

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

**AB-2003-5**

*Report of the Appellate Body*



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<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Canada – Aircraft</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
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<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2291
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<i>Turkey – Textiles</i>	Panel Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916 – Complaint by the European Communities</i> , WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
<i>US – 1916 Act (Japan)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916 – Complaint by Japan</i> , WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4831
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, 4793
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
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<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677
<i>US – FSC (Article 21.5 – EC)</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW
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<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601
<i>US – Malt Beverages</i>	Panel Report, <i>United States – Measures Affecting Alcoholic and Malt Beverages</i> , adopted 19 June 1992, BISD 39S/206
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003
<i>US – Superfund</i>	Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , adopted 17 June 1987, BISD 34S/136
<i>US – Tobacco</i>	Panel Report, <i>United States Measures Affecting the Importation, Internal Sale and Use of Tobacco</i> , adopted 4 October 1994, BISD 41S/I/131
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

TABLE OF ABBREVIATIONS USED IN THIS REPORT

<b>Abbreviation</b>	<b>Full Title / Meaning</b>
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
CRS order	The order issued by USDOC on 19 August 1993 imposing anti-dumping duties on certain corrosion-resistant carbon steel flat products from Japan (see footnote 3 of this Report)
CRS sunset review	The "five-year" review of the CRS order that USDOC initiated on 1 September 1999 (see footnote 4 of this Report), the final results of which were published on 2 August 2000 (see footnote 5 of this Report)
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Final Issues and Decision Memo	USDOC's "Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results" (see footnote 152 of this Report)
Final Results of the CRS sunset review	"Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order" (see footnote 5 of this Report)
GATT	<i>General Agreement on Tariffs and Trade 1947</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
KSC	Kawasaki Steel Corporation
NSC	Nippon Steel Corporation
Panel Report	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, 14 August 2003
Preliminary Issues and Decision Memo	USDOC's "Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results" (see footnote 202 of this Report)
Regulations	United States Code of Federal Regulations
SAA	Statement of Administrative Action (see footnote 9 of this Report)
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>



Sunset Policy Bulletin	USDOC's "Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin" (see footnote 11 of this Report)
Tariff Act	United States Tariff Act of 1930, as amended (see footnote 8 of this Report)
URAA	Uruguay Round Agreements Act (see footnote 61 of this Report)
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> (see footnote 32 of this Report)
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i>
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan**

Japan, *Appellant*  
United States, *Appellee*

Brazil, *Third Participant*  
Chile, *Third Participant*  
European Communities, *Third Participant*  
India, *Third Participant*  
Korea, *Third Participant*  
Norway, *Third Participant*

AB-2003-5

Present:

Taniguchi, Presiding Member  
Abi-Saab, Member  
Ganesan, Member

**I. Introduction**

1. Japan appeals certain issues of law and legal interpretations in the Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by Japan against the United States regarding the continuation of anti-dumping duties on certain corrosion-resistant carbon steel flat products from Japan following the conduct of a five-year, or "sunset", review of those duties.

2. On 29 July 1992, USDOC initiated an anti-dumping investigation covering, *inter alia*, certain corrosion-resistant carbon steel flat products from Japan.<sup>2</sup> As a result of this investigation, USDOC issued an order on 19 August 1993, imposing definitive anti-dumping duties on those corrosion-resistant steel products at the rate of 36.41 percent *ad valorem* for KSC, NSC, and "all others".<sup>3</sup> On

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<sup>1</sup>WT/DS244/R, 14 August 2003.

<sup>2</sup>"Initiation of Antidumping Duty Investigations and Postponement of Preliminary Determinations: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From Various Countries", United States Federal Register, 29 July 1992 (Volume 57, Number 146), p. 33488. (Exhibit JPN-12(a) submitted by Japan to the Panel)

<sup>3</sup>"Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products From Japan", United States Federal Register, 19 August 1993 (Volume 58, Number 159), p. 44163. (Exhibit JPN-12(e) submitted by Japan to the Panel)

1 September 1999, USDOC published a notice of initiation of a sunset review of the CRS order.<sup>4</sup> In the final results of that review, USDOC determined that revocation of the CRS order "would be likely to lead to continuation or recurrence of dumping".<sup>5</sup> USITC subsequently determined that revocation of the CRS order "would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time."<sup>6</sup> Accordingly, the United States did not revoke the CRS order.<sup>7</sup>

3. Before the Panel, Japan argued that certain provisions of the Tariff Act<sup>8</sup>, the SAA<sup>9</sup>, the implementing regulations<sup>10</sup>, and the Sunset Policy Bulletin<sup>11</sup> were, both "as such" and as applied in the CRS sunset review, inconsistent with Articles VI and X of the GATT 1994, Articles 2, 3, 5, 6, 11, 12, and 18 of the *Anti-Dumping Agreement*, and Article XVI:4 of the *WTO Agreement*.<sup>12</sup>

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<sup>4</sup>"Initiation of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products", United States Federal Register, 1 September 1999 (Volume 64, Number 169), p. 47767. (Exhibit JPN-8(a) submitted by Japan to the Panel) "Transition orders" are defined as orders that were in effect on 1 January 1995, when the *WTO Agreement* entered into force. The CRS order is a transition order and is therefore treated as having been issued on 1 January 1995. (Section 751(c)(6)(C) and (D) of the Tariff Act, Exhibit JPN-1(d) submitted by Japan to the Panel) For transition orders, the obligation to conduct a sunset review is an obligation to conduct such a review within five years of 1 January 1995. See also United States' first submission to the Panel, para. 29 and Article 18.3 of the *Anti-Dumping Agreement*.

<sup>5</sup>"Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results of Full Sunset Review of Antidumping Duty Order", United States Federal Register, 2 August 2000 (Volume 65, Number 149), p. 47380 at p. 47381. (Exhibit JPN-8(d) submitted by Japan to the Panel)

<sup>6</sup>"Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, The Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and The United Kingdom", USITC Publication 3364, November 2000, p. 58. (Exhibit JPN-9(b) submitted by Japan to the Panel)

<sup>7</sup>Panel Report, para. 2.1.

<sup>8</sup>Under United States statutory law, reviews of anti-dumping duty "orders" are governed primarily by Sections 751 and 752 of the Tariff Act, which correspond, respectively, to Sections 1675 and 1675a of Title 19 of the United States Code. (Exhibit JPN-1(d) and (e) submitted by Japan to the Panel) As the participants and the Panel have referred primarily to Sections 751 and 752 of the Tariff Act, rather than to Sections 1675 and 1675a of Title 19 of the United States Code, we will also refer to the Tariff Act provisions in this Report.

<sup>9</sup>Statement of Administrative Action, H.R. 5110, H.R. Doc. 316, Volume 1, 103d Congress, 2nd Session, 656 (1994). (Exhibit JPN-2 submitted by Japan to the Panel)

<sup>10</sup>"Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders", United States Federal Register, 20 March 1998 (Volume 63, Number 54), p. 13516 (Exhibit JPN-5 submitted by Japan to the Panel), codified in Part 351 of Title 19 of the Regulations. (Exhibit JPN-3 submitted by Japan to the Panel)

<sup>11</sup>"Policies Regarding the Conduct of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin", United States Federal Register, 16 April 1998 (Volume 63, Number 73), p. 18871. (Exhibit JPN-6 submitted by Japan to the Panel)

<sup>12</sup>Panel Report, para. 2.2. On appeal, Japan's "as such" challenges are limited to the Sunset Policy Bulletin.

4. In the Panel Report, circulated to Members of the WTO on 14 August 2003, the Panel found that the United States laws, regulations and policies challenged by Japan are not inconsistent with the *Anti-Dumping Agreement*, the GATT 1994, or the *WTO Agreement*, either as such or as applied in the CRS sunset review. Specifically, the Panel found that it did not need to address two of Japan's claims<sup>13</sup> and that:

(d) In respect of the dumping margins used in sunset reviews:

(i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Articles 2.2.1, 2.2.2, 2.4, 11.3 and 18.3 of the *Anti-dumping Agreement*,

...

(iii) the DOC did not act inconsistently with Article 2.4, or, in the alternative, Article 11.3, of the *Anti-dumping Agreement* regarding the administrative review dumping margins which it relied upon as a basis for its likelihood of continuation or recurrence of dumping determinations in this sunset review,

...

(e) In respect of determination of likelihood of continuation or recurrence of dumping on an order-wide basis in sunset reviews:

(i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Articles 6.10 and 11.3 of the *Anti-dumping Agreement* regarding the basis of the likelihood of continuation or recurrence of dumping determinations in sunset reviews,

(ii) the DOC did not act inconsistently with Articles 6.10 and 11.3 of the *Anti-dumping Agreement* by making its likelihood determination in this sunset review on an order-wide basis,

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<sup>13</sup>Panel Report, para. 8.1(d)(ii) (regarding USDOC's alleged reliance in the CRS sunset review on the dumping margins determined in the original investigation) and para. 8.1(d)(iv) (regarding the reporting by USDOC of those dumping margins to USITC for purposes of USITC's sunset review of the CRS order).

- (f) In respect of the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping in sunset reviews:
  - (i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Article 11.3 regarding the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping in sunset reviews,
  - (ii) the DOC did not act inconsistently with Article 11.3 of the *Anti-dumping Agreement* in this sunset review in making its determination regarding the likelihood of continuation or recurrence of dumping,

...

- (h) The US did not act inconsistently with Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement*.<sup>14</sup>

5. Certain of these findings were based on the Panel's initial finding that "the Sunset Policy Bulletin is not a mandatory legal instrument obligating a certain course of conduct and thus can not, in and of itself, give rise to a WTO violation."<sup>15</sup>

6. The Panel also found (and Japan does not appeal these findings) no inconsistency with the United States' WTO obligations in respect of the evidentiary standards applicable to the self-initiation of sunset reviews<sup>16</sup>, the *de minimis* standard applicable in sunset reviews<sup>17</sup>, cumulation in sunset reviews<sup>18</sup>, USDOC's refusal to consider certain additional information submitted by NSC<sup>19</sup>, or the administration of the relevant United States laws and regulations.<sup>20</sup> In the light of these conclusions, the Panel made no recommendations under Article 19.1 of the DSU.<sup>21</sup>

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<sup>14</sup>Panel Report, para. 8.1.

<sup>15</sup>*Ibid.*, para. 7.145. See also paras. 7.195 and 7.246.

<sup>16</sup>Panel Report, para. 8.1(a), finding no inconsistency with Articles 5.6, 11.1, 11.3, 12.1, or 12.3 of the *Anti-Dumping Agreement*.

<sup>17</sup>Panel Report, para. 8.1(b), finding no inconsistency with Articles 5.8 or 11.3 of the *Anti-Dumping Agreement*.

<sup>18</sup>Panel Report, para. 8.1(c), finding no inconsistency with Articles 3.3, 5.8, or 11.3 of the *Anti-Dumping Agreement*.

<sup>19</sup>Panel Report, para. 8.1(f)(iii), finding no inconsistency with Articles 6.1, 6.2, or 6.6 of the *Anti-Dumping Agreement*.

<sup>20</sup>Panel Report, para. 8.1(g), finding no inconsistency with Article X:3(a) of the GATT 1994.

<sup>21</sup>Panel Report, para. 8.2.

7. On 15 September 2003, Japan notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures*.<sup>22</sup> On 25 September 2003, Japan filed its appellant's submission.<sup>23</sup> On 10 October 2003, the United States filed its appellee's submission.<sup>24</sup> On the same day, Brazil, Chile, the European Communities, Korea, and Norway each filed a third participant's submission<sup>25</sup>, and India and Canada each notified its intention to appear at the oral hearing as a third participant.<sup>26</sup>

8. The oral hearing in the appeal was held on 30 October 2003. The participants and third participants presented oral arguments (with the exception of India) and responded to questions by the members of the Division hearing the appeal.

