”), WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 104; and *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* (“*Korea Dairy*”), WT/DS98/R, Report of the Panel, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

¹⁰⁷ See, e.g., *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Report of the Panel, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

its burden to establish a *prima facie* case. In the event the Panel should find to the contrary, however, Japan's claims are also rebutted below.

B. Article 11.3 of the AD Agreement Does Not Require an Antidumping Duty Order To Be Terminated after Five Years

73. Japan argues that Article 11.3 of the AD Agreement requires antidumping duty orders to be terminated after five years,¹⁰⁸ and imposes "strict disciplines" on any authority that continues an antidumping order.¹⁰⁹ Contrary to Japan's assertion, Article 11.3 creates no such requirement.¹¹⁰ The extent to which Japan improperly reads "strict disciplines" into the text of Article 11.3 is addressed in the next sections.

74. There is no dispute that a sunset review, like the sunset review at issue in this case, constitutes a "review" within the meaning of Article 11.3 of the AD Agreement. DSU Article 3.2 directs panels to "clarify" WTO provisions "in accordance with customary rules of interpretation of public international law." These rules make clear that the Panel must begin its analysis with the text of Article 11.3,¹¹¹ which provides:

Notwithstanding the provisions of paragraphs 1^[112] and 2^[113], any definitive anti-dumping duty ["antidumping duty order" in U.S. parlance] shall be terminated on a date not later than five years from its imposition . . . *unless* the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a

¹⁰⁸ First Written Submission of the Government of Japan ("Japan First Submission"), paras. 46, 49.

¹⁰⁹ *Id.*, paras. 47-52.

¹¹⁰ *Korea DRAMs*, para. 6.48, n.494 (noting that termination of a definitive duty five years from its imposition "is conditional"). The conditional nature of termination is underscored by the fact that Article 11.3 provides that the duty remains in force pending the outcome of the review.

¹¹¹ The Appellate Body has recognized that Article 31 of the *Vienna Convention* reflects a customary rule of interpretation. Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms of the treaty* in their context and in the light of its object and purpose." (Emphasis added.) In applying this rule, the Appellate Body has cautioned that an interpreter is limited to the words and concepts used in the treaty, and that the principles of interpretation set out in Article 31 "neither require nor condone the imputation into a treaty of words that are not there[.]" *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India Patent Protection*"), WTO/DS50/AB/R, Report of the Appellate Body, adopted 16 January 1998, para. 45. It goes without saying that a panel cannot "clarify" a treaty provision that does not exist.

¹¹² Paragraph 1 of Article 11 provides that "[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."

¹¹³ Paragraph 2 of Article 11 is also relevant to types of reviews other than sunset reviews, such as antidumping duty assessment reviews.

reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.⁵² The duty may remain in force pending the outcome of such a review. (Emphasis added.)

⁵² When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9¹¹⁴ that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

75. Article 11.3 is a specific implementation of the general rule, found in Article 11.1 of the AD Agreement, that an antidumping duty order shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.¹¹⁵

76. On its face, Article 11.3 gives authorities the option of either automatically terminating the definitive antidumping duty, or taking stock of the situation by conducting a review to determine whether continuation or recurrence of dumping and injury is likely. If so, the duty continues to be necessary in accordance with Article 11.1 and may be maintained; if not, the duty must be terminated.

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

C. The AD Agreement Does Not Impose Evidentiary Requirements on the Self-Initiation of Sunset Reviews Under Article 11.3

1. Under Article 11.3 of the AD Agreement, the Right of an Authority to Initiate a Sunset Review of Its Own Initiative is Unqualified

78. Article 11.3 contains no reference to evidentiary requirements for the self-initiation of sunset reviews.¹¹⁶ Nonetheless, Japan argues that an evidentiary requirement is a "procedural rule" and because Article 11, including Article 11.3, has no "procedural rules", such rules can and must be found elsewhere throughout the AD Agreement and applied to Article 11.3 sunset reviews.¹¹⁷

¹¹⁴ Article 9.3.1 addresses the annual administrative duty reviews under U.S. law.

¹¹⁵ *Korea DRAMs*, para. 6.40.

¹¹⁶ Japan itself concedes as much. Japan First Submission, para. 46.

¹¹⁷ *Id.*, paras. 51-2.

79. In the first instance, it is unclear what Japan means by a “procedural rule” or the basis for Japan’s assumption that an evidentiary requirement for self-initiation is a procedural rule. Moreover, Japan does not explain why “procedural rules” may or must be found elsewhere if not in the text. In *Canada Autos*, the Appellate Body stated that omission “must have some meaning.”¹¹⁸ It is, of course, Japan’s burden to explain why, in this case, the absence of any reference to evidentiary requirements where authorities initiate a sunset review on their own initiative means anything other than the plain meaning: that the Members did not agree to assume any such requirements.¹¹⁹

80. Japan’s argument further fails for the simple reason that when Article 11 contemplates procedural requirements, it states such requirements explicitly. For instance, Article 11.4 is a rule which, through cross-reference, renders the procedural requirements of Article 6 applicable to reviews under Article 11, including sunset reviews under Article 11.3. Also, Article 11.5 applies the provisions of Article 11 to price undertakings under Article 8. Finally, the second sentence of Article 11.4 sets out the time limits for reviews under Article 11, including Article 11.3. Whatever the phrase “procedural rules” that Japan has invented may mean, presumably Japan would accept that these requirements fall within that category. And, given that Article 11 does in fact contain these explicit requirements, this confirms that the absence of a rule on evidentiary requirements was intentional.

2. Japan’s “Object and Purpose” Arguments Do Not Support an Evidentiary Requirement of “Sufficient Evidence”

81. Japan next attempts to rely on the object and purpose of Article 11 to establish that the “sufficient evidence” standard of Article 5.6 is the evidentiary standard for self-initiation of sunset reviews under Article 11.3.¹²⁰ Japan’s arguments should be rejected because its approach to interpreting the AD Agreement is the very antithesis of the customary rule of treaty interpretation reflected in Article 31(1) of the *Vienna Convention*, that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of* its object and purpose.” (Emphasis added.)

82. Rather than reading the terms of the provision and interpreting them *in light of* the object and purpose of the AD Agreement, Japan effectively calls for the ascertainment of the object and purpose of a particular provision of the AD Agreement and then applying that object and purpose *in spite of* the ordinary meaning of the words. This runs afoul of the Appellate Body’s

¹¹⁸ See *Canada - Certain Measures Affecting the Automotive Industry* (“*Canada Autos*”), WT/DS139/AB/R-WT/DS142/AB/R, Report of the Appellate Body, adopted 19 June 2000, para. 138, citing *Japan - Taxes on Alcoholic Beverages* (“*Japan Taxes*”), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, Report of the Appellate Body, adopted 4 October 1996, p. 19 (discussing how the “omission” in Article III:2 of GATT 1994 of the general principle in Article III:1 “must have some meaning”).

¹¹⁹ See *supra* note 111.

¹²⁰ Japan First Submission, paras. 53-61.

admonition that “the treaty’s ‘object and purpose’ is to be referred to in determining the meaning of the ‘terms of the treaty’ and not as an independent basis for interpretation.”¹²¹

83. The use of “purposes” to override the text of the AD Agreement is precisely the sort of “independent basis for interpretation” that the Appellate Body has condemned, and which operates to circumvent the requirement in DSU Article 3.2 that DSB rulings cannot add to or diminish the rights and obligations provided in the covered agreements. Japan’s approach ignores the plain fact that, as noted above, where Members wished to have obligations set forth in one provision of the AD Agreement apply in another context, they did so expressly. If accepted, Japan’s approach would nullify the Members’ expectations as *explicitly* expressed in the AD Agreement.¹²²

84. Japan attempts to avoid the results of an appropriate interpretative analysis by arguing that it makes no sense to have an evidentiary requirement only for self-initiation of investigations.¹²³ On the contrary, it makes perfect sense given the fact that investigations and sunset reviews serve different functions and, in essence, gauge different things.

85. The purpose of an investigation is to determine whether the conditions necessary for the *imposition* of an antidumping duty currently exist, *i.e.*, injury caused by dumped imports. The purpose of a sunset review is to determine whether the conditions necessary for *continued imposition* of an antidumping duty exist, *i.e.*, expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The focus of a sunset review under Article 11.3 is likely future behavior if the remedial measure is removed, not whether or to what extent dumping currently exists, which is the focus of an investigation.¹²⁴ Therefore, it was reasonable

¹²¹ *Japan Taxes*, p. 11, footnote 20. See also Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5(1) J. INT’L ECON. L. 28-9 (2002) (“Although the reference to ‘object and purpose’ in the *Vienna Convention* rules draws upon elements of a teleological approach, it is not properly a license for a ‘teleological’ interpretation, since the ‘object and purpose’ considered is a measure for testing the ordinary meaning of treaty terms in their context, a headlight for illuminating and guiding the textual analysis, not a motor for driving its interpretation.”), and M.N. Shaw, *INTERNATIONAL LAW* (3d ed. 1995) 584 (The teleological approach “emphasizes the object and purpose of the treaty as the most important backcloth against which the meaning of any particular treaty provision should be measured. This teleological school of thought has the effect of undermining the role of the judge or arbitrator, since he will be called upon to define the object and purpose of the treaty and it has been criticized for encouraging judicial lawmaking.”).

¹²² See, e.g., *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* (“*Japan Hot-Rolled*”), WT/DS184/AB/R, Report of the Appellate Body, adopted 23 August 2001, para. 122 (finding no basis to read into Article 9.4 of the AD Agreement the word “entirely”), and para. 166 (finding no basis to read into Article 2.1 of the AD Agreement an additional condition that is not expressed in the text of the provision).

¹²³ Japan First Submission, para. 56.

¹²⁴ Indeed, it should be noted that Article 5.6 requires evidence of the *existence* of a dumping, injury and causal link. Because a sunset review deals with likely future behavior, the evidentiary requirements of Article 5.6 do not correspond exactly to the type of evidence needed for a sunset review. This is yet another reason why the requirements of Article 5.6 should not be read into Article 11.3.

for the drafters to adopt different initiation requirements for investigations and reviews,¹²⁵ and reasonable for the United States to establish different initiation requirements for investigations and sunset reviews.

86. To insinuate, as does Japan, that authorities must already have considered the issues of dumping and injury in determining whether to *initiate* a sunset review is like putting the cart before the horse.¹²⁶ The initiation of a review is the necessary beginning of a process leading to a determination of whether or not dumping and injury are likely to continue or recur. The standards for *initiation* of a review – whether on the initiative of an investigating authority or upon request by the domestic industry – in no way prejudice the standards applied by an investigating authority in reaching the *substantive determination* to be made in that review. Japan’s argument is based upon an incorrect equation of the standards for initiation with those for the substantive determination to be made in a review.

3. Japan’s “Context” Arguments Do Not Support an Evidentiary Requirement of “Sufficient Evidence”

87. Japan also makes the argument that the context of Article 11.3 confirms that the evidentiary requirement for self-initiation of sunset reviews under Article 11.3 is “sufficient evidence.”¹²⁷ This argument must fail because it would render various cross-references and explicit language regarding the scope of provisions of the AD Agreement redundant.

88. The immediate context of Article 11.3 is Article 11. Article 11 contains no reference to the “sufficient evidence” standard found in Article 5.6, yet it does contain specific references to other provisions.¹²⁸ The AD Agreement in general also contains multiple instances where obligations set forth in one provision are made applicable in another context by means of an express cross-reference,¹²⁹ or by means of an explicit statement on the scope of application of the

¹²⁵ The United States is not here advocating speculation as to the intent of the drafters, because the text of the AD Agreement is the best evidence of their intent. The point is that should one engage in such improper speculation, one would conclude that there were plenty of reasons as to why, contrary to Japan’s claim, it makes sense for the drafters to choose to have different initiation requirements for investigations and sunset reviews.

¹²⁶ Japan First Submission, paras. 55-6. Arguably, the results of the initial investigation and of the most recent administrative reviews in general could be considered evidence of the existence of dumping.

¹²⁷ *Id.*, paras. 62-74.

¹²⁸ In particular, Article 11.4 expressly makes the evidentiary and procedural provisions of Article 6 applicable to reviews (including sunset reviews under Article 11.3), while Article 11.5 expressly makes the provisions of Article 11 applicable to Article 8 undertakings.

¹²⁹ See, e.g., Article 2.4.2 (“Subject to the provisions governing fair comparison in paragraph 4 of this Article, the existence of margins of dumping during the investigation phase shall normally be established ...”); Article 6.7 (“The procedures described in Annex I shall apply to verifications carried out in exporting countries. The authorities shall, subject to the requirement to protect confidential information, make the results of any verifications available or provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.”); Article 11.4 (“The provisions of Article 6 regarding evidence and

(continued...)

particular provision.¹³⁰ Thus, it is obvious that the drafters knew how to have obligations set forth in one provision apply in another context. Accordingly, the omission of any express link between Article 11.3 and the “sufficient evidence” standard set forth in Article 5.6 means that the Members chose not to apply the evidentiary requirements of Article 5.6 to Article 11.3.¹³¹

89. A treaty interpreter must “give meaning and effect to all the terms of the treaty” and is “not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹³² Japan’s implicit attempt to read into Article 11.3 a cross-reference to Article 5.6 that is quite plainly not there – in the face of, and in contrast to, other express cross-references and scope language found in the AD Agreement – would do just that, *i.e.*, it would render the other cross-references and scope language superfluous.

90. Moreover, nothing in the text of Article 5.6 supports Japan’s arguments that the evidentiary requirements of that provision apply when authorities self-initiate sunset reviews under Article 11.3. Article 5.6 provides as follows:

If, in special circumstances, the authorities concerned decide to *initiate an investigation* without having received a written application by or on behalf of a domestic industry for the *initiation of such investigation*, they shall proceed only if they have sufficient evidence of the existence of dumping, injury and causal link, as described in paragraph 2, to justify the *initiation of an investigation*. (Emphasis added.)

¹²⁹ (...continued)

procedure shall apply to any review carried out under this Article.”); Article 11.5 (“The provisions of this Article shall *mutatis mutandis* apply to price undertakings accepted under Article 8.”); Article 12.3 (“The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.”).

¹³⁰ See, e.g., footnote 1 (“The term ‘initiated’ as used hereinafter means a procedural action by which a Member formally commences an investigation as provided in Article 5.”); Article 2.1 (“For the purpose of this Agreement a product is to be considered as being dumped[.]”); footnote 3 (“When in this Agreement the term ‘authorities’ is used, it shall be interpreted as meaning authorities at an appropriate senior level.”); Article 2.2.1.1 (“For the purpose of paragraph 2 of this Article, costs shall normally be calculated”); footnote 12 (“As used in this Agreement ‘levy’ shall mean the definitive or final legal assessment or collection of a duty or tax.”); Article 6.11 (“For the purposes of this Agreement, ‘interested parties’ shall include”); Article 18.3 (“Subject to subparagraphs 1 and 2, the provisions of this Agreement shall apply to investigations, and reviews of existing measures[.]”).

¹³¹ The *German Steel Sunset* panel performed a similar contextual analysis and reached the same conclusion. If the drafters had intended to make the Article 5.6 “sufficient evidence” standards for self-initiation of investigations applicable to self-initiation of Article 11.3 sunset reviews they could easily have done so. They did not. *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (“*German Steel Sunset*”), WT/DS213/R, Report of the Panel, circulated 3 July 2002, para. 8.26. To find a cross-reference between the two provisions when there is none runs afoul of the Appellate Body’s admonition that “the principles of treaty interpretation set out in Article 31 of the *Vienna Convention* ... neither require nor condone the imputation into a treaty of words that are not there[.]” *India Patent Protection*, para. 45.

¹³² *Korea Dairy*, para. 80 (citations omitted).

Article 5.6 unequivocally states that the evidentiary requirements are applicable only when authorities decide to self-initiate an *investigation*.

91. Article 5, the immediate context for Article 5.6, supports this conclusion. Article 5 is entitled “Initiation and Subsequent Investigation.” As the *German Steel Sunset* panel correctly found, Article 11 of the SCM Agreement – the parallel provision to Article 5 of the AD Agreement – clearly deals with “investigations”, which are distinguished from “reviews.”¹³³ Nothing in the text of Article 5 suggests that its provisions – including paragraph 6 – apply to anything other than the investigation phase of an antidumping proceeding.

92. As the Appellate Body has stated,

The implication arises that the choice and use of different words in different places . . . are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of the Members who negotiated and wrote that Agreement.¹³⁴

Consistent with this teaching, the *Korea DRAMs* panel found that the term “investigation” means “the investigative phase leading up to the final determination of the investigating authority.”¹³⁵ The panel correctly recognized that the choice and use of the word “investigation” in one article but not in another was not inadvertent, but instead had meaning. Considering the ordinary meaning of the terms of Article 5.6 of the AD Agreement, there is no support for the proposition that the Article 5.6 evidentiary standards for self-initiation apply beyond the context of an initial investigation.

93. Japan also attempts to bootstrap the Article 5.6 evidentiary requirement into Article 11.3 based on consideration of Articles 12 as context for Article 11.3.¹³⁶ Japan’s reasoning fails here as well.

¹³³ *German Steel Sunset*, para. 8.57, n. 293.

¹³⁴ *EC Hormones*, para. 164 (citation omitted).

¹³⁵ *Korea DRAMs*, para. 6.87, footnote 519, discussing Article 5 of the AD Agreement. In this regard, it should be noted that Article 18.3 of the AD Agreement, which is a transition rule, also distinguishes between “investigations” and “reviews of existing measures.” In *Brazil - Measures Affecting Desiccated Coconut* (“*Brazil Coconut*”), the Appellate Body specifically recognized this distinction between the initial investigation and the post-investigation or review phase. WT/DS22/AB/R, Report of the Appellate Body, adopted 20 March 1997, p. 9 (noting that the imposition of “definitive” duties (an “order” in U.S. parlance) ends the investigative phase); *see also United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, Report of the Appellate Body, adopted 7 June 2000, paras. 53, 61 (distinguishing between Article 21.2 administrative reviews and the original determination in an investigation).

¹³⁶ Japan First Submission, paras. 63-9.

94. Article 12 addresses “Public Notice and Explanation of Determinations.” The individual provisions of Article 12 require that public notice be given for initiation of an investigation, any preliminary or final determination, imposition of provisional measures, conclusion or suspension of an investigation, and termination or suspension of an investigation. These provisions also set forth what information such public notices must contain.

95. Japan is correct that Article 12.3 provides that the provisions of Article 12 apply “*mutatis mutandis*” to reviews. Consistent with the ordinary meaning of “*mutatis mutandis*,” this simply means that the public notice and explanation provisions are applicable to reviews, but with “necessary changes” or “changes as appropriate.” To suggest that Articles 12.1 and 12.3 are vehicles for making the evidentiary requirements of Article 5.6 for self-initiation of investigations applicable to Article 11.3 sunset reviews, however, ignores the obvious meaning of the text of Article 12.¹³⁷ Indeed, if anything, Article 12.3 merely reinforces the point that the drafters of the AD Agreement knew how to make the requirements of one provision apply to another provision, and that they chose not to make the requirements of Article 5.6 apply to Article 11.3.

96. In sum, the ordinary meaning to be given to the terms of Article 11.3 in their context and in light of the object and purpose of the AD Agreement provides no support for Japan’s contention that the Article 5.6 evidentiary requirements for self-initiation of an antidumping investigation apply in Article 11.3 sunset reviews initiated by authorities on their own initiative. Japan simply seeks to read into Article 11.3 “words that are not there.” The Panel should find that the AD Agreement imposes no evidentiary standards to the self-initiation of sunset reviews under Article 11.3.

4. U.S. Law as Such, and as Applied in the Instant Sunset Review, is Not WTO-Inconsistent in Providing for Automatic Self-Initiation of Sunset Reviews

97. Under U.S. law, Commerce automatically initiates a sunset review on its own initiative within five years of the date of publication of an antidumping duty order.¹³⁸ Commerce did so in the instant sunset review.

¹³⁷ For example, Article 12.1 states in relevant part that “[w]hen authorities are satisfied that there is sufficient evidence to justify initiation of an anti-dumping investigation pursuant to Article 5,” the administering authority is required to give public notice of the initiation. Japan draws the illogical conclusion that this Article 5 reference creates an obligation to demonstrate “sufficient evidence” before a sunset review may be self-initiated by the administering authority pursuant to Article 11.3. The reference to Article 5 investigations in Article 12.1 merely sets the conditions triggering the public notice requirements when the administering authority initiates an anti-dumping investigation.

¹³⁸ Sections 751(c)(1) and (2) of the Act (Exhibit JPN-1(d)); 19 CFR 351.218(c)(1) (Exhibit JPN-3).

98. As demonstrated above, the right of an authority to initiate a sunset review on its own initiative is unqualified. The AD Agreement contains no evidentiary prerequisites for self-initiation by authorities. Therefore, U.S. law is not WTO-inconsistent in providing for automatic self-initiation of sunset reviews, and Commerce's automatic self-initiation in the case of the Japan steel sunset review is also not WTO-inconsistent.

D. U.S. Regulations and Commerce's *Sunset Policy Bulletin* Are Not Inconsistent with the Article 11.3 Obligation to Determine Whether Dumping is Likely to Continue or Recur

1. U.S. Regulations, As Such, Provide for a Determination of Likelihood of Continuation of Dumping

99. The operative language of section 751(c) of the Act governing the obligation to determine likelihood is essentially identical to the language in Article 11.3 of the AD Agreement. Japan has made no claim that the U.S. statute is inconsistent with the Article 11.3 obligation to determine likelihood.

100. With respect to Commerce's regulations, Japan addresses only one instance in which a specific regulatory provision allegedly is inconsistent with the Article 11.3 obligation to determine likelihood. Section 351.222(i)(1)(ii) of Commerce's *Sunset Regulations* states that "where the Secretary determines that revocation or termination is not likely to lead to continuation or recurrence of ... dumping," Commerce will revoke the antidumping duty order.¹³⁹ Japan asserts that this regulatory language demonstrates that Commerce does not apply a likelihood standard, but rather, applies a "not likely" standard placing the burden on the foreign exporters to demonstrate that they will not dump in the future. Japan misconstrues the purpose, and, consequently, the meaning of that regulatory provision.

101. That provision, 19 C.F.R 351.222(i)(1)(ii), is ministerial in nature and addresses the timing of a revocation after Commerce has made a negative final sunset determination under section 751(d)(2). The phrase "not likely" is used in the regulation to describe a negative sunset determination and the process and time line Commerce must follow in providing public notice of the revocation.¹⁴⁰ It is not and should not be construed as the standard by which the sunset determination is made. When read in its entirety, it is clear that this section simply provides the time line for issuance of revocation notices in the event of a negative sunset determination.

¹³⁹ 19 CFR 351.222(i)(1)(ii) (Exhibit JPN-3).

¹⁴⁰ 19 CFR 351.222(i)(1)(i) provides that when the domestic industry has provided an inadequate response to Commerce's notice of initiation or has expressed no interest, Commerce will publish the notice of revocation "not later than 90 days after the date of publication ... of the notice of initiation." Similarly, section 351.222(i)(1)(ii) states that in the case of a full sunset review resulting in a negative final sunset determination, Commerce will revoke the order not later than 240 days ... after the date of publication ... of the notice of initiation." (Exhibit JPN-3.)

Thus, the “not likely” phrase as used in this section of Commerce’s *Sunset Regulations* does not constitute the standard by which Commerce determines likelihood in a sunset review.

102. Section 751(d)(2) of the Act is the provision of U.S. law governing full sunset reviews. Section 751(d)(2) clearly and unambiguously states that Commerce must determine that dumping “would be likely” in the context of a sunset review before an order could be maintained.¹⁴¹ Japan’s argument that section 351.222(i)(1)(i) mandates a “not likely” standard is simply incorrect. In accordance with U.S. law, Commerce must use a “likely” standard in determining whether dumping will continue or recur.¹⁴²

2. The SAA and Commerce’s *Sunset Policy Bulletin* Do Not Mandate WTO-Inconsistent Action Or Preclude WTO-Consistent Action

103. Japan identifies 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 AD Agreement.¹⁴³ Neither the SAA nor the *Sunset Policy Bulletin*, however, can be challenged as independent violations of the AD Agreement because they do not mandate or preclude actions subject to the AD Agreement.

104. In order for a measure, as such, to be found WTO-inconsistent, the measure must be “mandatory”, *i.e.*, it must require WTO-inconsistent action or preclude WTO-consistent action.¹⁴⁴ The Appellate Body and several panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure only if the measure “mandates” action that is inconsistent with WTO obligations, or

¹⁴¹ The relevant part of section 752(d)(2) states:

(2) Five year reviews

In the case of a review conducted under subsection (c) of this section, the administering authority shall revoke a countervailing duty order or an antidumping order or finding, or terminate a suspended investigation, unless –

(A) the administering authority makes a determination that dumping or a countervailable subsidy, as the case may be, *would be likely* to continue or recur.

(emphasis added) (Exhibit JPN-1(d)).