## **II. Arguments of the Participants and Third Participants**

### *A. Claims of Error by Japan – Appellant*

#### 1. The Sunset Policy Bulletin "As Such"

9. Japan argues that the Panel erred in finding that the Sunset Policy Bulletin is not "challengeable", as such, under the *WTO Agreement*. Japan asks the Appellate Body to reverse this finding and to find that the Sunset Policy Bulletin sets forth "actionable administrative procedures"<sup>27</sup> that can give rise to a violation of Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

10. Japan challenges the Panel's reasoning on this issue in three respects. First, Japan argues that the Panel erred in its analysis of the term "administrative procedures" in Article 18.4 of the *Anti-Dumping Agreement*. According to Japan, this term extends to the administration of anti-dumping laws by investigating authorities and to rules adopted by such authorities. Moreover, existing WTO jurisprudence recognizes that the "conformity" of a particular written instrument such as the Sunset Policy Bulletin with WTO rules and norms depends on its true nature and the manner in which it is applied, rather than on its form or language alone. For this reason, Japan maintains that the term

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<sup>22</sup>WT/DS244/7, 17 September 2003, attached as Annex 1 to this Report.

<sup>23</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>24</sup>Pursuant to Rule 22 of the *Working Procedures*.

<sup>25</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>26</sup>Pursuant to Rule 24(2) of the *Working Procedures*. By letter dated 14 October 2003, Canada withdrew its notification and informed the Appellate Body that it would not attend the oral hearing.

<sup>27</sup>Japan's appellant's submission, para. 107.

"administrative procedures" encompasses administrative rules that appear to be discretionary but in fact operate "substantively and effectively" as "mandatory rules."<sup>28</sup>

11. Japan also asserts that the Panel erred in applying its own interpretation of the term "administrative procedures" in Article 18.4. The Panel stated that the Sunset Policy Bulletin is not an administrative procedure under Article 18.4 because it is *not* a "pre-established rule that mandates certain conduct for sunset reviews."<sup>29</sup> However, the Sunset Policy Bulletin was published before USDOC had conducted any sunset review, and USDOC has consistently applied the rules therein in all sunset reviews. Although the Sunset Policy Bulletin is described in its own terms as "guidance", this does not mean that it grants USDOC discretion to act in a WTO-consistent manner. In fact, the Sunset Policy Bulletin contains explicit, written instructions to USDOC staff and is an official instrument published in the United States Federal Register. Japan contends that the mandatory nature of the Sunset Policy Bulletin is confirmed by its use of the word "will" and by the fact that USDOC strictly and consistently adheres to it, never having departed from it in more than 200 sunset reviews. This conclusion cannot be changed simply by asserting that USDOC may choose to depart from the Sunset Policy Bulletin at some point in the future.

12. Second, Japan contends that the Panel incorrectly applied the mandatory/discretionary distinction. This distinction reflects a policy adopted by certain panels rather than the text of the covered agreements. In the present case, the Panel should have examined the actual operation of the Sunset Policy Bulletin, rather than adopting a rigid dichotomy between mandatory and discretionary rules based on the language of the Sunset Policy Bulletin alone. Had it done so, the Panel would have recognized that this administrative procedure, which was written and applied by an executive branch agency (USDOC), differs from the more traditional situation in which the legislature writes the rules and the executive determines how to implement them. Moreover, in *US – Countervailing Measures on Certain EC Products*, the Appellate Body confirmed that a method developed by an administrative agency to determine certain issues may be subject to challenge "as such". Japan also emphasizes that Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* aim to prevent "needless repetitive litigation" by requiring Members to take steps—including "writing rules"—that ensure the conformity of their anti-dumping regimes with the *Anti-Dumping Agreement*.<sup>30</sup>

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<sup>28</sup>Japan's appellant's submission, para. 121.

<sup>29</sup>Panel Report, para. 7.137.

<sup>30</sup>Japan's appellant's submission, para. 146.



13. Third, Japan maintains that the Panel improperly made its findings based purely on the Panel's understanding of the Sunset Policy Bulletin as a whole, and in particular its reading of the general language in the introductory "overview" section of the Sunset Policy Bulletin. Instead of focusing on the instrument as a whole, the Panel should have carefully reviewed the specific rules under challenge: namely, the requirement to make a determination in a sunset review on an order-wide basis and the methods for determining the likelihood of continuation or recurrence of dumping in such a review. Those rules are mandatory and operate independently of other United States laws and regulations on anti-dumping. Japan's arguments on these specific rules are outlined later in this Report.<sup>31</sup>

2. Article 11.3 of the *Anti-Dumping Agreement*

14. Japan argues that the Panel erred in its general approach to interpreting Article 11.3 of the *Anti-Dumping Agreement* due to its failure to apply the proper standards of review. As regards the legal standard of review, the Panel paid insufficient attention to the relationship between Article 11.3 and the rest of the agreement and ignored the context of sunset reviews within the broader framework of anti-dumping obligations. According to Japan, the Panel's approach was contrary to the requirements of Article 31 of the *Vienna Convention*<sup>32</sup> and, in particular, the requirement that treaty terms be interpreted in good faith in accordance with their ordinary meaning and context. Concerning the factual standard of review, the Panel failed to consider the principle of good faith under Article 26 of the *Vienna Convention*. According to Japan, this principle imposes an obligation on Members' domestic authorities to act in an objective, unbiased and even-handed manner that respects fundamental fairness. Japan contends, therefore, that in a sunset review consistent with Article 11.3 of the *Anti-Dumping Agreement*, investigating authorities must make their determination without favouring any party.

(a) The Dumping Margins Used in the CRS Sunset Review

15. Japan states that the Panel erred in finding that USDOC, in making its likelihood determination in the CRS sunset review, did not act inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying on dumping margins that were determined in previous administrative reviews using a "zeroing" methodology.<sup>33</sup> Japan asks the Appellate Body to reverse

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<sup>31</sup>*Infra*, paras. 20-21 and 26-28.

<sup>32</sup>*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

<sup>33</sup>Japan states that, in calculating these margins, "DOC zeroed—literally, DOC ignored—negative margins." (Japan's appellant's submission, para. 39)

this finding and to find that USDOC's reliance on these dumping margins was inconsistent with Article 2.4 in conjunction with Article 2.1, and that it was therefore also inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

16. In Japan's view, the Panel incorrectly interpreted the word "dumping" in Article 11.3 by taking an overly narrow view of the textual and contextual aspects of this provision. For Japan, it made "no sense"<sup>34</sup> for the Panel to read the word "dumping" in Article 11.3 as having nothing to do with the framework for the determination of dumping contained in Article 2. As Article 2 is the key provision defining this word, Japan contends that the obligations of Article 2 apply wherever the word "dumping" appears in the *Anti-Dumping Agreement*.

17. Japan argues that the Panel made three specific mistakes in interpreting the word "dumping" in Article 11.3. First, the Panel failed to acknowledge the significance of the opening words of Article 2.1: "[f]or the purpose of this Agreement". Second, the Panel interpreted the terms "dumping" and "determination" in Article 11.3 inconsistently with their meaning in Article 2, incorrectly assuming that the phrase "likely to lead to continuation or recurrence" in Article 11.3 alters the "core concept" of dumping.<sup>35</sup> In fact, the only difference in the concepts of dumping under Articles 2 and 11.3 is the time period to which they apply. Third, the Panel erroneously concluded that, for the determination to be made under Article 11.3, "it is not necessary for dumping to have been found to exist".<sup>36</sup> Japan argues that, in order to find a likelihood of continuation of dumping, the authorities must first find that dumping exists at the time of the sunset review. According to Japan, this is a "fundamental prerequisite" and the authorities cannot determine that dumping is likely to continue without establishing it.<sup>37</sup>

18. Japan maintains that the Panel failed to consider whether the evidence on which USDOC based its determination under Article 11.3 was valid and consistent with Article 2. USDOC based its determination on margins that had been calculated using a methodology that "zeroed" out negative margins. If USDOC had not used this methodology in calculating dumping margins for NSC during the last administrative review before the sunset review, USDOC would have found that NSC was not dumping. Therefore, at the time of the sunset review, there would have been no dumping to "continue". Japan emphasizes that the point is not whether a precise calculation of likely dumping

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<sup>34</sup>Japan's appellant's submission, para. 16.

<sup>35</sup>*Ibid.*, para. 28.

<sup>36</sup>Panel Report, para. 7.179.

<sup>37</sup>Japan's appellant's submission, para. 36.

margins is required in a sunset review but, rather, whether the evidence on which the CRS sunset review determination was based is consistent with Article 2. As "zeroing" is inconsistent with Article 2.4 in conjunction with Article 2.1, the evidence on which USDOC relied to determine the existence of dumping was "legally defective".<sup>38</sup> USDOC therefore had no WTO-consistent evidence of the existence of dumping or its likely continuation. As a result, Japan argues, the United States acted inconsistently with Article 2.4 in conjunction with Article 2.1 and, therefore, Article 11.3.

19. Japan contends that the Panel also erred in invoking, in support of its finding, the fact that, during the CRS sunset review, NSC did not challenge USDOC's reliance on dumping margins calculated using a zeroing methodology. For Japan, that NSC did not raise this issue in the CRS sunset review is irrelevant to the WTO-inconsistency of this practice. Indeed, it was reasonable for NSC not to have challenged the zeroing methodology because zeroing is a well-established practice of the United States and NSC had no possibility of overturning it under United States law. Moreover, in *Thailand – H-Beams*, the Appellate Body recognized that the issues raised in a domestic anti-dumping proceeding may differ from those raised in a WTO dispute settlement proceeding. Japan adds that it is now raising this issue because, unlike USDOC, the WTO has the authority to decide whether zeroing is consistent with the *Anti-Dumping Agreement*.

(b) Order-Wide Basis of Likelihood Determination

(i) *Challenge to the Sunset Policy Bulletin "As Such"*

20. Japan challenges the Panel's finding that Japan failed to show that the Sunset Policy Bulletin "as such" is inconsistent with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* in stating that USDOC will make its likelihood determination in a sunset review on an order-wide basis. Japan asks the Appellate Body to reverse this finding and to find that Section II.A.2 of the Sunset Policy Bulletin, as such, is inconsistent with Articles 6.10 and 11.3, in conjunction with Article 2, of the *Anti-Dumping Agreement*.

21. Japan contends that the Panel erred in concluding that the Sunset Policy Bulletin does not create a "mandatory" rule that USDOC must make an order-wide determination in a sunset review. Section II.A.2 of the Sunset Policy Bulletin provides that USDOC "will" make an order-wide determination, and USDOC has no discretion to assess whether this is appropriate or to make an exception based on the facts of a particular sunset review. Japan argues that the Sunset Policy Bulletin requires USDOC to make its likelihood determination on an order-wide basis. For reasons

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<sup>38</sup>Japan's appellant's submission, para. 40.

elaborated in the following section<sup>39</sup>, Japan maintains that this requirement is inconsistent with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement*.

(ii) *Challenge to the Sunset Policy Bulletin "As Applied"*

22. Japan challenges the Panel's finding that USDOC did not act inconsistently with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* in making its likelihood determination in the CRS sunset review on an order-wide basis. Japan asks the Appellate Body to reverse this finding and to find that USDOC acted inconsistently with Articles 6.10 and 11.3, in conjunction with Article 2, of the *Anti-Dumping Agreement* in making its likelihood determination in the CRS sunset review on an order-wide basis.

23. Japan argues that the Panel failed to appreciate the proper relationship between Articles 2, 6, and 11.3 of the *Anti-Dumping Agreement*. The word "dumping", for purposes of the *Anti-Dumping Agreement* including Article 11.3, is defined in Article 2. The substantive rule in Article 2.1 is itself informed by the evidentiary rule in Article 6.10, which states that the margin of dumping must be established on a company-specific basis. Thus, a determination that dumping exists under Article 2.1 must be based on a positive, company-specific margin of dumping. The use of the word "dumping" in Article 11.3 imposes the same requirement on investigating authorities in establishing the existence of dumping in making a likelihood determination in a sunset review. Therefore, according to Japan, the likelihood determination under Article 11.3 must also be made and applied on a company-specific basis.<sup>40</sup>

24. Japan adds that the need for sunset review determinations to be made on a company-specific basis is confirmed by Article 11.4, which provides specifically that the procedural and evidentiary rules in Article 6 apply to sunset reviews. The Panel failed to give this cross-reference proper interpretive weight and ignored the text and context of Article 6 in finding that the rule in Article 6.10 is substantive rather than procedural. Japan argues that the Appellate Body recognized in *Thailand – H-Beams* and *EC – Tube or Pipe Fittings* that the requirements of Article 6 are procedural, even though some of them may also have substantive implications. The title of Article 6 is "Evidence", and Article 6.14 refers to the "procedures set out above". In Japan's view, the first sentence of Article 6.10 contains a rule that is procedural or evidentiary in the sense that it requires a

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<sup>39</sup>*Infra*, paras. 23-25.