¹⁴² In any event, under U.S. law, Commerce’s *Sunset Regulations* cannot supercede or override the clear statutory mandate contained in the relevant provisions of the antidumping statute to determine whether dumping would be likely to continue or recur upon expiry of the order. *See, e.g., Melamine Chems., Inc. v. U.S.*, 732 F.2d 924, 928-30 (Fed. Cir. 1984) (axiomatic that administrative regulations should not conflict with underlying statute) (Exhibit US-6); and *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1345-46 (CIT December 7, 2000) (statutory language controls in conflict with regulatory provision absent overwhelming evidence that the statutory provision is incorrect) (Exhibit US-7).

¹⁴³ Japan First Submission, paras. 118 *et seq.*

¹⁴⁴ *U.S. Export Restraints*, paras. 8.126-32.

“precludes” action that is WTO-consistent.¹⁴⁵ In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that the challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.¹⁴⁶

105. Moreover, for a measure to give rise to an independent violation of WTO obligations the measure must “constitute an instrument with a functional life of its own”—*i.e.*, it must “do something concrete, independently of any other instruments.”¹⁴⁷ As noted above, the SAA is a type of legislative history which, under U.S. law, provides authoritative interpretative guidance in respect of the statute.¹⁴⁸ 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.

106. Nor can the *Sunset Policy Bulletin* be challenged independently as a violation of WTO obligations. Under U.S. law, the *Sunset Policy Bulletin* is a non-binding statement, providing evidence of Commerce’s understanding of sunset-related issues not explicitly addressed by the statute and regulations.¹⁴⁹ 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.¹⁵⁰ 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.

107. Japan therefore cannot challenge Commerce’s anticipated actions as outlined in the SAA and *Sunset Policy Bulletin*. Instead, Japan may only challenge Commerce’s actual actions in the context of the final sunset determination of corrosion-resistant steel from Japan. As we demonstrate below, Japan’s challenge in this regard also fails.

¹⁴⁵ *United States - Anti-Dumping Act of 1916 (“1916 Act”)*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body, adopted 26 September 2000, paras. 88-9; *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 February 2002, para. 259; *see also U.S. Export Restraints*, paras. 8.77-9; *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, Report of the Panel, adopted 30 August 2002, para. 6.22.

¹⁴⁶ *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, Report of the Panel, adopted 23 August 2001, para. 5.50.

¹⁴⁷ *U.S. Export Restraints*, para. 8.85.

¹⁴⁸ *See supra* note 1.

¹⁴⁹ *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).

¹⁵⁰ As a matter of U.S. administrative law, Commerce practice cannot be binding because 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.

3. In This Case, Commerce Complied with the Article 11.3 Obligation to Determine Whether Dumping is “Likely” to Continue or Recur

108. Japan argues that Commerce determined likelihood of continuation of dumping in the final sunset determination of corrosion resistant-steel from Japan in a manner which violated Article 11.3. According to Japan, Commerce’s approach does not permit a prospective determination, but rather establishes an “irrefutable” presumption that dumping is likely to continue, which resulted in the improper use of a “not likely” standard in this case.¹⁵¹ This “not likely” standard, continues Japan, effectively shifted the evidentiary burden from Commerce to the respondent parties; rather than requiring Commerce to show affirmative evidence indicating recurrence and continuation of dumping in order to continue the order, respondents were required to submit evidence that dumping was not likely for the order to be revoked.¹⁵² Japan is wrong, however, because Commerce applied a “likely” standard in the sunset review in this case.

109. The final sunset determination 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.¹⁵³

110. The *Sunset Policy Bulletin* also provides that, where evidence such as *de minimis* or zero dumping margins and steady or increasing import volumes in the period prior to the sunset review exists, such evidence would not normally support a finding that dumping was likely to continue or recur if the order were revoked.¹⁵⁴

111. Thus, as a starting point for making its likelihood determination in this sunset review, Commerce considered the findings concerning dumping made in the original investigation. The rationale for this approach is that the findings in the original investigation provide the only evidence of the behavior of the respondents without the discipline of an antidumping order in place.¹⁵⁵ Commerce then examined any subsequent evidence, such as the final results of administrative reviews.

¹⁵¹ Japan First Submission, paras. 140-45.

¹⁵² *Id.*, para. 129.

¹⁵³ *Commerce Sunset Final*, p. 9 (Exhibit JPN-8(e)).

¹⁵⁴ *Sunset Policy Bulletin*, 63 FR at 18872-73 (Exhibit JPN-6).

¹⁵⁵ *Commerce Sunset Preliminary Decision Memorandum*, p. 37 (Exhibit JPN-8(c)).

112. As explained above, Commerce will normally find that dumping would likely continue or recur based on evidence of dumping and of reduced or depressed import volumes after imposition of the duty. If there is evidence that dumping has existed since the order was imposed and import volumes have been adversely affected, Commerce may make an affirmative sunset determination because, if these conditions are found, Commerce may reasonably conclude that dumping would continue were the discipline of the duty removed. This conclusion is not a presumption that dumping is likely to continue or recur in every case until proven otherwise, but it is Commerce's reasonable determination that these conditions are indicative of future behavior in the absence of an order based on evidence of past behavior after the order was put in place.¹⁵⁶

113. To address case-by-case differences, pursuant to Commerce's *Sunset Regulations*, parties are permitted to place any information they choose on the administrative record of the sunset review, including information to demonstrate that the existence of dumping and reduced or depressed import volumes should not support a finding that dumping is likely to continue or recur in the particular case. Commerce will also consider "other factors," such as price, cost, market, or other economic factors in determining the likelihood of continuation or recurrence of dumping.¹⁵⁷

114. In the original 1993 investigation, Commerce found that Japanese producers of corrosion-resistant steel were dumping the subject merchandise in the United States and calculated a 36.41 percent margin for NSC. Commerce assigned the same 36.41 percent margin to Kawasaki as BIA for its failure to respond to Commerce's questionnaire.¹⁵⁸

115. Commerce had conducted two administrative reviews in the five-year period prior to the sunset review. Commerce examined home market and U.S. prices and calculated a dumping

¹⁵⁶ Japan devotes a section of its brief to arguing that Article 11.3 of the AD Agreement requires the administering authority to take "positive action" in order to "determine" likelihood, and to collect data and base its determination on this "positive evidence", in an apparent attempt to discredit Commerce's reliance on evidence from previous determinations. Japan First Submission, paras. 108-116. Nothing in the text of Article 11.3, however, provides for such an obligation. Authorities are free to rely on historical evidence of dumping or evidence provided by interested parties, and need not collect new evidence themselves to make their determinations. Commerce reasonably can and, in this case, did make a determination of likelihood based on existing evidence, fully consistent with Article 11.3.

¹⁵⁷ *Sunset Policy Bulletin*, 63 FR at 18874 (Exhibit JPN-6). The SAA also provides that such other factors may include:

the market share of foreign producers subject to the dumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology in the industry; and prevailing prices in the relevant markets.

SAA at 890 (Exhibit JPN-2). The SAA provides that this list is merely illustrative and that Commerce should analyze such information on a case-by-case basis. *Id.*

¹⁵⁸ *Antidumping Duty Order*, 58 FR at 44163 (Exhibit JPN-12(e)).

margin of 12.51 percent for NSC for the 1996-97 period. For the 1997-98 period, Commerce examined sales by both NSC and Kawasaki and calculated dumping margins of 2.47 percent for NSC and 1.61 percent for Kawasaki. Thus, for at least two periods preceding the sunset review, Japanese producers were found to be dumping corrosion-resistant steel in the United States.

116. In the sunset review, Commerce examined information submitted by the parties and final results from the administrative reviews. As a result of its analysis, Commerce determined that Japanese producers and exporters had been dumping corrosion-resistant steel in the United States during the period from the issuance of the order until the sunset review.¹⁵⁹

117. In addition, Commerce examined import data from several sources, including information supplied by NSC in its substantive response,¹⁶⁰ and found that U.S. imports of Japanese corrosion-resistant steel had declined precipitously shortly after the antidumping duty order was issued and remained at these depressed levels for the entire period prior to the sunset review.¹⁶¹ Based on these findings, Commerce reasonably concluded it was likely that dumping by the Japanese producers and exporters would continue or recur in the event the order were revoked.¹⁶²

118. Commerce's final sunset determination that it was likely that dumping would continue or recur in this case is supported by the evidence. Commerce found dumping and depressed import volumes in the period prior to the sunset review. Consequently, in accordance with the obligations of Article 11.3, Commerce drew a reasonable and logical inference that this evidence was indicative of likely continuation or recurrence of dumping in the absence of a duty.

119. Japan argues that Commerce's focus on evidence of "historical dumping" is insufficient to support Commerce's finding here that Japanese exporters would continue to dump corrosion-resistant steel in the United States if the order were revoked.¹⁶³ Again, Japan's claim is unfounded. Article 11.3 requires that the authorities determine whether dumping is likely to *continue* or recur in the absence of the duty. Here, Commerce found that the Japanese exporter were dumping the subject merchandise in several periods prior to the sunset review. It stands to reason, therefore, that dumping will likely continue when there is no order in place because dumping occurred when there *was* an order in place. In fact, historical dumping with a discipline can be highly probative of the behavior of exporters without the discipline.

¹⁵⁹ *Commerce Sunset Preliminary Decision Memorandum*, pp. 24-9 (Exhibit JPN-8(c)); *Commerce Sunset Final Decision Memorandum* (Exhibit JPN-8(e)).

¹⁶⁰ NSC Substantive Response, pp. 7-8, 12-14 (Exhibit JPN-19(a)).

¹⁶¹ *Commerce Sunset Preliminary Decision Memorandum*, p. 29 (Exhibit JPN-8(c)); *Commerce Sunset Final Decision Memorandum* (Exhibit JPN-8(e)).

¹⁶² *Commerce Sunset Preliminary Decision Memorandum*, p. 29 (Exhibit JPN-8(c)); *Commerce Sunset Final Decision Memorandum* (Exhibit JPN-8(e)).

¹⁶³ Japan First Submission, para. 140.

120. Finally, Japan argues that Commerce's rejection of certain information, addressing reasons for the depressed import volumes, was improper. During the sunset review, NSC asserted that the production of corrosion-resistant steel at NSC's U.S. plant and a consistent U.S. customer base explained why the import levels remained depressed after the issuance of the order.¹⁶⁴ Japan asserts that Commerce's decision not to consider this additional evidence is indicative of the "not likely" presumption inherent in the approach Commerce applied in this case.¹⁶⁵

121. Japan is incorrect in its assertion. Commerce's *Sunset Regulations* require that when a party wishes Commerce to consider "other factors" during the course of a sunset review, the party must submit the "other factors" information and evidence of "good cause" for its consideration in the party's substantive response.¹⁶⁶ NSC, however, did not submit the "other factors" information on its substantive response.¹⁶⁷ Thus, in the first instance, Commerce decided not to consider the information because NSC supplied neither the information nor a justification of its relevance in a timely fashion.¹⁶⁸ Consequently, Commerce did not apply the requirement for "good cause" in this case. Second, Commerce explained that, even had the information been considered, it would not have affected Commerce's ultimate determination that it was likely that dumping would continue or recur because, whatever the circumstances concerning the import volumes, there remained the evidence that exporters were dumping after issuance of the order.¹⁶⁹

¹⁶⁴ NSC Case Brief, pp. 17-19 (Exhibit JPN- 19(c)).

¹⁶⁵ Japan First Submission, paras. 129-34.

¹⁶⁶ 19 CFR 218(d)(3)(iv) (Exhibit JPN-3).

¹⁶⁷ *Commerce Sunset Final Decision Memorandum*, p. 11 (Exhibit JPN-8(e)). The United States notes that NSC had 15 months from the publication of the schedule for sunset reviews until the initiation of the sunset review for corrosion-resistant steel from Japan to compile whatever information it considered relevant for Commerce's consideration in the sunset review. Commerce published its schedule for sunset reviews on May 14, 1998, which included the date of initiation for the sunset review on corrosion-resistant steel from Japan, and initiated this sunset review on September 1, 1999. Commerce's *Sunset Policy Bulletin* and *Sunset Regulations* also were published and publically available in March and May, 1998, respectively. Consequently, NSC was or should have been aware of Commerce's sunset review information requirements, processes, procedures, and methodology and could have submitted the "other factors" information, but did not.

¹⁶⁸ NSC Case Brief, pp. 16-19 (Exhibit JPN-19(c)) and NSC Substantive Submission (Exhibit JPN-19(a)); NSC supplied the information concerning the U.S. operations and customer base in its case brief on May 12, 2000, instead of earlier in its October 1, 1999, substantive submission.