<sup>40</sup>In addition, Japan explained in response to questioning at the oral hearing that, in its view, if investigating authorities make an affirmative likelihood determination in respect of one company and a negative likelihood determination in respect of another company, they must terminate the duty with respect to the latter company.

determination of the existence of dumping (whether under Article 2 or Article 11) to be based on evidence of positive, company-specific dumping margins.

25. Japan also states that the CRS sunset review demonstrates why company-specific determinations are required under Article 11.3. In particular, in the absence of zeroing, the dumping margin for NSC in the latest administrative review would have been negative, whereas the dumping margin for KSC would have remained positive. An objective evaluation of these facts would necessarily involve distinct analyses and separate determinations with respect to NSC and KSC. Yet USDOC made only one, order-wide determination. Therefore, Japan maintains that USDOC failed to comply with the requirement under Article 11.3 to make a company-specific likelihood determination.

(c) The Factors Considered by USDOC in Making a Likelihood Determination

(i) *Challenge to the Sunset Policy Bulletin "As Such"*

26. Japan challenges the Panel's finding that Japan failed to show that the Sunset Policy Bulletin "as such" is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* in that it unduly limits the factors to be taken into account by USDOC in making its likelihood determination in a sunset review. Japan asks the Appellate Body to reverse this finding and to find that Sections II.A.3 and 4 of the Sunset Policy Bulletin are, as such, inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

27. Japan maintains that Sections II.A.3 and 4 of the Sunset Policy Bulletin create mechanical rules that are not found in the Tariff Act or the SAA. The first rule under Section II.A.3 applies to "continuation" cases, which arise when USDOC finds that dumping exists at the time of the sunset review. In these cases, USDOC is required to make an affirmative determination of the likely "continuation" of dumping if it finds that dumping exists at a level above *de minimis* (0.5 percent). USDOC therefore makes its determination based on this single fact, without considering any other facts or conducting any analysis of probable future events. The second and third rules of Section II.A.3 apply to "recurrence" cases, which arise when USDOC finds no dumping at the time of the sunset review. Taken together, the second and third rules require USDOC to make an affirmative determination of the likely "recurrence" of dumping unless it finds that import volumes are at or above those existing before the order was issued. Japan argues that USDOC consistently applies these three rules mechanically, despite the inclusion of the word "normally" in the Sunset Policy Bulletin.

28. Japan argues that these rules are based on the presumptions that, if the duty is terminated, all responding parties will (i) export their products at volumes at least as high as before the order was issued; and (ii) lower their export price to below normal value in order to achieve such export volumes. USDOC does not adopt any mechanisms to confirm that these presumptions are correct in the circumstances of particular sunset reviews, and USDOC has no discretion to consider the case-specific facts that may rebut these presumptions. Moreover, responding parties wishing to show "good cause" for USDOC to consider other factors must direct their arguments to the factors contained in the three rules, namely the existence of dumping and depressed import levels. The mechanical application of these rules means that the outcome of the sunset review is predetermined in favour of the domestic industry. As the three rules in Section II.A.3 of the Sunset Policy Bulletin are inconsistent with Article 11.3, so too is the rule in Section II.A.4, which states that USDOC will normally make a negative likelihood determination where dumping ceased after the order was issued and import volumes remained stable or increased. For reasons elaborated in the following section<sup>41</sup>, Japan therefore maintains that Sections II.A.3 and 4 of the Sunset Policy Bulletin are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

(ii) *Challenge to the Sunset Policy Bulletin "As Applied"*

29. Japan challenges the Panel's finding that USDOC did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in making its likelihood determination in the CRS sunset review. Japan asks the Appellate Body to reverse this finding and to find that USDOC acted inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in the methodology and evidentiary standards that it applied in making its likelihood determination in the CRS sunset review.

30. Japan contends that the Panel made two specific errors in relation to this issue. First, the Panel failed to review whether USDOC made its likelihood determination in the CRS sunset review based on positive evidence evaluated in an even-handed, fair, unbiased, and objective manner. The only evidence USDOC considered was the dumping margins determined in the previous administrative reviews and the decline in import volumes following the imposition of the CRS order. USDOC's examination of this evidence did not meet the requisite standard of evaluation. As regards the previously-determined dumping margins, the mere existence of recent dumping is not sufficient to substantiate a determination of likely future dumping. USDOC's automatic presumption to the contrary predetermined the outcome of the CRS sunset review in favour of the domestic industry. As for the decline in import volumes, USDOC's examination of this evidence was irrelevant to its

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<sup>41</sup>*Infra*, paras. 30-32.

determination because it would in any event have made an affirmative determination based solely on the alleged current dumping. In addition, Japan maintains that USDOC relied on past import volumes that were more than five years old, ignored all intervening developments, and never considered *why* import volumes fell.

31. Second, Japan emphasizes that, although the Panel properly identified the requirements for a likelihood determination under Article 11.3, it failed to apply those requirements correctly to the CRS sunset review. Article 11.3 requires USDOC to make an unbiased "determination" that termination of the duty is "likely" to lead to the continuation or recurrence of dumping. This provision imposes a "serious burden"<sup>42</sup> on USDOC to make its likelihood determination according to *probable*, rather than *possible*, outcomes and to base its determination on a fresh analysis of positive, credible evidence. In Japan's view, the burden is not on the responding parties to demonstrate that future dumping is unlikely if the duty is terminated, but rather on USDOC to demonstrate that future dumping is likely.

32. According to Japan, USDOC did not meet this burden in the CRS sunset review. USDOC did not collect evidence supporting and detracting from the likelihood of future dumping, consider the likely movements of normal value and export price in the absence of the CRS order, nor issue a questionnaire to respondents to obtain all relevant information. Moreover, USDOC did not properly examine the evidence of "other factors" submitted by NSC. USDOC's treatment of this evidence demonstrates that it uses the "good cause" standard to justify its practice of restricting the evidence to import volume trends and dumping margins determined in previous administrative reviews. Limiting the evidence in this way helps USDOC to ensure a likelihood determination that favours the domestic industry. According to Japan, USDOC therefore failed to make an unbiased and objective determination in accordance with Article 11.3.

B. *Arguments of the United States – Appellee*

1. The Sunset Policy Bulletin "As Such"

33. The United States argues that the Panel was correct in finding that the Sunset Policy Bulletin is not a measure that can be challenged "as such". The United States asks the Appellate Body to uphold this finding.

34. The United States makes two main arguments regarding this issue. First, the United States contends that the Sunset Policy Bulletin is not a legal instrument under United States law and that,

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<sup>42</sup>Japan's appellant's submission, para. 57.

therefore, it is not a "measure". The Sunset Policy Bulletin is not an instrument with a functional life of its own, independent of other instruments. Rather, it operates on the basis of, and within the parameters set by, the Tariff Act and the implementing regulations. The purpose of the Sunset Policy Bulletin is to provide guidance to USDOC in assessing the facts in each sunset review. This guidance increases transparency and informs interested parties of USDOC's likely approach in given factual circumstances. However, USDOC may depart from the Sunset Policy Bulletin in any particular sunset review, provided that it explains its reasons for doing so. According to the United States, Japan's argument that USDOC has consistently followed the Sunset Policy Bulletin rather than conducting an independent analysis in every sunset review simply takes issue with the Panel's findings of fact.

35. The United States disputes Japan's view that the Sunset Policy Bulletin is a "pre-established rule" and an "administrative procedure" because it was published in the United States Federal Register before the first sunset review. Japan failed to establish before the Panel that, as a matter of United States municipal law, publication of the Sunset Policy Bulletin in the Federal Register transformed that bulletin from policy guidance into a "measure". The United States argues that, as the Panel found, the Sunset Policy Bulletin cannot be deemed to be a measure purely by virtue of the form in which it is maintained, or the time at which it was published.

36. The United States also disputes Japan's suggestion that the Sunset Policy Bulletin is a measure because USDOC allegedly adheres strictly to its provisions. The Sunset Policy Bulletin is "comparable to agency precedent"<sup>43</sup> and, under United States law, such precedent is not binding. Administrative practice of this kind cannot evolve into an administrative procedure or a measure solely because USDOC has conducted a number of sunset reviews in which it adhered to the Sunset Policy Bulletin. According to the United States, the panel in *US – Steel Plate* recognized that a practice does not become a measure by virtue of its being repeated.

37. Second, the United States argues that even if the Sunset Policy Bulletin were a measure susceptible to challenge in the present proceedings, it is not inconsistent with the United States' WTO obligations because it does not mandate WTO-inconsistent action. Japan bears the burden of demonstrating that the Sunset Policy Bulletin "mandates" WTO-inconsistent action or precludes WTO-consistent action. In fulfilling this burden, Japan would need to produce evidence of the scope and meaning of the Sunset Policy Bulletin within United States municipal law. However, as already explained, administrative precedent such as the Sunset Policy Bulletin has no functional life of its own, regardless of how often it is repeated. The United States argues that, consistent with this

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<sup>43</sup>United States' appellee's submission, para. 53.



interpretation, the Appellate Body indicated in *US – Carbon Steel* that an agency's consistent practice may comprise evidence of the meaning of a challenged law, but not evidence that such practice is itself a measure.

38. The United States emphasizes that the Appellate Body report in *US – Countervailing Measures on Certain EC Products* does not address the question of whether non-binding administrative precedent or practice can be challenged as a measure. In fact, panels have consistently concluded that such practice cannot be challenged in this way, for example, in *US – Steel Plate* and *US – Export Restraints*. The United States argues that even if such practice could be challenged as a measure, the Appellate Body has consistently applied the mandatory/discretionary distinction to preclude a finding of WTO-inconsistency where the relevant measure does not mandate the breach of a WTO obligation.

39. The United States points out that the Sunset Policy Bulletin does not contain rules that USDOC is required to follow. Rather, the Sunset Policy Bulletin "simply addresses the limited universe of practical scenarios that could arise in the period after imposition of the order".<sup>44</sup> The outcome in each sunset review is not predetermined by the provisions of the Sunset Policy Bulletin. Rather, the outcome depends on the facts of each case and must be supported by evidence on the record. If USDOC decided to modify its analysis in a way that would represent a change from past practice, it would explain this change and normally give parties an opportunity to comment on it. The United States therefore maintains that USDOC may reach similar results based on similar facts, not because it follows the fixed rules of the Sunset Policy Bulletin, but because it adopts consistent analysis for similar factual situations.

## 2. Article 11.3 of the *Anti-Dumping Agreement*

### (a) The Dumping Margins Used in the CRS Sunset Review

40. The United States argues that the Panel was correct in finding that the United States did not act inconsistently with Article 2.4 or, in the alternative, Article 11.3 of the *Anti-Dumping Agreement* in relying on the administrative review dumping margins while making its likelihood determination in the CRS sunset review. The United States requests the Appellate Body to uphold this finding.

41. According to the United States, Japan's appeal regarding "zeroing" is premised on factual findings that the Panel did not make. First, the Panel made no factual finding as to whether the dumping margins on which USDOC relied were calculated using the methodology proscribed by the

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<sup>44</sup>United States' appellee's submission, para. 67.

Appellate Body in *EC – Bed Linen*. Second, the Panel made no factual finding as to whether USDOC would have calculated negative dumping margins in the administrative reviews if it had not used such a methodology. As recognized in the Appellate Body Report in *Australia – Salmon*, appellate review does not extend to claims based on factual findings that the Panel did not make or upon facts that are not undisputed. Accordingly, the Appellate Body should dismiss in its entirety Japan's appeal regarding zeroing. The United States argues that, otherwise, Members will be able to use sunset reviews "as a back door"<sup>45</sup> to challenge other measures.

42. The United States also maintains that *EC – Bed Linen* is legally and factually irrelevant to USDOC's likelihood determination in the CRS sunset review. First, the methodology of the European Communities that the Appellate Body considered in *EC – Bed Linen* involved the calculation of dumping margins on a basis different from that used by USDOC in the administrative reviews. In that case, the European Communities calculated margins on an "average-to-average" basis whereas, in this case, USDOC did so on an "average-to-transaction" basis. Second, the United States argues that *EC – Bed Linen* concerned an anti-dumping investigation, whereas the present appeal concerns a sunset review of an anti-dumping duty.

43. The United States contends that the Panel correctly found that the substantive disciplines of Article 2 regarding the calculation of dumping margins in making a determination of dumping do not apply to the making of a likelihood determination under Article 11.3. The introductory words of Article 2.1 do not mean that every provision of Article 2 applies throughout the *Anti-Dumping Agreement*, as evidenced by the fact that certain provisions of Article 2 are expressly stated not to apply to reviews.<sup>46</sup> Article 11.3 of the *Anti-Dumping Agreement* does not prescribe a methodology for making a likelihood determination; nor does it require quantification of past or future dumping. In fact, according to the United States, Japan concedes that the likelihood determination is not tied to a specific amount of dumping. In the view of the United States, this concession cannot be reconciled with Japan's argument that the provisions of Article 2 regarding the calculation of dumping margins apply to sunset reviews.

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<sup>45</sup>United States' appellee's submission, para. 40.

<sup>46</sup>For example, the United States refers to the words "during the investigation phase" in Article 2.4.2. (United States' appellee's submission, footnote 66 to para. 44)

(b) Order-Wide Basis of Likelihood Determination

(i) *Challenge to the Sunset Policy Bulletin "As Such"*

44. The United States argues that the Panel was correct in finding that Japan failed to show that the Sunset Policy Bulletin as such is inconsistent with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* regarding the basis on which the likelihood determination is made in sunset reviews. The United States asks the Appellate Body to uphold this finding.

45. In the view of the United States, the Panel correctly identified the two questions to be answered in examining an "as such" claim: first, whether the alleged measure mandates a certain course of action; and second, whether that course of action is consistent with the relevant obligations. The Panel considered that it made more sense to begin by addressing the first of these questions, and Japan has not shown that in doing so the Panel committed a legal error. The United States maintains that, as a result of the Panel's finding that the Sunset Policy Bulletin is not a measure that can be challenged in WTO dispute settlement proceedings, the Panel was not required to address the second question.

(ii) *Challenge to the Sunset Policy Bulletin "As Applied"*

46. The United States argues that the Panel was correct in finding that the United States did not act inconsistently with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* in making its likelihood determination in the CRS sunset review on an order-wide basis. The United States asks the Appellate Body to uphold this finding.

47. The United States emphasizes that, pursuant to Article 11.4, only the provisions of Article 6 "regarding evidence and procedure" are incorporated into Article 11. As the Panel found, no substantive obligation is imposed on investigating authorities to calculate dumping margins in a sunset review. Accordingly, the procedural or evidentiary requirements of Article 6 regarding the calculation of such margins do not apply to Article 11.3. In particular, the United States maintains that the procedural requirement in Article 6.10 that dumping margins be calculated on a company-specific basis does not apply to sunset reviews.

48. The United States contends that the provisions of Articles 11.3, 9.2, and 9.4 confirm that investigating authorities are not required to make their likelihood determination in a sunset review on a company-specific basis. Article 11.3 does not prescribe a methodology that investigating authorities must follow in making their likelihood determination. Nor does Article 11, as a whole, describe any

criteria for making a likelihood determination focusing on individual companies. In particular, Article 11.3 "does not distinguish between the specificity required" for the likelihood determination regarding dumping and that regarding injury, "and the latter determination is *inherently* order-wide."<sup>47</sup> Article 11.3 also does not refer to making a determination for individual companies. Instead, it provides for a review of the "definitive" duty. Pursuant to Article 9.2, such a duty is imposed on a product-specific basis rather than a company-specific basis. Similarly, the United States maintains that Article 9.4 assumes that a definitive duty is imposed on a product rather than with respect to individual companies, thus enabling duties to be applied to suppliers not included in the anti-dumping investigation.

(c) The Factors Considered by USDOC in Making a Likelihood Determination

(i) *Challenge to the Sunset Policy Bulletin "As Such"*

49. The United States argues that the Panel was correct in finding that Japan failed to show that the Sunset Policy Bulletin "as such" is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* regarding the obligation to make a likelihood determination in sunset reviews. The United States asks the Appellate Body to uphold this finding. For reasons described in relation to the previous issue<sup>48</sup>, the United States argues that the Panel was correct in declining to consider further Japan's "as such" claim regarding this issue.

(ii) *Challenge to the Sunset Policy Bulletin "As Applied"*

50. The United States maintains that the Panel was correct in finding that the United States did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in making its likelihood determination in the CRS sunset review. The United States requests the Appellate Body to uphold this finding.

51. According to the United States, Article 11.3 of the *Anti-Dumping Agreement* does not prescribe a methodology that investigating authorities must follow in making their likelihood determination. Article 11.3 is a "specific implementation of the general rule" in Article 11.1.<sup>49</sup> A sunset review under Article 11.3 focuses on future behaviour and not on the current existence of dumping. According to the United States, footnote 22 to Article 11.3 confirms that Article 11.3 does not require investigating authorities to calculate the precise amount of dumping in any given year or

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<sup>47</sup>United States' appellee's submission, para. 33. (original emphasis)

<sup>48</sup>*Supra*, para. 45.

<sup>49</sup>United States' appellee's submission, para. 12.

in the future because the current existence of a specific amount of dumping is not determinative of the likelihood that dumping will continue or recur.

52. The United States contends that the Panel properly assessed USDOC's conduct of the CRS sunset review according to the appropriate standard. The Panel examined whether USDOC based its determination on positive evidence evaluated in an objective manner. The Panel correctly found that USDOC had a sufficient factual basis to allow it to draw reasoned and adequate conclusions that dumping was likely to continue or recur if the CRS order were revoked.<sup>50</sup> Japan's objection to this finding goes to the Panel's assessment of the facts before it and the weight accorded to those facts. As Japan does not argue that the Panel failed to discharge its function correctly under Article 11 of the DSU, the United States maintains that Japan's challenge to the Panel's finding falls outside the scope of appellate review pursuant to Article 17.6 of the DSU, as interpreted by the Appellate Body in *EC – Hormones*.

53. The United States adds that the Panel correctly identified the "positive evidence" on which USDOC based its likelihood determination. Specifically, this comprised evidence of dumping and declining import volumes after the CRS order was issued. The evidence of dumping was contained in the results of the two administrative reviews of the CRS order, the second of which was completed only one month before USDOC issued its preliminary results in the CRS sunset review. The evidence of import volumes indicated that imports had declined substantially after the CRS order was imposed and remained depressed for the period prior to the CRS sunset review. As the Panel has found, based on this evidence, it was reasonable for USDOC to make an affirmative likelihood determination.

54. The United States disagrees with Japan's argument that USDOC's analysis was based on limited facts and a methodology that predetermined the result. A likelihood determination in a sunset review inevitably rests on facts relating to the past and present. USDOC found that Japanese suppliers had continued to dump since the imposition of the CRS order and that there was no evidence to suggest that they would cease dumping if the CRS order were revoked. USDOC afforded NSC an opportunity to explain its behaviour in the CRS sunset review. Yet, according to the United States, although NSC attempted to explain why its import volumes were depressed, it did not attempt to explain or disprove its ongoing dumping or why this would stop if the CRS order were revoked.

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<sup>50</sup>Panel Report, paras. 7.271-7.272 and 7.278-7.283.

C. *Arguments of the Third Participants*

1. Brazil

55. Brazil argues that the Panel erred in concluding that the United States did not act inconsistently with the *Anti-Dumping Agreement* or the *WTO Agreement* by applying a "zeroing" methodology in sunset reviews. In particular, the Panel erred in finding no correlation between Articles 2 and 11.3 of the *Anti-Dumping Agreement*. USDOC's practice of "zeroing" out negative dumping margins in original investigations and reviews is inconsistent with the United States' WTO obligations. Brazil reaffirms its arguments before the Panel in this regard.

2. Chile

56. Chile argues that the Panel erred in concluding that the Sunset Policy Bulletin is not a mandatory legal instrument. The Panel should have focused on the aims of the Sunset Policy Bulletin and the manner in which it is used by USDOC. In particular, the Sunset Policy Bulletin is a binding legal instrument establishing certain conditions that are not found in the relevant statute and regulations. Accordingly, USDOC must apply the Sunset Policy Bulletin in order to comply with the statute and regulations.

57. Chile contends that the Panel erred in finding that the disciplines applicable to original investigations under the *Anti-Dumping Agreement* do not apply to sunset reviews. Although an original investigation is different from a sunset review, this does not mean that the disciplines envisaged in the *Anti-Dumping Agreement* for investigations do not apply to sunset reviews. Both types of proceeding result in the imposition of an anti-dumping duty upon exporters of the relevant product. Moreover, Article 11.1 sets out one of the "guiding principles"<sup>51</sup> of the *Anti-Dumping Agreement*, according to which the continuation of an anti-dumping measure is an exception to the general rule of termination. Chile argues that the reference to "dumping" in Article 11.1 is a reference to dumping as defined in Article 2.

58. Chile maintains that the Panel erred in finding that Article 11.3 of the *Anti-Dumping Agreement* does not require investigating authorities to make their likelihood determination in a sunset review on a company-specific basis. Article 11.4 requires investigating authorities, in a sunset review, to use the logic underlying the rules of evidence and procedure in Article 6, including Article 6.10. In Chile's view, if investigating authorities do not make a company-specific likelihood

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<sup>51</sup>Chile's third participant's submission, para. 3.

determination, they will not be able to determine the manner in which individual companies will behave if the duty is terminated.

59. Chile suggests that the Panel erred in finding that USDOC's methodology for making the likelihood determination in a sunset review is not inconsistent with the *Anti-Dumping Agreement*. Although the *Anti-Dumping Agreement* does not prescribe a methodology for making this determination, USDOC's methodology pre-determines the outcome of the sunset review because USDOC will normally make an affirmative likelihood determination based only on dumping margins and import levels. Moreover, Chile contends that, in the CRS sunset review, USDOC relied on margins that were not properly established.

### 3. European Communities

60. The European Communities contends that the Panel erred in concluding that the Sunset Policy Bulletin is not an actionable measure "as such". The European Communities submits that the mandatory/discretionary distinction is not based on any provision of the covered agreements. In this regard, the European Communities agrees with the report of the panel in *US – Section 301 Trade Act*. Accordingly, the Panel should have determined whether the Sunset Policy Bulletin was "challengeable" based on the specific provisions of the *Anti-Dumping Agreement*, and Article 18.4 in particular. The term "administrative procedures" in Article 18.4 applies to all rules and procedures that guide proceedings under the *Anti-Dumping Agreement* and that are not legally binding. For reasons advanced by Japan<sup>52</sup>, the European Communities argues that the Sunset Policy Bulletin falls within the meaning of this term. Further, even if the mandatory/discretionary distinction is relevant, the Sunset Policy Bulletin is mandatory. Although USDOC may have a theoretical ability to depart from the Sunset Policy Bulletin, it is "highly unlikely" to do so.<sup>53</sup> Thus, according to the European Communities, as a practical matter the Sunset Policy Bulletin is binding on USDOC staff and is therefore mandatory.

61. The European Communities argues that the Panel erred in finding that Article 2 of the *Anti-Dumping Agreement* does not apply in the context of a sunset review. Properly interpreted, Article 11.3 does not require investigating authorities to calculate likely future dumping margins, but it does require them to consider evidence of dumping since the duty was imposed. In doing so, both the definition of "dumping" in Article 2.1 and the requirements of Article 2 regarding the calculation

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<sup>52</sup>European Communities' third participant's submission, referring to Japan's appellant's submission, paras. 131-137.

<sup>53</sup>*Ibid.*, para. 45.

of dumping margins apply. The European Communities agrees with Japan that it is irrelevant that NSC did not challenge the "zeroing" methodology in the CRS sunset review.

62. According to the European Communities, the Panel also erred in concluding that the United States did not act inconsistently with Article 11.3 in basing its likelihood determination in the CRS sunset review exclusively on past dumping margins and past import volumes. The likelihood determination in a sunset review must be based on positive evidence. Past dumping margins and import volumes are relevant to the likelihood determination, but authorities must also rely on other relevant factors in making that determination. Moreover, USDOC has an obligation to take into account all relevant factors. The Sunset Policy Bulletin is inconsistent with this obligation because it requires importers to show "good cause" before USDOC will consider "other factors". The European Communities also suggests that the Sunset Policy Bulletin improperly limits the circumstances in which an anti-dumping duty will be terminated following a sunset review.