¹⁶⁹ Japan cites two final sunset determinations where Commerce found "good cause" to consider "other factors" and yet did not lift the antidumping duty order as support for its claim. In *Brass Sheet and Strip from the Netherlands*, 65 FR 735 (Jan. 6, 2000) (Exhibit JPN-25(l)), Commerce found that the "other factors" did not outweigh evidence of the existence of dumping and depressed import levels in that case, and reasonably determined that it would be likely that dumping would continue or recur in the absence of the order. Thus, Japan's claim is nothing more than an allegation that Commerce improperly weighed the evidence in that case.

Japan also cites *Sugar & Syrups from Canada*, 64 FR 48362 (Sept. 3, 1999) (Exhibit JPN 25(m)) and infers that Commerce found "good cause" to examine other factors presented by the domestic industry simply to perpetuate the order. Japan is wrong. Commerce preliminarily determined to revoke the order because of the absence of

(continued...)

122. Finally, to the extent that Japan believes that allegedly disparate treatment between the conduct of a review pursuant to Article 11.2 and sunset reviews under Article 11.3 illustrates that Commerce applied a “not likely” standard in this case, Japan is again wrong. When Commerce conducts an Article 11.2 review, Commerce examines an individual exporter’s past behavior to determine whether that exporter has dumped the subject merchandise during each of three one-year periods prior to and including the revocation review. If that exporter has not dumped during these periods and no other evidence exists to demonstrate that the exporter is likely to dump in the future, Commerce will revoke the order with respect to that exporter.

123. In an Article 11.3 sunset review, Commerce conducts a similar analysis, but instead of focusing on the individual exporter, Commerce examines dumping on an order-wide basis as it did here. Commerce’s analysis, exactly like the Article 11.2 review, focused on the existence of dumping in the period prior to the sunset review and the likelihood of future dumping by the Japanese producers of corrosion-resistant steel. Commerce again used the past behavior of the exporters, in this case, NSC and Kawasaki, who were found to be dumping in the investigation or subsequent reviews, to determine whether it was likely that dumping would continue or recur in the future absent the order. Consequently, Japan’s claim that Commerce applied different “likely” standard in this case than is does in Article 11.2 reviews is simply incorrect.

124. In sum, Japan has failed to identify and articulate how Commerce’s application of the policies set forth in the SAA and Commerce’s *Sunset Policy Bulletin* is inconsistent with the obligation to determine likelihood under Article 11.3.

E. Commerce’s Analysis of Dumping In the Context of the Likelihood and “Margin Likely to Prevail” Determinations in this Case Was Consistent With The AD Agreement

125. Japan further attempts to undermine the determinations in this case by asserting that Commerce’s reliance on pre-WTO Agreement dumping margins in analyzing the likelihood of continuation or recurrence of dumping is inconsistent with Articles 2, 11.3, and 18.3 of the AD Agreement, both as a general practice and as applied in this case.¹⁷⁰ In the same vein, Japan challenges, both in general and as applied in this case, Commerce’s reliance on margins from the original investigation because of the application of allegedly WTO-inconsistent methodologies in

¹⁶⁹ (...continued)

dumping and the presence of significant import volumes during the period prior to the sunset review. In the final sunset determination, Commerce determined that dumping by the Canadian producers was likely to continue or recur if the order were revoked because an analysis of price and cost data indicated that the Canadian producer could not export refined sugar to the United States profitably while paying a Canadian tariff on sugar.

¹⁷⁰ Japan First Submission, paras. 161-74.

that segment of the proceeding.¹⁷¹ Japan also maintains that Commerce's sunset practice, both in general and as applied in this case, violates the AD Agreement by relying on dumping margins from the original investigation and the two completed administrative reviews which were calculated using what Japan refers to as a "zeroing" methodology, *i.e.*, a methodology in which no offset is granted to the respondent for negative differences between the normal value and export price (or constructed export price) of individual transactions.¹⁷² Finally, Japan contends that the approach Commerce uses to identify the rate of dumping likely to prevail in the event of revocation, both as a general practice and as applied in this case, violates Articles 2, 11.3, and 18.3 of the AD Agreement.¹⁷³

126. As an initial point, Japan has not demonstrated that Commerce is required by any of the measures at issue to rely on any of the margin information to which Japan objects for purposes of sunset reviews. Consequently, Japan may only challenge Commerce's reliance on such information *in this case*. As discussed above,¹⁷⁴ there is no basis for Japan's challenge to some "general practice," which would not be more than such reliance in different cases.

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

1. Article 11.3 Does Not Require a Quantification of Dumping or the Use of Any Particular Methodology

128. Customary rules of treaty interpretation dictate that the words of a treaty form the starting point for the process of interpretation. The text of Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review under Article 11.3 is on future behavior, *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what

¹⁷¹ *Id.* The second and third of these claims – regarding the "10/90/10" test and the minimums for SG&A and profit – were not raised in Japan's Request for the Establishment of a Panel, and should not, therefore, be considered as independent claims in this proceeding. WT/DS244/2 (4 April 2002).

¹⁷² Japan First Submission, paras. 175-84 and 226-30.

¹⁷³ *Id.*, paras. 214 - 25.

¹⁷⁴ *See* discussion *supra*, at para. 107.

extent dumping or injury currently exists. Thus, neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is of central significance to the results of the review; indeed, such precision is certainly not required.¹⁷⁵

129. Under Article 11.3, the administering authority is required to determine whether continuation or recurrence of dumping is likely. Article 11.3 does not, however, set forth a methodology to be used in performing this likelihood analysis. Nor does Article 11.3 require quantification of past or future amounts of dumping.¹⁷⁶ This is reinforced by note 22 of Article 11.3, which provides that “[w]hen the amount of the anti-dumping duty is determined on a retrospective basis, a finding in the most recent assessment proceeding ... that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.” No specific amount of dumping – even the most current – is decisive as to whether dumping is likely to continue or recur.

130. Japan itself seems to recognize no one specific amount of dumping is decisive. In particular, Japan states that “[t]he Panel here need not decide exactly what the authorities must do. We are not arguing there *must* be a complete recalculation in every case” (emphasis added).¹⁷⁷ In other words, Japan concedes that the likelihood of dumping determination in sunset reviews under Article 11.3 is not tied to any specific amount of dumping.

131. Article 18.3 does not change this fact. Article 18.3 provides that “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.” Article 18.3 is a timing provision and, therefore, is intended to resolve questions regarding which cases are subject to the provisions of the AD Agreement, *i.e.*, questions that may arise in the transition from pre-WTO to WTO rules.¹⁷⁸ It is not intended to establish substantive rules regarding the conduct of sunset reviews. Thus, contrary to Japan’s contention, Article 18.3 does not make all provisions that are applicable to investigations equally applicable to reviews.

¹⁷⁵ See, e.g., *Korea DRAMs*, para. 6.43 (discussing prospective analysis, albeit in the context of a different type of review). Although there is no requirement to quantify the amount of dumping likely to continue or recur, as discussed below, the United States does so under its domestic law. Commerce transmits this information to the USITC.

¹⁷⁶ The Appellate Body has found that when an article is silent with respect to an issue, it cannot impute words that are not there or import concepts that were not intended. See, e.g., *Japan Hot-Rolled*, para. 166 (for purposes of determining normal value, Article 2.1 is silent as to how to determine the parties to the relevant sales transactions; the Appellate Body therefore refused to read into Article 2.1 any conditions on this aspect of the dumping determination).

¹⁷⁷ Japan First Submission, para. 170.

¹⁷⁸ *Brazil Coconut*, p. 18 (“The Appellate Body sees Article 32.3 of the SCM Agreement as a clear statement that for countervailing duty investigations or reviews, the dividing line between the application of the GATT 1947 system of agreements and the WTO Agreement is to be determined by the date on which the application was made for the countervailing duty investigation or review”).

132. Article 18.3.1 provides that “[w]ith respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply.” This provision is also a timing rule governing the transition from pre-WTO to WTO requirements. Of interest in the context of Japan’s claims, however, is the fact that this provision recognizes that for assessment reviews initiated prior to the date of entry into force of the WTO Agreement, application of pre-WTO rules may be appropriate.¹⁷⁹

133. Nor does the fact that Commerce reports the amount of dumping likely to continue or recur to the USITC imply a corresponding obligation under the AD Agreement to calculate dumping margins in sunset reviews. As explained above, under U.S. law, Commerce and the USITC each conduct sunset reviews.¹⁸⁰ When Commerce makes a determination that revocation of an antidumping order would likely lead to continuation or recurrence of dumping, Commerce transmits its determination to the USITC, along with a determination regarding the amount of the margin of dumping that is likely to prevail if the order is revoked.¹⁸¹ Commerce will normally select the margins from the investigation because those margins are the only calculated rates that reflect the behavior of exporters without the discipline of an order in place.¹⁸²

134. This does not change the fact that there is no *obligation* in a sunset review under Article 11.3 to calculate either a current or future amount of dumping. While Commerce has chosen to report a future amount of dumping to the USITC to assist it in making its likelihood of injury determination, WTO Members have not assumed any obligation to do so under the AD Agreement.

135. In sum, Articles 11.3 or 18 do not require consideration of specific *amounts* of dumping, or the use of specific *methodologies*, in order to determine that dumping is likely to continue or recur. Commerce appropriately and reasonably relied on evidence of dumping and import volumes over the course of the order in making its determination that dumping is likely to continue or recur.

2. The Margins Determined In Commerce’s Original Investigation, And The Methodologies Used To Derive Them, Cannot Be Challenged Before This Panel

¹⁷⁹ Japan argues that authorities are required to “apply” Article 2-consistent dumping margins in the context of Article 11.3 sunset reviews. Japan First Submission, para. 160. It is unclear what Japan means by “apply”. There is simply no discussion in Japan’s brief concerning an obligation under Article 11.3 to “apply” dumping margins in a sunset review and what “apply” means in that context.

¹⁸⁰ Sections 751(c) and 752 of the Act (Exhibit JPN-1(d) & (e)).

¹⁸¹ Section 752(c) of the Act (Exhibit JPN-1(e)).

¹⁸² *Sunset Policy Bulletin*, 63 FR at 18873 (Exhibit JPN-6).

136. Japan maintains that the margin calculations in the investigation, which were considered by Commerce in making its sunset determinations, were performed in a manner that was inconsistent with WTO requirements. However, those specific margins, and the methodologies used to derive them, cannot now be challenged before this Panel.

137. Article 18.3 of the AD Agreement provides that “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.” The AD Agreement thus applies only to investigations that were based on U.S. dumping petitions filed after January 1, 1995, the date of entry-into-force of the WTO Agreement with respect to the United States. The antidumping investigation in this case was initiated on the basis of a petition filed prior to January 1, 1995. Thus, the specific margins calculated by Commerce in the original investigation, and the calculation methodologies used to derive them, cannot be challenged before this Panel.

138. An analogous situation was presented in *Korea DRAMs*. In that case, the United States maintained that a WTO proceeding arising from the final results of the third administrative review of the order did not provide an appropriate forum in which to challenge a product scope determination made during the original investigation. The United States pointed out that (1) the product scope determination had been made prior to the creation of the WTO and the entry-into-force of the AD Agreement and (2) product scope issues were not revisited during the third administrative review. The United States asserted, therefore, that claims regarding product scope were inadmissible under Article 18.3 of the AD Agreement. The panel found for the United States, finding that the AD Agreement applies only to those parts of a pre-WTO measure that “are included in the scope of a post-WTO review.”¹⁸³ In the instant case, the specific amounts of the original dumping margins were not revisited in the sunset review. Consequently, those margins, and the methodologies used to derive them, cannot be challenged before this Panel.

3. Japan’s Claims Regarding Commerce’s Identification of the Margins Likely to Prevail In the Event of Revocation Are Equally Erroneous

139. Under U.S. law, in making its sunset injury determination, the USITC “may consider the magnitude of the margin of dumping.”¹⁸⁴ In order for the USITC to have the option of doing this, Commerce, pursuant to the statute,¹⁸⁵ must report to the USITC the margin(s) likely to prevail in the event of revocation and must normally choose that rate from among the rates previously calculated in the investigation or administrative reviews. The SAA explains that the

¹⁸³ *Korea DRAMs*, para. 6.14.

¹⁸⁴ Section 752(a)(6) (Exhibit JPN-1(e)).

¹⁸⁵ Section 752(c)(3) (“The administering authority shall provide to the Commission the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the suspended investigation is terminated. The administering authority shall normally choose a margin that was determined under section 1673d of this title or under subsection (a) or (b)(1) of section 1675 of this title.”) (Exhibit JPN-1(e)).