#### 4. Korea

63. According to Korea, the Panel should have considered and upheld Japan's claims under Article 2.4 in addition to those under Article 11.3. The definition of dumping in Article 2 of the *Anti-Dumping Agreement* applies throughout that agreement, including in sunset reviews under Article 11.3. This interpretation is supported by the text, object and purpose of Article VI of the GATT 1994 as well as the *Anti-Dumping Agreement*, including Articles 2, 11.1, and 11.3. As a result, a determination of the existence of dumping that is based on a "zeroing" methodology is not a determination of dumping within the meaning of Article 2. Korea argues that such a determination cannot form the basis for a likelihood determination under Article 11.3.

64. In Korea's view, the Panel erred in concluding that USDOC's likelihood determination in the CRS sunset review was consistent with Article 11.3 of the *Anti-Dumping Agreement*. USDOC's likelihood determination was based on positive dumping margins calculated in recent administrative reviews and statistics regarding import volumes since the imposition of the CRS order. These two pieces of evidence alone cannot satisfy the requirements of positive evidence and a sufficient factual basis for a likelihood determination under Article 11.3. Moreover, Korea maintains that USDOC's definition of "dumping" in the CRS sunset review incorporated the impermissible practice of zeroing and was therefore inconsistent with Article 11.3.



5. Norway

65. Norway contends that the Panel erred in finding that the Sunset Policy Bulletin is not an administrative procedure under Article 18.4 of the *Anti-Dumping Agreement* and that it is therefore not challengeable, as such, under Article XVI:4 of the *WTO Agreement*. The term "administrative procedures" in Article 18.4 of the *Anti-Dumping Agreement* encompasses administrative rules such as the Sunset Policy Bulletin that may appear to be discretionary, but are consistently followed in practice. In addition, the Panel drew an improper distinction between mandatory and discretionary legislation. It applied this distinction mechanically to the Sunset Policy Bulletin even though this is an instrument of an administrative agency and not a legislative rule. In Norway's view, when properly applied, the mandatory/discretionary distinction does not preclude the Sunset Policy Bulletin from being "challengeable", as such, under the *WTO Agreement*.

66. According to Norway, the Panel erred in finding that Article 2 of the *Anti-Dumping Agreement* does not apply in the context of a sunset review under Article 11.3. The definition of "dumping" in Article 2 applies to Article 11.3 as well. Moreover, the dumping margins in the administrative reviews were calculated using a "zeroing" methodology that is inconsistent with Article 2.4. The evidence on which USDOC relied in making its likelihood determination in the CRS sunset review was therefore "legally defective."<sup>54</sup> Norway argues that it is irrelevant that NSC did not raise these concerns during the CRS sunset review.

67. Norway argues that the Panel erred in concluding that the Sunset Policy Bulletin, as such, is not inconsistent with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* in stating that USDOC will make its likelihood determination in a sunset review on an order-wide basis. The Panel should have considered the mandatory nature of this specific rule. For the reasons advanced by Japan, Norway considers that Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* require investigating authorities to make their likelihood determination in a sunset review on a company-specific basis.

68. Norway adds that the Panel erred in concluding that the Sunset Policy Bulletin, as such, is not inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. The Sunset Policy Bulletin creates narrow rules that necessarily lead to USDOC making an affirmative likelihood determination in a sunset review. According to Norway, these rules are consistently applied and rely on presumptions rather than facts.

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<sup>54</sup>Norway's third participant's submission, para. 17.

### III. Preliminary Issues

69. Two preliminary issues arise with respect to the scope of Japan's appeal. The first concerns Japan's request, in its Notice of Appeal<sup>55</sup>, that we reverse the finding of the Panel in paragraph 8.1(d) of the Panel Report that:

In respect of the dumping margins used in sunset reviews:

- (i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Articles 2.2.1, 2.2.2, 2.4, 11.3 and 18.3 of the *Anti-dumping Agreement*.

70. Japan's appellant's submission contains no arguments in support of its request that we reverse this finding. At the oral hearing, Japan confirmed that it is not pursuing its appeal of paragraph 8.1(d)(i) of the Panel Report. In other words, concerning the dumping margins used in sunset reviews, Japan's appeal does not challenge—and we therefore do not address—the Panel's finding regarding the consistency of the Sunset Policy Bulletin *as such* with the *Anti-Dumping Agreement*. Rather, Japan's appeal concerning the dumping margins used in sunset reviews is limited to the issue of whether the Panel erred in finding that, *in the CRS sunset review*, USDOC did not act inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying on dumping margins calculated in previous administrative reviews allegedly using a "zeroing" methodology. We address this issue in Section VI.C of this Report.<sup>56</sup>

71. The second preliminary issue was raised by the United States in its appellee's submission. According to the United States, Japan's "claims"<sup>57</sup> that the Panel failed to apply the correct legal and factual standards of review in interpreting Article 11.3 fall outside the scope of appellate review because Japan's Notice of Appeal did not refer to Article 11 of the DSU or Article 17.6 of the *Anti-Dumping Agreement* and did not allege that the Panel erred in its application of the standards of review prescribed in those provisions. In consequence, the United States argues, we are precluded from finding that the Panel acted inconsistently with Article 11 of the DSU or Article 17.6 of the *Anti-Dumping Agreement*.<sup>58</sup> At the oral hearing, Japan explained that the references in its appellant's submission to these standards of review<sup>59</sup> form part of Japan's "reasoning" in support of its appeal of certain findings by the Panel regarding Article 11.3 of the *Anti-Dumping Agreement*, but that Japan is not asking us to find that the Panel acted inconsistently with Article 11 of the DSU or Article 17.6 of

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<sup>55</sup>WT/DS244/7, 17 September 2003, p. 2, attached as Annex 1 to this Report.

<sup>56</sup>See *infra* paras. 118-138.

<sup>57</sup>United States' appellee's submission, para. 8.

<sup>58</sup>United States' response to questioning at the oral hearing.

<sup>59</sup>Japan's appellant's submission, paras. 3-15.

the *Anti-Dumping Agreement*. Therefore, the issue of whether Japan's Notice of Appeal included any allegations of inconsistency with Article 11 of the DSU or Article 17.6 of the *Anti-Dumping Agreement* has become moot. We have not been asked to make findings in relation to these provisions, and we make no findings on them.<sup>60</sup>

#### IV. Issues Raised in this Appeal

72. The following issues are raised in this appeal:

- (a) whether the Panel erred in finding, in paragraphs 7.145, 7.195, and 7.246 of the Panel Report, that the Sunset Policy Bulletin is not a mandatory legal instrument and thus is not a measure that is "challengeable", as such, under the *Anti-Dumping Agreement* or the *WTO Agreement*;
- (b) whether the Panel erred in finding, in paragraphs 7.170, 7.184, and 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying, in the CRS sunset review, on dumping margins calculated in previous administrative reviews allegedly using a "zeroing" methodology;
- (c) as regards the making of likelihood determinations on an order-wide basis:
  - (i) whether the Panel erred in finding, in paragraph 8.1(e)(i) of the Panel Report, that Japan failed to show that the Sunset Policy Bulletin, *as such*, is inconsistent with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement* in stating that USDOC will make its determination in a sunset review on an "order-wide" basis;
  - (ii) whether the Panel erred in finding, in paragraphs 7.208 and 8.1(e)(ii) of the Panel Report, that the United States did not act inconsistently with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement* in making its determination in the CRS sunset review on an "order-wide" basis;

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<sup>60</sup>We have already held that a claim, by an appellant, that a panel erred under Article 11 of the DSU, and a request for a finding to this effect, must be included in the Notice of Appeal, and clearly articulated and substantiated in an appellant's submission with specific arguments. (Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 74; Appellate Body Report, *Japan – Apples*, para. 127; and Appellate Body Report, *US – Steel Safeguards*, para. 498)

- (d) as regards the factors considered by USDOC in making a likelihood determination:
  - (i) whether the Panel erred in finding, in paragraph 8.1(f)(i) of the Panel Report, that Japan failed to show that the Sunset Policy Bulletin, *as such*, is inconsistent with Article 11.3 of the *Anti-Dumping Agreement* in that it limits the factors to be taken into account by USDOC in determining, in a sunset review, if the expiry of the duty would be likely to lead to continuation or recurrence of dumping;
  - (ii) whether the Panel erred in finding, in paragraphs 7.283 and 8.1(f)(ii) of the Panel Report, that the United States did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in the CRS sunset review in determining that dumping was likely to continue or recur; and
- (e) whether the Panel erred in finding, in paragraphs 7.315 and 8.1(h) of the Panel Report, that, with respect to the Sunset Policy Bulletin, the United States did not act inconsistently with Article 18.4 of the *Anti-Dumping Agreement* or Article XVI:4 of the *WTO Agreement*.

**V. Is the Sunset Policy Bulletin "Challengeable" As Such?**

**A. The Sunset Policy Bulletin**

73. Before turning to Japan's appeal on this issue, we wish to set out certain background information concerning the Sunset Policy Bulletin. This document forms part of the overall framework within which "sunset" reviews of anti-dumping or countervailing duties are conducted in the United States. Sunset reviews became part of United States law when the United States implemented the Uruguay Round agreements through the URAA.<sup>61</sup> The URAA consists of a broad-ranging package of new laws as well as modifications to existing United States trade laws, such as the Tariff Act. With respect to sunset reviews, the URAA added Sections 751(c) and 752 to the Tariff Act. These statutory provisions governing sunset reviews were in turn implemented through amendments to the Regulations.<sup>62</sup> Section 218 of Part 351 of Title 19 of the Regulations sets forth a number of detailed rules and procedures for USDOC to follow in conducting sunset reviews, as well as specific rules that apply to interested parties.

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<sup>61</sup>Uruguay Round Agreements Act, Public Law 103-465, 108 Stat. 4809, which became law in the United States on 8 December 1994. (Exhibit JPN-1(a) submitted by Japan to the Panel)

<sup>62</sup>*Supra*, footnote 10.

74. Japan's request for establishment of a panel<sup>63</sup> referred to these statutory and regulatory provisions, as well as to the SAA<sup>64</sup> and the Sunset Policy Bulletin.<sup>65</sup> The Sunset Policy Bulletin, together with a request for comments thereon, was published by USDOC in the United States Federal Register in 1998, before the United States had conducted any sunset review of anti-dumping or countervailing duties. In the Sunset Policy Bulletin, USDOC sets forth "policies regarding the conduct of five-year ('sunset') reviews ... pursuant to the provisions of sections 751(c) and 752 of the Tariff Act of 1930, as amended, and [USDOC's] regulations".<sup>66</sup> In developing the Sunset Policy Bulletin, USDOC drew on "the guidance provided by the legislative history accompanying the URAA, specifically the Statement of Administrative Action".<sup>67</sup> The Sunset Policy Bulletin is "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".<sup>68</sup> According to the Sunset Policy Bulletin, these statutory and regulatory provisions assign to USDOC the responsibility, in sunset reviews of anti-dumping duties, of, *inter alia*, determining whether revocation of an anti-dumping duty order would be likely to lead to continuation or recurrence of dumping. This appeal concerns certain provisions contained in Section II.A of the Sunset Policy Bulletin, entitled "*Determination of Likelihood of Continuation or Recurrence of Dumping*".

B. *Japan's Appeal*

75. Before the Panel, Japan claimed, *inter alia*, that certain provisions of the Sunset Policy Bulletin are, "as such", inconsistent with relevant United States obligations under the *Anti-Dumping Agreement*.<sup>69</sup>

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<sup>63</sup>WT/DS244/4, 5 April 2002.

<sup>64</sup>The SAA, which was submitted to the United States Congress along with the proposed URAA, "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements". (SAA, p. 656)

<sup>65</sup>See *infra*, footnote 69.

<sup>66</sup>Sunset Policy Bulletin, p. 18871.

<sup>67</sup>*Ibid.*, p. 18872.

<sup>68</sup>*Ibid.*, pp. 18871 and 18872.