“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.”¹⁸⁶ 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 company-specific margin from the investigation for each company...”¹⁸⁷ 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.”¹⁸⁸

140. In the instant case, Commerce found that, while dumping had continued throughout the life of the order, import volumes had decreased. 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. Both the statutory requirement that this action reflected and the manner in which the requirement was applied here are both entirely consistent with the AD Agreement. There is no provision of the AD Agreement that precludes the USITC from considering the magnitude of the margin of dumping likely to prevail in the event of revocation (or, for that matter, requires such consideration), and there is no provision in the Agreement that limits how the margin likely to prevail might be identified. 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.”

141. Japan maintains that, pursuant to Articles 2, 11.3, and 18.3, generally and as applied in the instant case, the margins reported to the USITC as the rates of dumping likely to prevail in the event of revocation were improperly identified by Commerce.¹⁸⁹ Japan’s argument here is simply a reiteration of its arguments regarding Commerce’s determination of the likelihood of continuation or recurrence or dumping.

142. The only new element to Japan’s presentation is its tendentious recitation of certain facts and speculations, to wit, “Consider the margins in this case. The original dumping margins were seven years old when they were used in the final determination of this sunset review. In the next sunset review, these dumping margins will be 13 years old.”¹⁹⁰ Japan further maintains that, “[t]he USG’s approach, however, overlooks the equally valid point that only the post-order dumping margins reflect the current reality of the market.”¹⁹¹ Needless to say, the *next* sunset review is not at issue in the case presently before this Panel. Moreover, the “current reality of the

¹⁸⁶ SAA at 890 (Exhibit JPN-2).

¹⁸⁷ *Sunset Policy Bulletin*, 63 Fed. Reg. at 18873 (Exhibit JPN-6).

¹⁸⁸ *Id.*

¹⁸⁹ Japan First Submission, paras. 214-25.

¹⁹⁰ *Id.*, para. 214.

¹⁹¹ *Id.*, para. 222.

market” is not the issue in a sunset review conducted pursuant to Article 11.3. Rather, the issue under Article 11.3 is whether dumping and injury are likely to continue or recur in the event of the expiry of the duty, an inherently forward-looking inquiry.

143. Article 11.3 plainly does not require the quantification of dumping margins in sunset reviews and does not include any specifications regarding the methodology or methodologies that must be employed in such reviews. Moreover, Japan’s attempt to rely on Articles 2 and 18.3 to advance its claims fails for the same reasons here as it did in the context of Japan’s attack on Commerce’s approach to determining the likelihood of continuation or recurrence of dumping. Those Articles cannot sustain either Japan’s claim that consideration of pre-WTO dumping margins in a sunset review is *precluded* or its claim that Commerce is permitted to rely only on dumping margins that include an offset for negative differences between the export price (or constructed export price) of individual transactions and normal value. Consequently, Japan’s reiteration of its arguments regarding the quantification of dumping margins should be rejected by this Panel.

4. Japan’s Reliance On The Findings In *EC Bed Linen* Is Misplaced

144. With respect to Commerce’s use of allegedly “zeroed” dumping margins, Japan’s reliance on the Appellate Body’s findings in *EC Bed Linen*¹⁹² is misplaced. *EC Bed Linen* arose from an investigation, not a sunset review.¹⁹³ For that reason, unlike the present case, Article 11.3 did not apply in that case. At the root of Japan’s failure to acknowledge this key distinction is a failure to acknowledge that there are a fundamental differences between the purpose of an investigation and the purpose of a sunset review. The function of an investigation is to regulate the imposition of an antidumping duty in the first instance. Its focus is on past behavior, a focus that lends itself to precise mathematical calculations. In contrast, the focus of a sunset review under Article 11.3 is on future behavior, a focus that does not lend itself to precise mathematical calculations.

145. In *EC Bed Linen*, the administering authority made price comparisons on an average-to-average basis, not the average-to-transaction basis that was used in the investigation and the administrative reviews that were considered in the instant sunset review.¹⁹⁴ Moreover, the average-to-average basis of the price comparisons in *EC Bed Linen* was a key factor in the

¹⁹² *European Communities, Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* (“*EC Bed Linen*”), WT/DS141/AB/R, Report of the Appellate Body, adopted 12 March 2001.

¹⁹³ The decision on the “zeroing” issue in *EC Bed Linen* revolved around Article 2.4.2 of the AD Agreement. Article 2.4.2, however, includes an explicit textual limitation to the “investigation phase.” The ordinary meaning of this phrase makes it clear that the requirements in Article 2.4.2 are applicable only to investigations. Moreover, the context of the Agreement supports this conclusion. Where a provision is intended to apply to administrative reviews, either a specific reference to “review” is included in the provision itself or there is a cross-reference between the provision and the Article governing the relevant type(s) of review. Thus, for example, Articles 11.2, 11.3, and 11.4 refer specifically to reviews, and Article 11.4 cross-references the requirements of Article 6 and thereby incorporates them as requirements for Article 11 reviews.

¹⁹⁴ *EC Bed Linen*, para. 47.

Appellate Body's analysis of the "zeroing" issue.¹⁹⁵ Thus, that analysis is legally and factually irrelevant to the determinations that Japan is attempting to challenge in this case.

F. There is No *De Minimis* Standard for Sunset Reviews

146. Under Article 5.8 of the AD Agreement, Members must apply a two percent *de minimis* standard in antidumping duty investigations.¹⁹⁶ Japan argues that the Article 5.8 *de minimis* standard is applicable in sunset reviews under Article 11.3. Nothing in Article 11.3 or elsewhere in the AD Agreement sets a *de minimis* standard for sunset reviews. Nor does a contextual analysis of Article 11.3, in light of the object and purpose of the AD Agreement provide any support for Japan's claim.

1. Nothing in Article 11.3 or Elsewhere in the AD Agreement Sets a *De Minimis* Standard for Sunset Reviews

147. Nothing in the text of Articles 5.8 or 11.3 requires application of the Article 5.8 two percent *de minimis* standard in Article 11.3 sunset reviews, or any other type of review. In particular, there is no reference in Article 11.3 to a *de minimis* standard and the text of Article 5.8 makes no reference to Article 11.3.

148. As noted above, customary rules of treaty interpretation provide that the words of a treaty must be interpreted according to their "ordinary meaning" taking into account their "context" and in light of the "object and purpose" of the agreement. Japan has bypassed any discussion of the ordinary meaning of Articles 5.8 and 11.3, and the Panel need go no further than the above textual analysis to conclude that Japan's *de minimis* claim is without merit. Nonetheless, as demonstrated below, Japan's "object and purpose" alone fails to overcome the obvious lack of any textual and contextual support for their claim.

¹⁹⁵ The finding was based on the fact that, under the average-to-average methodology in Article 2.4.2, "the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions." *EC Bed Linen*, para. 55 (emphasis in original).

¹⁹⁶ The text of Article 5.8 reads in relevant part:

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

The United States applies a two percent *de minimis* standard in antidumping duty investigations pursuant to section 733(b)(3) of the Act (Exhibit JPN-1(b)).

149. First, in addition to the lack of textual support, Japan's argument lacks contextual support. Specifically, note 22 of Article 11.3 provides that "a finding in the most recent assessment proceeding ... that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty." Thus, the current margin of dumping is not decisive as to whether dumping is likely to recur. Japan's claim that a *de minimis* standard is required in the context of Article 11.3 sunset reviews would render note 22 meaningless.¹⁹⁷

150. Second, Japan garners no more support from its "object and purpose" arguments. Japan claims that the object and purpose of the sunset review mechanism set forth in Article 11.3 is to ensure that the only antidumping duties imposed are those which are necessary to counteract dumping that is likely to cause injury if the duty were to expire. According to Japan, sunset reviews therefore are equivalent to investigations because they require the investigating authority to demonstrate that the conditions for *imposing* antidumping duties would still be present, in the absence of the duty. Japan concludes with the argument that only a margin of dumping less than the Article 5.8 two percent *de minimis* standard is presumed not to cause injury and, therefore, it is "logically and legally unavoidable to conclude" that the same *de minimis* standard is applicable in a sunset review.

151. Japan completely ignores the fundamental difference between investigations, in which a *de minimis* standard is required under Article 5.8, and sunset reviews. In the context of Article 5.8, the function of the *de minimis* standard is to determine whether a product is being introduced into the commerce of another country at less than its normal value and, thus, warranting the imposition of an antidumping duty order in the first instance. For example, in an investigation, if the investigating authority found that a product was being sold with a margin of dumping of more than two percent, imposition of an antidumping duty would be warranted if the dumped imports were found to cause injury.

152. By contrast, the focus of the sunset review is the future. Other factors could warrant maintaining the duty beyond the five-year point, *even if* the margin of dumping was determined currently to be *zero*, as stated in footnote 22, because dumping may be likely to recur absent the discipline of the duty. This distinction between the object and purpose of an investigation and the object and purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer an intent that the *de minimis* standard for investigations applies in sunset reviews.

153. Finally, Japan would have the Panel read into the use of the word "dumping" in Article 11 an implicit reference to Article 5.8 because authorities must terminate an investigation

¹⁹⁷ As is well established under WTO jurisprudence, an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. *See, e.g., United States - Standards for Reformulated and Conventional Gasoline* ("Reformulated Gasoline"), WT/DS2/AB/R, Report of the Appellate Body, adopted 20 May 1996, p.15.

if the margin of dumping is *de minimis*.¹⁹⁸ Nothing in the word “dumping,” as defined in the AD Agreement implies anything about a *de minimis* standard. The term “dumping” simply means the existence of dumping as defined in Article 2.1 of the AD Agreement; Article 2 contains no *de minimis* standard.

154. The report in *Korea DRAMs* is instructive. In that case, Korea argued that the *de minimis* standard in Article 5.8 of the AD Agreement applied to reviews as well as investigations. The panel rejected Korea’s arguments, finding that “the term ‘investigation’ [used in the context of Article 5.8] means the investigative phase leading up to the final determination of the investigating authority.”¹⁹⁹ Thus, the *Korea DRAMs* panel found no textual or contextual support for Korea’s claim that the *de minimis* standard applied beyond the investigative phase.²⁰⁰

155. In sum, giving the text of the AD Agreement its ordinary meaning, the only conclusion one can reach is that there is no obligation to apply the Article 5.8 *de minimis* standard in an Article 11.3 sunset review.

2. The United States’ *De Minimis* Standard Is Not Evidence of Any Obligation in the AD Agreement

156. In an attempt to bolster its non-existent textual argument, Japan cites the fact that the United States applies a *de minimis* standard in sunset reviews as indicative of the requirement to apply a *de minimis* rule in the context of Article 11.3 sunset reviews.²⁰¹ In addition, Japan argues that, given the provisions of Article 5.8 of the AD Agreement, the United States should have terminated the duty.²⁰² Japan is incorrect on both accounts.

157. The United States’ *de minimis* “practice” does not implicate the AD Agreement. As demonstrated above, there is no *de minimis* standard in sunset reviews. Thus, Members are free to determine what, if any, *de minimis* standard they will apply. Nothing in the AD Agreement prevents Members from establishing procedures that are not required by the AD Agreement, as long as those procedures do not conflict with the obligations they have assumed under the AD Agreement. Because Members may choose to go beyond their obligations under the Agreement,

¹⁹⁸ Japan First Submission, para. 187.

¹⁹⁹ *Korea DRAMs*, para. 6.87.

²⁰⁰ The Panel in *German Steel Sunset*, in reading the analogous Article 21.3 of the SCM Agreement held that the *de minimis* standard contained in Article 11.9 of the SCM Agreement was “implied” in Article 21.3. The Panel concluded that the object and purpose of Article 11.9, based on a 1987 Note by the Secretariat, was that the “principle rationale for the *de minimis* standard set out in Article 11.9 is that a *de minimis* subsidy is considered to be non-injurious.” *German Steel Sunset*, para. 8.61. The United States respectfully asserts that this rationale is in error and is not supported by the customary rules of treaty interpretation. Note that the dissenting Panelist concluded that, absent a cross-reference to Article 11.9, there is no *de minimis* standard for sunset reviews under the SCM Agreement because the SCM Agreement does not provide for one by its terms. *German Steel Sunset*, para. 10.8.

²⁰¹ Japan First Submission, para. 198.

²⁰² *Id.*, para. 199.

their domestic law has no bearing on an analysis of what the AD Agreement requires.

158. Finally, whether Japan's expectations with respect to Articles 5.8 and 11.3 were legitimate can only be considered by applying the customary rules of treaty interpretation. Japan's expectations, like the expectations of all Members, are reflected in the AD Agreement itself. As the Appellate Body has stated:²⁰³

The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.

159. Thus, Japan's only legitimate expectations with respect to Articles 5.8 and 11.3 are those reflected in the AD Agreement itself. Japan has no basis to expect a particular outcome or interpretation if that was not what was negotiated. As demonstrated above, an analysis of the text, context and object and purpose of Article 11.3 reveals no support for Japan's arguments that a *de minimis* standard is applicable in sunset reviews, let alone the particular *de minimis* standard suggested by Japan. As such, Japan's expectation that the United States would terminate the antidumping duty on certain corrosion-resistant carbon steel flat products from Japan has no basis in the AD Agreement.

160. In sum, applying customary rules of treaty interpretation, the Panel should find that there is no *de minimis* standard for sunset reviews in the AD Agreement and, therefore, the United States' application of a 0.5 percent *de minimis* standard in sunset reviews does not constitute a violation of its obligations under the AD Agreement.

G. There Is No Obligation Under Article 11.3 Or Elsewhere In The AD Agreement To Determine Likelihood On A Company-Specific Basis

161. Japan maintains that sunset review determinations of whether revocation is likely to lead to continuation or recurrence of dumping must be made on a company-specific basis, citing

²⁰³ *India Patent Protection*, para. 45 (emphasis added). In a similar vein, the Appellate Body has stated as follows: "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intention of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty." *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, Report of the Appellate Body, adopted 22 June 1998, para. 84 (emphasis in original).

Articles 11.3 and 6.10 of the Agreement.²⁰⁴ Because both the SAA and the *Sunset Policy Bulletin* provide that Commerce will make its determination of likelihood on an order-wide basis,²⁰⁵ Japan asserts that U.S. policy and practice, both in general and as applied in this case, are inconsistent with the AD Agreement. Moreover, Article 11.3 provides no support for Japan's claim, and Article 11.4 expressly precludes substantive claims based on Article 6.10. Consequently, the statutory provision in question, as well as its application in this case, is consistent with the Agreement because there is no basis for maintaining that likelihood of dumping determinations must be made on a company-specific basis.

162. U.S. law requires that the determination in a sunset review of the likelihood of continuation or recurrence of dumping be made on an order-wide basis.²⁰⁶ Accordingly, the SAA states that, "Commerce and the Commission will make their sunset determinations on an order-wide, rather than a company-specific basis."²⁰⁷ Commerce reflected this in the *Sunset Policy Bulletin*, stating that, "[c]onsistent with the SAA at 879 . . . the Department will make its determination of likelihood on an order-wide basis."²⁰⁸ In the instant sunset review, Commerce found 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,²⁰⁹ and concluded that dumping was likely to continue or recur in the event of revocation. Commerce further concluded that the margins from the original investigation best reflected the rate of dumping likely to prevail in the event of revocation, explaining that the original dumping rates were the most probative of future dumping behavior because they reflect "the behavior of exporters without the discipline of an order in place."²¹⁰

163. The text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, makes no reference to determining the likelihood of dumping for individual companies; rather, it refers to review of the "definitive" duty:

Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition . . . unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.

²⁰⁴ Japan First Submission, paras. 202-6.

²⁰⁵ SAA at 879 (Exhibit JPN-2); *Sunset Policy Bulletin*, 63 FR at 18872 (Exhibit JPN-6).

²⁰⁶ Section 751(c)(1) ("[T]he administering authority and the Commission shall conduct a review to determine . . . whether revocation of the countervailing or antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping[.]") (Exhibit JPN-1(d)).

²⁰⁷ SAA at 879 (Exhibit JPN-2).

²⁰⁸ *Sunset Policy Bulletin*, 63 FR at 18872 (Exhibit JPN-6).

²⁰⁹ *Commerce Sunset Final Decision Memorandum*, p. 6 (Exhibit JPN-8(e)).

²¹⁰ *Id.*, p. 8. Commerce found that, in the event of revocation, each producer/exporter was likely to dump merchandise subject to the order at the rate of 36.41 percent.

The duty may remain in force pending the outcome of such a review.

164. That the definitive duty is imposed on a product-specific (*i.e.*, order-wide), not a company-specific, basis is made clear by Article 9.2 of the Agreement.²¹¹ There is no textual or logical reason why a measure that is imposed on a product-specific basis may not be reviewed for sunset purposes on a product-specific basis. Moreover, the text of Article 11.3 makes no distinction between the specificity of the likelihood of dumping determination and the specificity of the likelihood of injury determination. The likelihood of injury determination is, however, inherently order-wide, and it therefore follows that the likelihood of dumping determination under Article 11.3 may also be order-wide.

165. Article 11.4, the provision of the AD Agreement that contains the procedural requirements for sunset reviews, incorporates by reference “[t]he provisions of Article 6 regarding evidence and procedure” into Article 11, *i.e.*, it makes those provisions applicable to reviews carried out under Article 11. The key modifier in Article 11.4, however, is “regarding evidence and procedure.” Thus, 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; they are only intended to have an impact on the *manner* in which the substantive standards or criteria are applied. Consequently, there is nothing in Article 11, including in Article 11.4, that even suggests standards or criteria for the likelihood of dumping determination which focus on individual companies’ likelihood of continuation or resumption of dumping. The order-wide approach required by U.S. law is therefore entirely consistent with the Agreement.

166. Indeed, Japan’s argument stands Article 11.4 on its head – Japan’s position is precisely that Article 11.4, by means of Article 6.10,²¹² provides substantive standards for sunset reviews, and that an order-wide analysis of the likelihood of continuation or recurrence of dumping is therefore prohibited.²¹³ Japan simply ignores the modifying language in Article 11.4 (“regarding evidence and procedure”).

167. The United States also notes that Japan fails to acknowledge that, in this case, Commerce identified *company-specific* dumping margins likely to prevail in the event of revocation.²¹⁴ In the instant sunset review, Commerce found that, in the event of revocation, each producer/exporter was likely to dump merchandise subject to the order at the rate of 36.41

²¹¹ Article 9.2 begins with the following phrase: “When an anti-dumping duty is imposed in respect of *any product...*” (Emphasis added.)

²¹² Article 6.10 states in pertinent part that “[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer of the product under investigation.”

²¹³ Japan First Submission, para. 205 (“USDOC’s rules reflect an ‘all or nothing approach,’ whereas the AD Agreement clearly contemplates allowing these companies who are no longer likely to dump to be exempt from the antidumping order after five years.”).

²¹⁴ *Sunset Policy Bulletin*, 63 FR at 18873-74 (Exhibit JPN-6).

percent.²¹⁵

168. Finally, if Japan is maintaining that Article 6.10 requires Commerce to *quantify* dumping margins in each sunset review, and to do so on a company-specific basis, Japan's argument is inconsistent with both the ordinary meaning of Article 11.3 and its object and purpose. To reiterate a point discussed at length in Section F above, nothing in Article 11.3 indicates either the manner in which the likelihood of dumping determination is to be made or that it must be premised on the quantification of dumping margins. Moreover, the object and purpose of Article 11.3 is focused on future behavior, not past behavior, and it would therefore be at odds with such object and purpose to require the quantification of dumping margins in sunset reviews.

169. In sum, there is no basis in the Agreement for Japan's claim that Commerce was required to determine the likelihood of continuation or recurrence of dumping on a company-specific basis.

H. Commerce Complied with the Evidentiary and Procedural Requirements of Article 11.3 in this Case

170. There is no dispute that, based on Article 11.4, the provisions of Article 6 on evidence and procedure apply to sunset reviews under Article 11.3. Article 6 requires domestic authorities to give interested Members and parties ample opportunity to present in writing all evidence which they consider relevant to the proceeding. Article 6.1 provides that exporters shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence they consider relevant to the inquiry. Article 6.1.1 further provides that exporters receiving questionnaires shall be given at least 30 days for reply.

171. Japan does not challenge the WTO-consistency of U.S. law in this regard; Japan does, however, claim that Commerce failed to comply in this case with the evidentiary and procedural requirements of Article 11.3. As demonstrated below, Japan's claim is unfounded.

172. 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 Agreements.²¹⁶ 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.

²¹⁵ *Commerce Sunset Final*, 65 FR at 47381 (Exhibit JPN8-(d)).

²¹⁶ *Sunset Initiation Schedule*, 63 FR 29372 (Exhibit JPN-18).

173. During the sunset review, NSC actively participated in a number of ways. NSC filed a complete substantive response within the 30-day deadline provided in Commerce's *Sunset Regulations*.²¹⁷ NSC filed a rebuttal to the substantive response of the domestic interested parties,²¹⁸ and filed a notice of appearance to participate in the public hearing requested by the domestic interested parties. NSC did not request a hearing itself and withdrew its request to participate in the hearing requested by the domestic interested parties. NSC also requested an extension of the time limit to file its case brief. Commerce granted that request and extended the filing deadline for both case and rebuttal briefs for all parties.²¹⁹ NSC also filed a case brief wherein it explained that "other factors" existed to account for, *inter alia*, the reduction in import levels since the order.²²⁰ Commerce rejected NSC's arguments concerning "other factors" for consideration in the sunset review because NSC had failed to provide "good cause", *i.e.* information or evidence to warrant consideration of the other factors, as required by Commerce's *Sunset Regulations*.

174. Japan claims that Commerce's rejection of NSC's submission was contrary to its right under the AD Agreement for "sufficient opportunity to present [] arguments and supporting information."²²¹ Specifically, Japan takes issue with the 30-day deadline for submission of the substantive response, despite that fact that 30 days is the requirement under Article 6.1.1. Japan complains that the respondent must present all of its evidence "up front" without knowing whether the domestic industry will participate,²²² but does not show how this in any way contravenes the requirements of Article 6.

175. Japan also claims the requirement for a demonstration of "good cause" before Commerce will consider additional information adds an additional burden that cannot be overcome within the 30-day deadline, and restricts Commerce's ability to collect information after the 30-day deadline in violation of Article 6.6.²²³ However, given that NSC had over 15 months to gather any data it considered appropriate and to prepare its submission, that Commerce's regulations were published and publicly available, and that NSC had 30 days in which to present its arguments and supporting information in this case, Japan cannot reasonably argue that NSC did not have "sufficient opportunity." Moreover, Commerce evidently did not feel restricted in its ability to collect information; it suggested in the final sunset determination that, even had NSC's "other factors" been considered, they would not have altered Commerce's affirmative final determination because, as explained earlier, Commerce had found that NSC was dumping the subject merchandise in the United States in two prior administrative reviews.²²⁴

²¹⁷ NSC Substantive Response (Exhibit JPN-19(a)).

²¹⁸ NSC Rebuttal to Substantive Response (Exhibit JPN-19(b)).

²¹⁹ *Commerce Sunset Final*, 63 FR at 47380 (Exhibit JPN-8(d)).

²²⁰ NSC Case Brief (Exhibit JPN-19(c)).

²²¹ Japan First Submission, para. 149.

²²² *Id.*, para. 151.

²²³ *Id.*, paras. 152-3.

²²⁴ 64 FR at 12951 (Exhibit JPN-15(e)); 65 FR at 8935 (Exhibit JPN-16(e)).

176. Finally, Japan claims that Commerce impermissibly limited the presentation of information necessary to establish NSC's case to the 30 days it had to file its substantive response, in violation of Articles 6.1, 6.2, and 6.6 of the AD Agreement. Nothing in Article 6.1, 6.2, or 6.6 requires a "broader" opportunity to present evidence than the requirements of those provisions themselves. Article 6.1.1 provides that respondents be given at least 30 days to respond to a questionnaire. Japan acknowledges that NSC had 30 days in which to file its substantive response in this case. In addition, Commerce's schedule for initiation of this sunset review was issued more than a year before its initiation. The reporting requirements for Commerce's sunset questionnaire are published in the *Sunset Regulations*. NSC participated fully in the sunset review, filing a substantive response, a rebuttal substantive response and a case brief. Thus, Japan's claim that Commerce impermissibly limited NSC's ability to present its case is belied by the facts.

177. In sum, Commerce followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Article 6.

I. The USITC's Decision To Cumulate Imports From Various Countries In This Sunset Review Is Consistent With the AD Agreement

178. The AD Agreement does not require application of a quantitative negligibility test in sunset reviews. Under the applicable U.S. statute, the Tariff Act of 1930, as amended, in a sunset review, the Commission may cumulate imports if it finds that certain statutory elements are met.²²⁵ The Act does not require the application of a quantitative negligibility test in sunset reviews. Consequently, the USITC's determination in this case is consistent with the AD Agreement. Japan argues otherwise and insists that the AD Agreement requires a strict quantitative negligibility assessment in sunset reviews as it does in original investigations. Japan relies on a convoluted interpretation of Articles 3, 5.8, and 11 of the AD Agreement to support its contention. However, a proper review of the interplay between these articles and the structure of

²²⁵ Subsection 752(a)(7) of the Act (Exhibit JPN-1(e)) provides:

[T]he Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the United States market. The Commission 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.