<sup>69</sup>Japan's "as such" claims, to the extent relevant to this appeal, related to: (i) Section II.A.2 of the Sunset Policy Bulletin, regarding the making of determinations in sunset reviews on an order-wide basis; and (ii) Sections II.A.3 and 4 of the Sunset Policy Bulletin, regarding the factors considered by USDOC in making a determination in a sunset review. In its request for establishment of a panel, Japan's "as such" claims referred to both the SAA and the Sunset Policy Bulletin. However, in response to a question from the Panel, Japan clarified that it was not challenging the WTO-consistency of the SAA. Accordingly, the Panel construed Japan's "as such" claims as claims against the Sunset Policy Bulletin alone. (Panel Report, paras. 7.113, 7.195, and 7.246) In this appeal, too, Japan's "as such" claims relate solely to the Sunset Policy Bulletin.

76. The Panel declined to address the substance of Japan's "as such" claims against the provisions of the Sunset Policy Bulletin because it found that:

... the Sunset Policy Bulletin is not a mandatory legal instrument obligating a certain course of conduct and thus can not, in and of itself, give rise to a WTO violation.<sup>70</sup>

... the Sunset Policy Bulletin is not a measure that is challengeable, as such, under the *WTO Agreement*.<sup>71</sup>

... the Sunset Policy Bulletin is not challengeable as such under the *WTO Agreement*.<sup>72</sup>

77. Japan asks us to reverse these findings and to find that the Sunset Policy Bulletin sets forth "actionable administrative procedures"<sup>73</sup> that can, as such, be challenged under, and that are inconsistent with, the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*.

78. As a first step in examining Japan's appeal, we consider it important to distinguish between two issues that the Panel did not seem to differentiate in its analysis.<sup>74</sup> The first issue concerns the type of measures that may, as such, form the subject matter of dispute settlement under the *Anti-Dumping Agreement*. In other words, does the type of instrument itself—be it a law, regulation, procedure, practice, or something else—govern whether it may be subject to WTO dispute settlement? The second issue concerns whether a measure's mandatory or discretionary character determines if it can, as such, be found to be *inconsistent* with the covered agreements.

79. In our view, the ambiguity created by the Panel's approach stems from its use of the term "challengeable". In other words, it is not clear to us whether the Panel's finding that, because the Sunset Policy Bulletin is not a "mandatory legal instrument"<sup>75</sup>, it is not "challengeable, as such"<sup>76</sup>, is to be understood as a finding that non-mandatory measures cannot, as such, constitute the *specific*

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<sup>70</sup>Panel Report, para. 7.145.

<sup>71</sup>*Ibid.*, para. 7.195.

<sup>72</sup>*Ibid.*, para. 7.246.

<sup>73</sup>Japan's appellant's submission, para. 107.

<sup>74</sup>We drew attention to a similar "blurring" of two distinct issues by the panel in *Guatemala – Cement I*. (Appellate Body Report, *Guatemala – Cement I*, para. 69)

<sup>75</sup>Panel Report, para. 7.145.

<sup>76</sup>*Ibid.*, para. 7.195. See also para. 7.246.

*measure at issue*, or as a finding that non-mandatory measures cannot, as such, constitute a violation of a Member's obligations.<sup>77</sup>

80. We consider below these two ways in which the Panel's finding can be understood.

C. *The Type of Measures that Can, As Such, be the Subject of Dispute Settlement Proceedings*

81. We first examine whether there is any basis for holding that non-mandatory measures cannot, as such, be subject to dispute settlement under the *Anti-Dumping Agreement*. In so doing, we start with the concept of "measure". Article 3.3 of the DSU refers to "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures taken by another Member*". (emphasis added) This phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the "measure" and a "Member". In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.<sup>78</sup> The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.<sup>79</sup>

82. In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application.<sup>80</sup> In other words, instruments of a Member containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the

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<sup>77</sup>For example, in footnote 103 to paragraph 7.119 of the Panel Report, the Panel seemed to equate "the nature of 'measures' that may form part of the 'matter' referred to the DSB under the DSU" with "the nature of a 'measure' that is challengeable in WTO dispute settlement" and considered the latter to be "a fundamental matter relating to our mandate and jurisdiction in this case."

<sup>78</sup>We need not consider, in this appeal, related issues such as the extent to which the acts or omissions of regional or local governments, or even the actions of private entities, could be attributed to a Member in particular circumstances.

<sup>79</sup>Both specific determinations made by a Member's executive agencies and regulations issued by its executive branch can constitute acts attributable to that Member. See, for example, the Panel Report in *US – DRAMS*, where the measures referred to the panel included a USDOC determination in an administrative review as well as a regulatory provision issued by USDOC.

<sup>80</sup>See, for example Panel Report, *US – Superfund*; Panel Report, *US – Malt Beverages*; Panel Report, *EEC – Parts and Components*; Panel Report, *Thailand – Cigarettes*; Panel Report, *US – Tobacco*; Panel Report, *Argentina – Textiles and Apparel*; Panel Report, *Canada – Aircraft*; Panel Report, *Turkey – Textiles*; Panel Report, *US – FSC*; Panel Report, *US – Section 301 Trade Act*; Panel Report, *US – 1916 Act (EC)*; Panel Report, *US – 1916 Act (Japan)*; Panel Report, *US – Hot-Rolled Steel*; Panel Report, *US – Export Restraints*; Panel Report, *US – FSC (21.5 – EC)*; and Panel Report, *Chile – Price Band System*. See also Appellate Body Report, *US – Carbon Steel*, paras. 156 and 157. See also Appellate Body Report, *US – 1916 Act*, footnotes 34 and 35 to paras. 60 and 61, respectively.

disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms.<sup>81</sup> It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated.

83. Having outlined these general propositions, we next consider whether there are any limitations upon the types of measures that may, as such, be the subject of dispute settlement under the DSU or the applicable covered agreement, in this case the *Anti-Dumping Agreement*.<sup>82</sup> As regards the specific requirements of the *Anti-Dumping Agreement*, we have explained that Article 17.4 precludes a panel from addressing individual acts (as opposed to measures "as such") committed by an investigating authority in the context of the initiation and conduct of anti-dumping investigations *unless* one of the three types of measure listed in Article 17.4 is identified in the request for establishment of a panel.<sup>83</sup> These measures are a definitive anti-dumping duty, the acceptance of a price undertaking, and a provisional measure. We have also found, in *US – 1916 Act*, that Article 17.4 does not place such a limit on a panel's jurisdiction to entertain claims against *legislation as such*. Indeed, we stated in that appeal that no provision of the *Anti-Dumping Agreement* precludes a panel from considering claims against legislation *as such*.<sup>84</sup>

84. Our reasoning for concluding that the panel in *US – 1916 Act* had jurisdiction to consider *legislation*, as such, also applies in this case, where the relevant measures are specific provisions of an administrative instrument issued by an executive agency pursuant to statutory and regulatory provisions. That reasoning was based on the GATT *acquis* and the language of the *Anti-Dumping Agreement*, in particular Articles 17.3 and 18.4.

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<sup>81</sup>Panel Report, *US – Superfund*, para. 5.2.2.

<sup>82</sup>We recall, in this regard, that Article 1.1 of the DSU applies the rules and procedures contained in the DSU to "disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1", but that this general rule is, under Article 1.2 of the DSU, subject to the special or additional rules and procedures on dispute settlement identified in Appendix 2 to the DSU. The *Anti-Dumping Agreement* is listed as a covered agreement in Appendix 1 of the DSU. Articles 17.4 through 17.7 of the *Anti-Dumping Agreement* are listed as special or additional rules in Appendix 2 to the DSU.

<sup>83</sup>Appellate Body Report, *Guatemala – Cement I*, paras. 79-80; Appellate Body Report, *US – 1916 Act*, paras. 72-74.

<sup>84</sup>Appellate Body Report, *US – 1916 Act*, paras. 63-82.



85. In the practice under the GATT, most of the measures subject, as such, to dispute settlement, were *legislation*. We nevertheless observed in *Guatemala – Cement I* that, in fact, a broad range of measures could be submitted, as such, to dispute settlement:

In the practice established under the GATT 1947, a "measure" may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government (see *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116).<sup>85</sup>

86. The provisions of the *Anti-Dumping Agreement* setting forth a legal basis for matters to be referred to consultations and thus to dispute settlement, are also cast broadly. Article 17.3 establishes the principle that when a complaining Member "considers" that its benefits are being nullified or impaired "by another Member or Members"<sup>86</sup>, it may request consultations. This language underlines that a measure attributable to a Member may be submitted to dispute settlement provided only that another Member has taken the view, in good faith, that the measure nullifies or impairs benefits accruing to it under the *Anti-Dumping Agreement*. There is no threshold requirement, in Article 17.3, that the measure in question be of a certain type.

87. We also believe that the provisions of Article 18.4 of the *Anti-Dumping Agreement* are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to "take all necessary steps, of a general or particular character" to ensure that their "laws, regulations and administrative procedures" are in conformity with the obligations set forth in the *Anti-Dumping Agreement*. Taken as a whole, the phrase "laws, regulations and administrative procedures" seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.<sup>87</sup> If some of these types of measure could not, as such,

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<sup>85</sup>Appellate Body Report, *Guatemala – Cement I*, footnote 47 to para. 69. We note, too, that the panel in *Japan – Semi-Conductors* referred (in para. 107) to another GATT case, *Japan – Agricultural Products I*, where the panel also examined a measure composed, at least in part, of administrative guidance.

<sup>86</sup>Article 17.3 of the *Anti-Dumping Agreement* provides in relevant part:

If any Member *considers* that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, *by another Member or Members*, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. (emphasis added)

<sup>87</sup>We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.

be subject to dispute settlement under the *Anti-Dumping Agreement*, it would frustrate the obligation of "conformity" set forth in Article 18.4.

88. This analysis leads us to conclude that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*. Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged "as such". To the extent that the Panel's findings in paragraphs 7.145, 7.195, and 7.246 of the Panel Report suggest otherwise, we consider them to be in error.

89. We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to "preserve [their] rights and obligations ... under the covered agreements, and to clarify the existing provisions of those agreements".<sup>88</sup> As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their "judgement as to whether action under these procedures would be fruitful" and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations. It is to this issue that we now turn.

D. *The Panel's Finding that the Sunset Policy Bulletin, As Such, Cannot be Inconsistent with the Anti-Dumping Agreement*

90. As we have explained<sup>89</sup>, the Panel's finding that the Sunset Policy Bulletin is not "challengeable" as such can be understood as a finding that the Sunset Policy Bulletin, as such, cannot constitute a violation of the United States' obligations under the *Anti-Dumping Agreement*. In this section, we examine this understanding of the Panel's finding.

91. In this case, the specific provisions of the Sunset Policy Bulletin identified in Japan's request for establishment of a panel are: (i) Section II.A.2 of the Sunset Policy Bulletin, regarding the making of determinations in sunset reviews on an order-wide basis; and (ii) Sections II.A.3 and 4 of the Sunset Policy Bulletin, regarding the factors considered by USDOC in making a determination in a sunset review.

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<sup>88</sup>Article 3.2 of the DSU.

<sup>89</sup>*Supra*, para. 79.

92. The Panel decided to examine the merits of Japan's claims against these provisions of the Sunset Policy Bulletin by adopting the following approach. The Panel asked first whether the Sunset Policy Bulletin is a "mandatory legal instrument containing legally binding obligations".<sup>90</sup> The Panel explained that it would go on to consider the specific provisions of the Sunset Policy Bulletin and assess their consistency with the provisions of the WTO agreements *only* if the answer to this question was affirmative. The Panel also took the view that, if it determined that the Sunset Policy Bulletin was not a mandatory legal instrument containing legally binding obligations, it need not proceed any further with its analysis of Japan's claims regarding the specific provisions of the Sunset Policy Bulletin.<sup>91</sup>

93. In adopting this approach, the Panel was applying, as a preliminary consideration, the so-called "mandatory/discretionary distinction". We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such.<sup>92</sup> As the Panel seemed to acknowledge<sup>93</sup>, we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction.<sup>94</sup> Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the "mandatory/discretionary distinction" may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion.

94. In accordance with its declared approach, the Panel undertook an "analysis of whether the Bulletin mandates certain behaviour under US law, independently from other legal instruments such as the Statute and the Regulations".<sup>95</sup> The Panel looked at the introductory language of the Sunset

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<sup>90</sup>Panel Report, para. 7.118.