In a sunset review, before it exercise its discretion to cumulate, the USITC conducts a "no discernible adverse impact" analysis. Recognizing the difficulty in predicting precisely the volume of imports from each subject country and the rest of the world, Congress instead chose a more general standard of "no discernible adverse impact." S. Rep. 103-412, 2nd Sess. at 51 (1994).

the AD Agreement as a whole, shows that the AD Agreement does not require any, much less a strict quantitative negligibility analysis in a sunset review.

1. Article 11 of the AD Agreement Does Not Contain a Negligibility Requirement

179. As noted earlier, customary rules of treaty interpretation provide that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” In applying this rule, the Appellate Body has cautioned that a “treaty interpreter must begin with, and focus upon, the text of a particular provision.”²²⁶ Furthermore, the Appellate Body has stated that the principles of interpretation set out in Article 31 “neither require nor condone the imputation into a treaty of words that are not there[.]”²²⁷

180. On its face, Article 11.3 does not contain a negligibility standard. Nor is there any reference to negligibility concepts anywhere in Article 11. Moreover, the plain terms of Article 11 neither implicitly nor explicitly incorporate negligibility concepts from Article 5.8 and Article 3.3. Throughout the AD Agreement, there are instances where the obligations set forth in one provision are made applicable in another context by means of express cross-references.²²⁸ Indeed, Article 11.4 specifically indicates that “[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article,” and Article 11.5 specifically applies the provisions of Article 11 *mutatis mutandis* to price undertakings accepted under Article 8 of the AD Agreement. The negotiators clearly cross-referenced provisions that they wanted to be applicable to Article 11. Quite simply, if the negotiators of the AD Agreement had wanted to incorporate the concepts of negligibility from Article 5.8 or 3.3, they could and would have done so.

2. Neither Article 3.3 nor Article 5.8 Dictates A Quantitative Negligibility Assessment in Sunset Reviews

²²⁶ *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (“Shrimp”), WT/DS58/AB/R, Report of the Appellate Body, adopted 6 November 1998, para. 114.

²²⁷ *India Patent Protection*, para. 45.

²²⁸ See e.g., Article 1, footnote 1 (“the term ‘initiated’ as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5”); Article 6.7 (“The procedures described in Annex I shall apply to investigations carried out in the territory of other Members”); Article 12.2.2 (“In particular, the notice or report shall contain the information described in subparagraph 2.1”); Article 6.1.3 (“Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.”); Article 12.2.3 (“The provisions of this article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply to duties retroactively.”); Article 18.3.1 (“With respect to the calculation of margins of dumping in refund procedures under paragraph 3 of Article 9, the rules used in the most recent determination of the review shall apply.”)

181. The AD Agreement addresses the issue of negligibility only in the context of cumulation in original investigations. 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.)

On its face, Article 3.3 applies to investigations, not reviews. Apart from the absence of any mention of reviews, 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.

182. As with Article 3.3, the contention that Article 5.8, which provides a quantitative test for negligibility, applies to reviews is quickly dispelled by its plain language. First, Article 5 of the AD Agreement indicates in its title “Initiation and Subsequent Investigation” that it applies only to investigations. The plain language of Article 5.8 also indicates its applicability in investigations only, stating that “an *investigation* shall be terminated promptly as soon as the authorities are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case.”²²⁹ In a sunset review, there is no requirement to terminate a

²²⁹ Article 5.8 states in full:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 percent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which account for less than 3 percent of the imports of the like product in the importing Member collectively account for more than 7 percent of the like product in the importing Member.

(Emphasis in original.)

(continued...)

review upon a finding of injury, as the investigating authority is not required to make a finding of injury. Rather, in a sunset review, the investigating authority is required to find whether injury would be “likely.” Finally, nowhere in Article 5.8 or Article 5 in general are there any references to Article 11.3 reviews, or any other reviews under Article 11.

183. The choice and use of the term “investigation” in Articles 3.3 and 5.8 but not in Article 11, cannot be considered inadvertent. Quite simply, considering the ordinary meaning of the terms of Article 3.3 and 5.8, there is no support for the contention that the Article 5.8 negligibility standard applies beyond the context of an initial investigation.

184. As the Appellate Body has stated,

The implication arises that the choice and use of different words in different places . . . are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent on the part of Members who negotiated and wrote that Agreement.²³⁰

185. As discussed, the *Korea DRAMs* panel applied this principle in a context very similar to that presented in this dispute. In *Korea DRAMs*, the panel rejected Korea’s argument that reached the same conclusion in the context of the *de minimis* standard in Article 5.8 of the AD Agreement applied to Article 11 reviews as well as to investigations. The panel correctly found that “the term ‘investigation’ [as used in the context of Article 5] means the investigative phase leading to the final determination of the investigating authority.” Thus, the *Korea DRAMs* panel found no textual or contextual support for Korea’s claim that the *de minimis* standard applied beyond the investigative phase.²³¹

186. Nevertheless, Japan argues that the negligibility standards of Article 5.8 is incorporated *vis-a-vis* 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 its 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, in turn, the negligibility requirements under Article 5.8. Thus, 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. However, the fact that “injury” should be interpreted in accordance with Article 3 does not automatically mean that all provisions of Article 3 are applicable to Article 11; indeed, as discussed above, Article 3

²²⁹ (...continued)

²³⁰ *EC Hormones*, para.164 (citation omitted).

²³¹ *German Steel Sunset*, para. 8.80 (finding that the quantitative provisions for initial investigations apply in Article 11.3 sunset reviews). See also the dissenting opinion of one member of the Panel in *German Steel Sunset* on the assessment relating to the application of a *de minimis* standard to Article 11.3 sunset reviews.

is by its terms limited to investigations. The issue of whether or not imports are negligible is not an interpretation of injury. Furthermore, the text of the AD Agreement provides no support for the view that negligible imports are equivalent to no injury. Thus, footnote 9 does not provide support for Japan's argument that an Article 5.8 negligibility assessment is required in sunset reviews.

187. The focus of a review under Article 11.3 differs from that of an original investigation under Article 3. The difference between the nature and practicalities of the inquiry in an original investigation and of the inquiry in a sunset review demonstrate that the tests for each cannot be identical. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports that are competing without the requested remedial measures in place. As such, the authorities must examine the volume, price effects and impact of the unrestrained imports on a domestic industry that may be indicative of present injury or threat of material injury.

188. Five years later, in an Article 11.3 sunset review, the investigating authorities, in deciding whether to remove the order, examine the *likely* volume of imports *in the future* that have been restrained for the last five years by the antidumping duty order and their *likely* impact *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place. 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. With the presence of the order, it would not be surprising that no injury or causal link presently exist, a fact recognized by the standard of "continuation or recurrence of injury." Thus, the inquiry contemplated pursuant to Article 11.3 is counterfactual in nature, and entails application of decidedly different standard with respect to the volume, price and relevant impact factors. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years. The authority must then decide the likely impact of a prospective change in the status quo, *i.e.*, the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports.

189. 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 quantitative negligibility requirements applicable in original investigation 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 antidumping duty order.

190. The absence of language regarding negligibility in Article 11.3 is consistent with the fact that the purposes of the review provisions would not be served by grafting a negligibility test unto the review proceedings. 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.

191. Moreover, there is no indication that the negotiators intended an investigating authority to assess whether likely future imports in the event of revocation of an order would exceed a negligibility threshold. It is not surprising that the negotiators avoided any assessment of negligibility in sunset review proceedings, as the practical difficulties in applying such an assessment would be significant. Assessing negligibility requires a calculation of imports from the countries subject to the review divided by total imports from all other countries of the world. In original investigations, such historical data is readily available. A sunset review proceeding, however, requires the investigating authority to determine future events based on a change in the status quo (revocation of an order or orders). Thus to apply accurately the three or seven percent threshold in Article 5.8, the authority would have to (1) predict a precise import volume for the subject country at issue; (2) if orders on more than one country are involved, predict precise import volumes for the rest of the world, including how much imports would be affected by the change in the status quo and any likely re-entry of imports from the countries subject to review.²³² Consequently, Japan's contention that the negligibility requirement of Article 5.8 is somehow incorporated into Article 11 *vis-a-vis* Footnote 9 of Article 3 is unpersuasive and without basis.

192. As demonstrated above, the AD Agreement does not require *any* negligibility test in sunset reviews. Therefore, the USITC was not required to undertake a negligibility analysis in this sunset review. Moreover, the AD Agreement does not contain any requirements for a particular cumulation methodology in sunset reviews. Accordingly, the Panel should reject Japan's contention that the USITC acted inconsistently with the AD Agreement by failing to apply a strict numerical negligibility test before it cumulated imports from the various countries subject to review.²³³

²³² Japan argues, based on the volumes of imports throughout the period of review, that imports from Japan had been consistently less than three percent of total imports, and as an aggregate of all individually negligible countries was less than seven percent. Japan offers no support for its contention that if there was negligibility assessment in a sunset review that it must be based on current volumes. Rather, if such an assessment was required, as Article 11.3 indicates the assessment would be based on *likely future* volumes.

²³³ Japan contends that the USITC performed a negligibility assessment in another five-year review, *Certain Pipe and Tube From Argentina, Brazil, Canada, India, Korea, Mexico, Singapore, Taiwan, Thailand, Turkey, and Venezuela*, Inv. Nos. 701-TA-253 (Review) and 731-TA-132, 252, 271, 273, 276, 277, 296, 409, 410, 532-534, 536, and 537 (Review), USITC Pub. No. 3316 (July 2000). First, this is simply not true. In that case, the USITC did not determine that imports from any country were negligible as defined by Article 5.8; rather, the USITC simply

(continued...)

J. The Actions at Issue Are Consistent With the AD Agreement and Do Not Violate Article X:3(a) of GATT 1994

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

194. In considering the application of Article X:3(a) to this case, the Panel should note three things. First, Article X:3(a) is limited to the *administration* of certain laws, regulations, judicial decisions and administrative rulings of general application, *not* to the laws, regulations and administrative rulings themselves.²³⁴ Therefore, to the extent that Japan is complaining about laws, regulations and rulings of general application, as contrasted with their administration, its complaint is not properly founded in Article X:3(a).

195. GATT Article X:3(a) provides: “Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.” The panel in *Korea Stainless Steel* explained that Article X:3(a) requires uniformity of treatment with respect to persons similarly situated.²³⁵ Moreover, in *Bananas*, the Appellate Body wrote:

The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings... To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.²³⁶

²³³ (...continued)

addressed whether volumes of imports would increase if the order was lifted based on prior volumes of imports. *Id.* at 26.

²³⁴ *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.

²³⁵ *United States- Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea* (“*Korea Stainless Steel*”), WT/DS179/R, Report of the Panel, adopted 1 February 2001.

²³⁶ *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (“*Bananas*”), Report of the Appellate Body, adopted 9 September, 1997, para. 200 (emphasis in the original). See also *European Communities – Measures Affecting the Importation of Poultry Products*, WT/DS69/AB/R, Report of the Appellate Body, adopted July 23, 1998, at para. 115, wherein the Appellate Body (continued...)

196. Therefore, as explained by the *Korea Stainless Steel* panel and the Appellate Body, the purpose of GATT Article X:3(a) is to ensure that the administering authority has administered the law or the regulations in a uniform, impartial, and reasonable manner by ensuring that similarly situated persons are not treated differently. The purpose of GATT Article X:3(a) is not, as Japan claims, to ensure that the administering authority administers different provisions that cover different situations in the same manner.

197. Introducing its Article X:3(a) claim, Japan explains that:

The pattern of U.S. anti-import bias is pervasive in this case. The United States essentially decided to continue the anti-dumping order in this case before the sunset review even began. Consequently, the United States has not administered its sunset review laws in a uniform, impartial and reasonable manner, and thus has acted inconsistently with its obligations under Article X:3(a) of the GATT 1994.²³⁷

198. In considering Article X:3(a), the Panel should keep in mind that a “uniform, impartial and reasonable” system is not necessarily one in which each decision looks like the one before. The Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the AD Agreement – from other Article X:3(a) disputes, in which the overall administration of some program was alleged to be arbitrary. For example, the allegation addressed under Article X:3(a) by the Appellate Body in *Shrimp*²³⁸ was that the entire procedure under review was “non-transparent and ex-parte,” that there was no formal notice of or reasons provided for actions, and that there was no opportunity for review of or appeal from an action.

199. Such cases, in which the allegation is one of overall arbitrary application addressed by Article X:3(a), are very different from the purpose for which Japan seeks to use Article X:3(a) in the present case. Japan has not alleged that the overall procedure of the antidumping law of the United States is applied arbitrarily, or that Members are otherwise deprived of basic due process, such as notice and opportunity for review in antidumping proceedings. Rather, it disagrees with the specific results in this proceeding.

200. As the WTO panel in *Japan Hot-Rolled Steel* explained:

Where we have found that a particular action or category of action is not inconsistent with a specific provision of the AD Agreement, we are faced with the

²³⁶ (...continued)

emphasized that to the extent Brazil's appeal related to the substantive content of the EC rules rather than to their publication or administration, it fell outside the scope of Article X of GATT.

²³⁷ Japan First Submission, para. 246.

²³⁸ *Shrimp*, para. 188.

question whether a Member can be found to have violated Article X:3(a) of GATT 1994 by an action which is not consistent with the specific WTO obligations governing such actions. We have serious doubts as to whether such a finding would be appropriate.²³⁹

201. The United States' actions were consistent with GATT Article X:3(a), because, as the United States established above in this submission, Commerce and the USITC implemented consistently the determinations with the pertinent, substantive provisions of the AD Agreement. The repetitious nature of much of Japan's first submission regarding its alleged due process claims²⁴⁰ bears out the point, established above, that Article X:3(a) cannot be used as a method to circumvent proper review under the pertinent WTO agreement.

202. With regard to Japan's first Article X:3(a) claim that Commerce automatically self-initiated the sunset review without any evidence to justify the initiation, the United States has explained above that Article 11.3 of the AD Agreement clearly provides for self-initiation of sunset reviews by the administering authority. In accordance with its obligations under Article 11.3, the United States self-initiates and conducts a sunset review for each antidumping order. Notwithstanding Japan's claim, Article X:3(a) cannot be used to undercut the specific obligations agreed upon in the AD Agreement.

203. Next, there is also no merit, either legal or factual, in Japan's statement that Commerce did not give Japanese respondents an adequate opportunity to respond to the Commerce's request for information or to provide any other information NSC wished to provide for consideration in the sunset proceeding. Article 6.1.1 provides that respondent must be afforded 30 days in which to respond to questionnaires in a sunset review. In addition, Commerce provides an opportunity for interested parties to supply during this period any other information the parties deem relevant to the sunset proceeding. Commerce throughout its proceeding disclosed to interested parties all information under consideration and provided an opportunities for submissions by which they could defend their interests.

204. Finally, Article 6.1.1 provides that parties should be afforded an extension of time in which to reply to questionnaires upon good cause and whenever practicable. Commerce's *Sunset Regulations* provide for extensions of time upon request. In fact, Commerce provided such opportunities in this case. As explained above, Commerce provided NSC 30 days to answer its questionnaire and to provide whatever factual information NSC wished. NSC was on notice when the initiation would occur for at least 15 months prior to Commerce's initiation of the sunset review. In addition, Commerce granted parties, at NSC's request, additional time to file rebuttal briefs in the sunset proceeding. Consequently, Japanese respondents had an opportunity to provide whatever information they deemed relevant to the proceeding.

²³⁹ *Japan Hot-Rolled Steel*, para 7.268.

²⁴⁰ Japan First Submission, paras. 91-100.

205. Japan also makes much of the amount of information required by Commerce from the respondent, exporters or producers compared to the amount of information required of the domestic industry. Japan considers that the greater amount of information required of a respondent, in comparison to the domestic industry, is indicative of the “unfairness” given that the respondent only receives 30 days to respond to Commerce’s questionnaire. Japan’s claim is specious both in law and fact.

206. As explained above, Commerce’s regulations provide for 30 days to reply plus the opportunity to request extensions of time. Japan and NSC had 15 months notice concerning the date of initiation of the sunset review on corrosion-resistant carbon steel from Japan. In addition, Commerce’s “questionnaire” is part of Commerce’s *Sunset Regulations*, is publically available, and has been published in the *Federal Register*.²⁴¹ More importantly, perhaps, Japan is ignoring one-half of the process necessary to conduct a full sunset review. Not only is Commerce required to make a determination concerning the likelihood of the recurrence or continuation of dumping, the USITC is required to determine the likelihood of recurrence or continuation of injury. In making that determination, the USITC requires a significant amount of material from the domestic industry in order to make its likelihood determination.²⁴² While Commerce requires more information from a respondent than from the domestic industry in making its sunset determination, the USITC requires more information from the domestic industry. Thus, Japan’s claim that the Commerce requirement for more information demonstrates some bias in favor of the domestic industry is without support given the disparate necessities of the two decision-making agencies under this bifurcated system.

207. Japan asserts that Articles 11.2 and 11.3 both contain the same language with respect to determining “likelihood of continuation or recurrence of dumping,” but that Commerce’s approach to Article 11.3 sunset reviews is different from its approach to Article 11.2 reviews. Japan claims that the U.S. difference in approach between Article 11.2 and 11.3 reviews, as such, is inconsistent with Article X:3(a) of GATT 1994.

208. Article 11.2 reviews, however, cover different situations than those covered by Article 11.3 sunset reviews. As such, the language and requirements of Article 11.2 and Article 11.3 are different. Japan’s assertion that the U.S. difference in approach between Articles 11.2 and 11.3 reviews is inconsistent with GATT Article X:3(a) is based on its misunderstanding of the purpose of the two articles in the AD Agreement and of GATT Article X:3(a).

209. The plain language of Article 11.2 indicates that reviews to determine the need for continued imposition of an antidumping duty may be taken at various points in time, and such reviews may examine various aspects of the antidumping order at issue. When conducting Article 11.2 reviews, the administering authorities may examine (1) whether the continued imposition of the duty is necessary to offset dumping; (2) whether the injury would be likely to

²⁴¹ 19 CFR 351.218(d)(3) (Exhibit JPN-3).

²⁴² USITC Pub. 3364, at Annex A (Exhibit JPN-9(b)); 19 CFR 207.61(b)(3) (Exhibit US-2).

continue or recur if the duty were removed or changed; or (3) both. Moreover, the use of the term “where warranted” suggests that 11.2 reviews are not mandatory – the administering authority has discretion to determine when to undertake such reviews. The administering authority may decide such a review is warranted on its own initiative or upon a submission containing positive information by an interested party.

210. The plain language of Article 11.3 indicates that sunset reviews are mandatory and must be conducted no later than a certain point in time. Administering authorities may initiate sunset reviews on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry. Moreover, the administering authority is required to examine whether revocation of the antidumping order would be likely to lead to (1) continuation or recurrence of dumping; and (2) continuation or recurrence of injury.

211. As explained above, the language and requirements of Article 11.2 and 11.3 are different and specific to each provision because Article 11.2 and 11.3 reviews cover different situations. As such, the United States developed different approaches for Article 11.2 and 11.3 reviews. Under U.S. law, Article 11.2 and Article 11.3 reviews are governed by different statutory and regulatory provisions.²⁴³ This difference in approach, however, does not mean that the U.S. administration of the law is not uniform, impartial, and reasonable under GATT Article X:3(a). It simply means that the United States recognizes that different types of reviews require different laws and regulations to comply with different provisions under the AD Agreement. Accordingly, Japan’s assertion that the U.S. difference in approach between Article 11.2 and 11.3 reviews is inconsistent with Article X:3(a) of GATT should be rejected.

212. In conclusion, the Panel must reject Japan’s arguments that alleged inconsistencies by the United States, amounting to an alleged denial of due process, constitute a violation of Article X:3(a).

K. U.S. Law Is In Conformity with Article XVI:4 of the WTO Agreement

213. As discussed above, Congress specifically undertook to make the antidumping provisions of U.S. law consistent with U.S. international obligations.²⁴⁴ It adopted requirements that fully satisfy the obligations of the AD Agreement. Since U.S. laws are in conformity with the AD Agreement, the United States is not in violation of Article XVI:4 of the WTO Agreement.

L. The Specific Remedy Sought by Japan Is Inconsistent With Established Panel Practice and the DSU

²⁴³ Under U.S. law, Article 11.3 sunset reviews are covered by sections 751(c) and 752 and Commerce’s regulations 19 C.F.R. 351.218, 19 C.F.R. 351.221, 19 C.F.R. 351.222(i), 19 C.F.R. 351.307, 19 C.F.R. 351.308(f), 19 C.F.R. 351.309, and 19 C.F.R. 351.310. Under U.S. law, Article 11.2 reviews are covered by sections 751(a), 751(b), and 751(d) and Commerce’s regulations at 19 C.F.R. 351.222.

²⁴⁴ SAA, p. 656 (Exhibit JPN-2).

214. Finally, in its first submission, Japan has requested this Panel to recommend that, if the Panel finds that there is insufficient evidence to determine that dumping and injury were likely to continue or recur if the order were revoked, the DSB request the United States to terminate its antidumping duty order.²⁴⁵ In so doing, Japan has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Japan on the merits, the Panel nonetheless should reject the requested remedy, and instead should make a recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its antidumping measure into conformity with its obligations under the AD Agreement.

215. In the first place, the text of DSU Article 19.1 is absolutely clear on the recommendation that a panel is to make in such a case: “Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it *shall* recommend that the Member concerned bring the measure into conformity with that agreement.” (Emphasis added.) In short, specific remedies – such as the ones that Japan seeks here – are not authorized by the text of the DSU.

216. The specific remedy²⁴⁶ of revocation requested by Japan goes far beyond the type of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country “bring its measures . . . into conformity with GATT.”²⁴⁷ This is true not only for GATT disputes, in general, but for disputes involving the imposition of antidumping (and countervailing duty) measures, in particular.²⁴⁸

217. The requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and, before it, under GATT 1947. Article 3.4 of the DSU provides that “[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter,” and Article 3.7 provides that “[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred.” To this end, Article 11 of the DSU directs panels to “consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.” Ideally, a mutually agreed solution will be achieved before a panel issues its report. If this does not occur, however, a general panel

²⁴⁵ Japan First Submission, at para. 283(B).

²⁴⁶ By “specific” remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel.

²⁴⁷ See, e.g., *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268, Report of the Panel, adopted 22 March 1988, BISD 35S/98, 115, para. 5.1. The United States will refrain from a lengthy citation of all other panel reports in which panels have made recommendations using similar language; the number of such reports is well in excess of 100.

²⁴⁸ See, e.g., *Canadian Countervailing Duties on Grain Corn from the United States*, SCM/140 and Corr. 1, Report of the Panel, adopted 28 April 1992, BISD 39S/411, 432, para. 6.2; *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92, 40S/205, adopted 27 April 1993, para. 302.

recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.

218. Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. A panel cannot, and should not, prejudge by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel's report.

219. In addition, the requirement that panels issue general recommendations comports with the nature of a panel's expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party. Thus, while it is appropriate for a panel to determine in a particular case that a Member's legislation was applied in a manner inconsistent with that country's obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations.

220. Japan's proposed remedy is particularly inappropriate in view of the arguments that it makes in this case. Although Japan contests certain aspects of Commerce's final sunset determination, Commerce could reach the same conclusion in its final sunset determination even if Japan were to prevail on several of its claims. Likewise, as has been seen, Japan does not contend that the USITC could not reach an affirmative determination on the evidence before it, but rather that certain findings in reaching an affirmative likelihood determination were erroneous. Thus, even on Japan's own arguments, it would be possible for the U.S. authorities to reach revised determinations in response to an adverse panel decision that would not necessitate terminating the antidumping order. Especially in this case, it should be for the WTO Member and its investigating authorities to decide how to conform their measures to any adverse panel findings.²⁴⁹

221. As the WTO panel in *Korea Stainless Steel*²⁵⁰ noted:

[T]he *AD Agreement* is comprised of eighteen separate articles and innumerable obligations. Thus, violations of the *AD Agreement* may take many different forms and have different implications for the anti-dumping measure in question. In our view, Korea's contention that Article 1 of the *AD Agreement* dictates that any violation of the *AD Agreement*, irrespective of its nature and severity, requires the revocation of an anti-dumping measure is unsustainable. Although we do not agree

²⁴⁹ *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, para. 596 (panel under Tokyo Round AD Code declined to recommend revocation because "it could not be presumed that a methodology of calculating dumping margins consistent with the Panel's findings on these aspects would necessarily result in a determination that no dumping existed [.]")

²⁵⁰ *Korea Stainless Steel*, para. 7.9 (emphasis in original).

that such an interpretation would render Article 19.1 of the *DSU* a nullity in the strictly legal sense, we do believe that, had the drafters intended to deviate from the general rule of Article 19.1 and *require* revocation of anti-dumping measures in all cases of violation, they would have manifested that intention through a special or additional dispute settlement provision of Article 17 of the *AD Agreement*. (Footnote omitted.)

222. The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. In Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

223. In sum, specific remedies are at odds with the expressed terms of the DSU and established GATT and WTO practice. Therefore, regardless of how the merits of this case are decided, Japan's request for specific remedies should be rejected.

VI. CONCLUSION

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