<sup>91</sup>*Ibid.*

<sup>92</sup>Appellate Body Report, *US – 1916 Act*, paras. 61 and 88.

<sup>93</sup>In footnote 95 to para 7.114, the Panel quoted the following statement from para. 7.88 of the Panel Report in *US – Steel Plate*: "[t]he Appellate Body has recognized the distinction, but has not specifically ruled that it is determinative in consideration of whether a statute is inconsistent with relevant WTO obligations."

<sup>94</sup>In our Report in *US – 1916 Act*, we examined the challenged legislation and found that the alleged "discretionary" elements of that legislation were not of a type that, *even under the mandatory/discretionary distinction*, would have led to the measure being classified as "discretionary" and therefore consistent with the *Anti-Dumping Agreement*. In other words, we *assumed* that the distinction could be applied because it did not, in any event, affect the outcome of our analysis. We specifically indicated that it was not necessary, in that appeal, for us to answer "the question of the continuing relevance of the distinction between mandatory and discretionary legislation for claims brought under the *Anti-Dumping Agreement*". (Appellate Body Report, *US – 1916 Act*, para. 99) We also expressly declined to answer this question in footnote 334 to paragraph 159 of our Report in *US – Countervailing Measures on Certain EC Products*. Furthermore, the appeal in *US – Section 211 Appropriations Act* presented a unique set of circumstances. In that case, in defending the measure challenged by the European Communities, the United States unsuccessfully argued that discretionary regulations, issued under a separate law, cured the discriminatory aspects of the measure at issue.

<sup>95</sup>Panel Report, para. 7.124.

Policy Bulletin, and highlighted the fact that this language provides for sunset reviews to be conducted "pursuant to the provisions of the act, including sections 751(c) and 752 of the act, and the Department's regulations" and states that the Bulletin is 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."<sup>96</sup> This language, the Panel held, demonstrates that "the Bulletin operates on the basis of, and within the parameters set by, the Statute and the Regulations".<sup>97</sup> Moreover, the Panel noted that Japan had "pointed to no other provision in the US legislation that would suggest that the Bulletin can in fact operate independently from other legal instruments under US law".<sup>98</sup> Based on these considerations, the Panel found:

... that the Sunset Policy Bulletin, in and of itself, is not a legal instrument that operates so as to mandate a course of action. It follows that the Bulletin can not constitute a measure that can be challenged in WTO dispute settlement proceedings.<sup>99</sup>

95. We disagree with the approach that led the Panel to this finding. In its analysis, the Panel had done nothing more than look at the introductory language of the Sunset Policy Bulletin. It had not conducted any in-depth consideration of the impugned provisions of the Bulletin. We do not see how the Panel could have reached its aforementioned conclusion basing itself merely on observations that the Sunset Policy Bulletin provides for sunset reviews to be conducted pursuant to the governing statute, and that the provisions of the Sunset Policy Bulletin provide only "guidance". The Panel made no reference to a part of the introductory language that seems to us to be significant, namely, that the Bulletin addresses "methodological or analytical issues *not* explicitly addressed by the statute and regulations."<sup>100</sup> It is also not clear to us whether the Panel's statement that the Sunset Policy Bulletin "can not constitute a measure that can be challenged in WTO dispute settlement proceedings"<sup>101</sup> was based on its view that the Sunset Policy Bulletin is not a legal instrument, or that it is not mandatory, or both.

96. The Panel added that "the fact that the DOC may depart from the Sunset Policy Bulletin under US law under certain conditions further supports our finding that it is not a binding legal instrument under US law."<sup>102</sup> In so stating, the Panel recognized that USDOC's ability to depart from the Sunset

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<sup>96</sup>Panel Report, para. 7.124, quoting the Sunset Policy Bulletin, p. 18872. (underlining added by the Panel)

<sup>97</sup>*Ibid.*, para. 7.125.

<sup>98</sup>*Ibid.*

<sup>99</sup>*Ibid.*, para. 7.126.

<sup>100</sup>Sunset Policy Bulletin, pp.18871 and 18872. (emphasis added)

<sup>101</sup>Panel Report, para. 7.126.

<sup>102</sup>*Ibid.*, para. 7.127.

Policy Bulletin is subject to conditions, but it did not explore the scope or significance of those conditions.<sup>103</sup>

97. Japan argued before the Panel that the repeated practice of USDOC, as demonstrated in its conduct of a large number of sunset reviews, serves to establish that the relevant provisions of the Sunset Policy Bulletin have the meaning and effect alleged by Japan, namely, that they unduly limit the factors that USDOC will take into account in making its determination. The Panel, however, did not make any factual findings as to the relevance or cogency of this evidence. Rather, the Panel opined that the Sunset Policy Bulletin, by itself, could not constitute "practice" because it was issued before any sunset review had occurred. The Panel also took the view that a repeated response to a particular set of circumstances could not "transform" the Bulletin into an "administrative procedure", or indicate that, "merely by repetition, the DOC would somehow become compelled to follow the Bulletin."<sup>104</sup> In so doing, the Panel does not seem to have allowed for the possibility that Japan was not challenging the Sunset Policy Bulletin *as practice*, but was, rather, relying on the evidence of the consistent application of the Sunset Policy Bulletin in all sunset reviews so far conducted by USDOC to support its arguments that USDOC treats the "rules" in the Sunset Policy Bulletin as binding.

98. The Panel adopted a similar narrow approach in finding that the Sunset Policy Bulletin is not an "administrative procedure" within the meaning of Article 18.4 of the *Anti-Dumping Agreement*. Having adopted the view that an administrative procedure is "a pre-established rule for the conduct of an anti-dumping investigation"<sup>105</sup>, the Panel assumed that a "rule" means a "mandatory rule" and used its previous finding that the Sunset Policy Bulletin is not a mandatory legal instrument to come to the conclusion that it therefore cannot be an administrative procedure. Again, the Panel did not consider the normative nature of the provisions of the Sunset Policy Bulletin, nor compare the type of norms that USDOC is required to publish in formal regulations with the type of norms it may set out in policy statements.<sup>106</sup> These inquiries would have assisted the Panel in determining whether the Sunset Policy Bulletin is, in fact, an "administrative procedure" within the meaning of Article 18.4 of the *Anti-Dumping Agreement*.

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<sup>103</sup> According to the United States, USDOC may depart from the Sunset Policy Bulletin as long as it gives reasons for doing so and does not act in an "arbitrary or capricious" manner. (United States' appellee's submission, para. 68, as clarified by the United States at the oral hearing)

<sup>104</sup> Panel Report, para. 7.138.

<sup>105</sup> *Ibid.*, para. 7.134, referring to Panel Report, *US – Steel Plate*, para. 7.22.

<sup>106</sup> This examination would have assisted the Panel because, as we have explained, *supra*, para. 87, the phrase "laws, regulations and administrative procedures" in Article 18.4 denotes, collectively, the body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.

99. In sum, we are of the view that the Panel's characterization of the Sunset Policy Bulletin was based on a number of deficiencies. First, the Panel looked only at the introductory language of the Sunset Policy Bulletin in order to conclude that it is "not a legal instrument that operates so as to mandate a course of action".<sup>107</sup> Second, the Panel did not examine any specific provisions of the Sunset Policy Bulletin<sup>108</sup>, nor compare the contents of the Sunset Policy Bulletin to the contents of the corresponding statutory and regulatory provisions. Third, the Panel did not consider the extent to which the specific provisions of the Sunset Policy Bulletin are normative in nature, nor the extent to which USDOC itself treats these provisions as binding. The Panel did not undertake such an inquiry notwithstanding the fact that Japan had introduced extensive evidence concerning the application of the specific norms found in the Sunset Policy Bulletin in a large number of sunset review proceedings. Fourth, the Panel summarily rejected Japan's argument that the Sunset Policy Bulletin is an administrative procedure within the meaning of Article 18.4 of the *Anti-Dumping Agreement* solely on the basis of its finding that the Sunset Policy Bulletin is "not a mandatory legal instrument".<sup>109</sup>

100. For all of these reasons, we reverse the Panel's findings that:

... the Sunset Policy Bulletin is not a mandatory legal instrument obligating a certain course of conduct and thus can not, in and of itself, give rise to a WTO violation.<sup>110</sup>

... the Sunset Policy Bulletin is not a measure that is challengeable, as such, under the *WTO Agreement*.<sup>111</sup>

... the Sunset Policy Bulletin is not challengeable as such under the *WTO Agreement*.<sup>112</sup>

101. Having failed properly to characterize the Sunset Policy Bulletin, the Panel also erred in concluding, on this basis alone, that it need examine "no further" Japan's claims that Sections II.A.2, 3, and 4 of the Sunset Policy Bulletin are, as such, inconsistent with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement*.<sup>113</sup> In Sections VI.D.2 and VI.E.1 of this Report, we will consider whether we can, ourselves, complete the analysis and rule on these claims.

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<sup>107</sup>Panel Report, para. 7.126.

<sup>108</sup>Namely, Sections II.A.2, 3, and 4.

<sup>109</sup>Panel Report, para. 7.145.

<sup>110</sup>*Ibid.*

<sup>111</sup>*Ibid.*, para. 7.195.

<sup>112</sup>*Ibid.*, para. 7.246.

<sup>113</sup>*Ibid.*, paras. 7.195 and 7.246.

## VI. Japan's Specific Claims under Article 11.3 of the *Anti-Dumping Agreement*

### A. Overview

102. Japan's appeal raises a number of specific issues concerning whether the Panel properly applied Article 11.3 of the *Anti-Dumping Agreement*. These issues relate to: (i) the dumping margins used by USDOC in the CRS sunset review; (ii) USDOC's making of determinations in sunset reviews on an order-wide basis; and (iii) the factors considered by USDOC in making a determination in a sunset review. Before turning to these issues, it is worth considering briefly Article 11.3 as a whole.

103. Article 11.3 of the *Anti-Dumping Agreement* governs sunset reviews of anti-dumping duties. It provides:

*Duration and Review of Anti-Dumping Duties and Price Undertakings*

...

11.3 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 (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), 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.<sup>22</sup> The duty may remain in force pending the outcome of such a review.

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<sup>22</sup> 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 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.

104. Article 11.3 imposes a temporal limitation on the maintenance of anti-dumping duties. It lays down a mandatory rule with an exception. Specifically, Members are required to terminate an anti-dumping duty within five years of its imposition "*unless*" the following conditions are satisfied: first, that a review be initiated before the expiry of five years from the date of the imposition of the duty; second, that in the review the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of *dumping*; and third, that in the review the authorities determine that

the expiry of the duty would be likely to lead to continuation or recurrence of *injury*. If any one of these conditions is not satisfied, the duty must be terminated.<sup>114</sup>

105. This appeal concerns the obligations that apply to investigating authorities with respect to the second of these conditions.<sup>115</sup> It focuses on the particular disciplines with which authorities must comply in determining, in accordance with Article 11.3, "that the expiry of the duty would be likely to lead to continuation or recurrence of dumping". In this Report, we refer to this determination as the "likelihood determination". The likelihood determination is a prospective determination. In other words, the authorities must undertake a forward-looking analysis and seek to resolve the issue of what would be likely to occur if the duty were terminated.

106. In considering the nature of a likelihood determination in a sunset review under Article 11.3, we recall our statement in *US – Carbon Steel*, in the context of the *SCM Agreement*, that:

... original investigations and sunset reviews are distinct processes with different purposes. The nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation.<sup>116</sup>

107. This observation applies also to original investigations and sunset reviews under the *Anti-Dumping Agreement*. In an original anti-dumping investigation, investigating authorities must determine whether *dumping exists* during the period of investigation. In contrast, in a sunset review of an anti-dumping duty, investigating authorities must determine whether the expiry of the duty that was imposed at the conclusion of an original investigation would be *likely to lead to continuation or recurrence of dumping*.

108. An examination of the language in Article 11.3 sheds light on the obligations of investigating authorities in conducting a sunset review. Article 11.3 refers to, but does not define, the word "dumping". Article VI:1 of the GATT 1994 provides that dumping occurs where "products of one country are introduced into the commerce of another country at less than the normal value of the products". Article 2.1 of the *Anti-Dumping Agreement* confirms this definition in the following terms:

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<sup>114</sup>We note that Article 11.3 is textually identical to Article 21.3 of the *SCM Agreement*, except that, in Article 21.3, the word "countervailing" is used in place of the word "anti-dumping" and the word "subsidization" is used in place of the word "dumping". Given the parallel wording of these two articles, we believe that the explanation, in our Report in *US – Carbon Steel*, of the nature of the sunset review provision in the *SCM Agreement* also serves, *mutatis mutandis*, as an apt description of Article 11.3 of the *Anti-Dumping Agreement*. (Appellate Body Report, *US – Carbon Steel*, paras. 63 and 88)

<sup>115</sup>This appeal does not raise any issues concerning the initiation of a sunset review or the determination regarding injury in a sunset review.

<sup>116</sup>Appellate Body Report, *US – Carbon Steel*, para. 87.



*Determination of Dumping*

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

109. We agree with Japan that the words "[f]or the purpose of this Agreement" in Article 2.1 indicate that this provision describes the circumstances in which a product is to be considered as being dumped for purposes of the entire *Anti-Dumping Agreement*, including Article 11.3. This interpretation is supported by the fact that Article 11.3 does not indicate, either expressly or by implication, that "dumping" has a different meaning in the context of sunset reviews than in the rest of the *Anti-Dumping Agreement*. Therefore, Article 2.1 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994 suggest that the question for investigating authorities, in making a likelihood determination in a sunset review pursuant to Article 11.3, is whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping of the product subject to the duty (that is, to the introduction of that product into the commerce of the importing country at less than its normal value). The Panel also appeared to reach a similar conclusion.<sup>117</sup>

110. Turning to the word "determine" in Article 11.3, we note that the dictionary definitions of this verb include "[c]onclude from reasoning or investigation, deduce" as well as "[s]ettle or decide (a dispute, controversy, etc., or a sentence, conclusion, issue, etc.) as a judge or arbiter".<sup>118</sup> As for "review", definitions of this noun include "[a]n inspection, an examination" and a "general survey or reconsideration of some subject".<sup>119</sup> Finally, the adjective "likely" is defined as "[h]aving an appearance of truth or fact; that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable; to be reasonably expected".<sup>120</sup>

111. This language in Article 11.3 makes clear that it envisages a process combining *both* investigatory and adjudicatory aspects. In other words, Article 11.3 assigns an active rather than a passive decision-making role to the authorities. The words "review" and "determine" in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence

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<sup>117</sup>Panel Report, para. 7.174 and footnote 144 thereto.

<sup>118</sup>*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. I, p. 659.

<sup>119</sup>*Ibid.*, Vol. II, p. 2567.

<sup>120</sup>*Ibid.*, Vol. I, p. 1595.

and arrive at a reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination. In view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated—and not simply if the evidence suggests that such a result might be possible or plausible.

112. In addition to the text of Article 11.3, certain other provisions of the *Anti-Dumping Agreement* confirm that sunset reviews must conform to the principles outlined above. Article 11.4 applies the provisions of Article 6 regarding "evidence and procedure" to reviews, and Article 12.3 applies the provisions of Article 12 on "Public Notice and Explanation of Determinations" to reviews. Thus, even though the rules applicable to sunset reviews may not be identical in all respects to those applicable to original investigations, it is clear that the drafters of the *Anti-Dumping Agreement* intended a sunset review to include both full opportunity for all interested parties to defend their interests, and the right to receive notice of the process and reasons for the determination.

113. Article 11.3 states that, notwithstanding the provisions of Articles 11.1 and 11.2, Members "shall" terminate an anti-dumping duty "unless" the authorities make an affirmative likelihood determination in a sunset review. This confirms that the mandatory rule in Article 11.3 applies in addition to, and irrespective of, the obligations set out in the first two paragraphs of Article 11. This also suggests to us that authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply. In addition, our view of the exacting nature of the obligations imposed on authorities under Article 11.3 is supported by a consideration of the implications of initiating a sunset review. The last sentence of Article 11.3 allows the relevant duty to continue while the review is underway, and Article 11.4 contemplates that the review process may take up to one year. These provisions create an additional exception to the requirement that anti-dumping duties will be terminated after five years, permitting a Member to maintain the duty for the period during which the review is ongoing, regardless of the outcome of that review. This, too, suggests that the drafters of the *Anti-Dumping Agreement* saw the sunset review as a rigorous process that can take up to one year, involving a number of procedural steps, and requiring an appropriate degree of diligence on the part of the national authorities.

114. The Panel described Article 11.3 as imposing the following obligations on investigating authorities in a sunset review:

The text of Article 11.3 contains an obligation "to determine" likelihood of continuation or recurrence of dumping and injury. The text of Article 11.3 does not, however, provide explicit guidance regarding the meaning of the term "determine". The ordinary meaning of the word "determine" is to "find out or establish precisely" or to "decide or settle". The requirement to make a "determination" concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of positive evidence, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a sufficient factual basis to allow it to draw reasoned and adequate conclusions concerning the likelihood of such continuation or recurrence.<sup>121</sup> (footnotes omitted)

115. The Panel's description of the obligations of investigating authorities in conducting a sunset review closely resembles our own, and we agree with it.

B. *The CRS Sunset Review*

116. Before beginning our analysis of Japan's specific claims under Article 11.3, it is useful to identify certain factual aspects of the CRS sunset review, as established by the Panel. The Panel found that USDOC based its affirmative likelihood determination in the CRS sunset review on two factors: (a) that dumping continued after the CRS order was issued; and (b) that import volumes dropped after the CRS order was issued and remained at relatively low levels.<sup>122</sup> The Panel found that, in establishing the first of these elements, USDOC relied on dumping margins that it had determined in the first two "administrative reviews"<sup>123</sup> of the CRS order conducted after the *WTO Agreement* entered into force.<sup>124</sup> In the first administrative review, USDOC determined a dumping

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<sup>121</sup>Panel Report, para. 7.271.

<sup>122</sup>*Ibid.*, para. 7.272.

<sup>123</sup>Under the United States' "retrospective" duty assessment system, final liability for anti-dumping duties is determined after merchandise is imported. The United States explained, in response to questioning at the oral hearing, that "[t]he purpose of an administrative review is to determine the final liability, the final amount of duties owed."

<sup>124</sup>Panel Report, paras. 7.150 and 7.155.

margin of 12.51 percent for NSC.<sup>125</sup> In the second administrative review, USDOC determined dumping margins of 2.47 percent for NSC and 1.61 percent for KSC.<sup>126</sup>

117. NSC participated in the CRS sunset review as a foreign producer and exporter of the subject merchandise. Several domestic interested parties also participated in that review.<sup>127</sup> The Panel found that, in the CRS sunset review, NSC raised no objection to USDOC's reliance on the dumping margins from the administrative reviews or to the methodology that was used in the administrative reviews to calculate those margins. Instead, NSC relied on the fact that those margins had decreased to support its argument that USDOC should make a negative likelihood determination in the CRS sunset review.<sup>128</sup>

C. *The Dumping Margins Used in the CRS Sunset Review*

1. Japan's Appeal

118. Before the Panel, Japan challenged USDOC's reliance in the CRS sunset review<sup>129</sup> on the dumping margins calculated in the two previous administrative reviews. The Panel noted that Japan did not challenge the duties collected pursuant to the administrative reviews or contend that the use, in sunset reviews, of margins calculated in administrative reviews is *per se* inconsistent with the *Anti-Dumping Agreement*.<sup>130</sup> Rather, Japan argued only that USDOC could not, in the CRS sunset review,

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<sup>125</sup>"Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Antidumping Duty Administrative Review", United States Federal Register, 16 March 1999 (Volume 64, Number 50), p. 12951 at p. 12959. (Exhibit JPN-14(e) submitted by Japan to the Panel) This review covered the period 1 August 1996 to 31 July 1997.

<sup>126</sup>"Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Antidumping Duty Administrative Review", United States Federal Register, 23 February 2000 (Volume 65, Number 36), p. 8935 at p. 8948. (Exhibit JPN-15(e) submitted by Japan to the Panel) This review covered the period 1 August 1997 to 31 July 1998.

<sup>127</sup>"Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Sunset Review of Antidumping Duty Order", United States Federal Register, 27 March 2000 (Volume 65, Number 59), p. 16169 at p. 16170. (Exhibit JPN-8(b) submitted by Japan to the Panel)

<sup>128</sup>Panel Report, para. 7.183.

<sup>129</sup>As explained above, Japan's appeal on this issue is limited to the CRS sunset review and does not extend to the Sunset Policy Bulletin "as such". *Supra*, para. 70.

<sup>130</sup>Panel Report, para. 7.157.

rely on the margins in question because they had been calculated using a "zeroing" methodology<sup>131</sup> that the Appellate Body has found to be inconsistent with Article 2.4.<sup>132</sup>

119. The Panel construed Japan's claim as "predicated on an inconsistency with Article 2.4" of the *Anti-Dumping Agreement*.<sup>133</sup> The Panel found that, in the CRS sunset review, the United States did not act inconsistently with that provision by relying on the dumping margins in question<sup>134</sup> because "the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of dumping* [do not] apply in making a *determination of likelihood of continuation or recurrence of dumping* under Article 11.3."<sup>135</sup> The Panel also examined, in the alternative, whether the United States acted inconsistently with Article 11.3 in the CRS sunset review.<sup>136</sup> The Panel stated that:

... it would not have been unreasonable for the DOC, in the particular circumstances of this case, to have considered that these administrative review dumping margins could properly be taken into account in considering whether likelihood of continuation or recurrence of "dumping" existed.<sup>137</sup>

120. The Panel therefore found, in the alternative, that the United States did not act inconsistently with Article 11.3.<sup>138</sup>

121. On appeal, Japan argues that the Panel erred in interpreting the obligations of the United States under Articles 2.4 and 11.3 of the *Anti-Dumping Agreement*. Accordingly, Japan asks us to reverse the above findings of the Panel and to find that, in the CRS sunset review, the United States acted inconsistently with Article 2.4 in conjunction with Article 2.1 and, therefore, with Article 11.3 of the *Anti-Dumping Agreement* by relying on dumping margins calculated in previous

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<sup>131</sup>Before the Panel, Japan stated that "USDOC has a standard practice of using the zeroing methodology to eliminate all negative dumping margins." Japan also stated that "USDOC calculated NSC's dumping margin in ... [the] administrative reviews by zeroing the negative margins." (Japan's first submission to the Panel, paras. 181-182)

<sup>132</sup>Japan's first submission to the Panel, para. 176, referring to Appellate Body Report, *EC – Bed Linen*. The Final Results of the CRS sunset review were published on 2 August 2000. The Appellate Body Report in *EC – Bed Linen*, in which we found a zeroing methodology of the European Communities to be inconsistent with the *Anti-Dumping Agreement*, was subsequently circulated to WTO Members on 1 March 2001 and adopted on 12 March 2001. See *infra*, para. 134.

<sup>133</sup>Panel Report, para. 7.171.

<sup>134</sup>*Ibid.*, para. 7.170. See also para. 8.1(d)(iii).

<sup>135</sup>*Ibid.*, para. 7.168. (original emphasis)

<sup>136</sup>*Ibid.*, para. 7.172. The Panel considered that this "alternative" analysis would be constructive "in the event that we have construed Japan's claims and arguments ... in an overly restrictive manner". (Panel Report, para. 7.172)

<sup>137</sup>*Ibid.*, para. 7.183.

<sup>138</sup>*Ibid.*, para. 7.184. See also para. 8.1(d)(iii).

administrative reviews using a "zeroing" methodology.<sup>139</sup> Like the Panel<sup>140</sup>, we stress that Japan challenges USDOC's use of these margins only in the CRS *sunset review*. Japan does not contend, in this proceeding, that the calculation of dumping margins in the *administrative reviews*, or the collection of duties on the basis of those margins, was inconsistent with the *Anti-Dumping Agreement*.

122. In addressing this issue, we first consider the reasons for the Panel's findings regarding Articles 2.4 and 11.3 of the *Anti-Dumping Agreement*, keeping in mind the specific context of the CRS sunset review. We then assess whether, in the circumstances of the CRS sunset review, USDOC acted inconsistently with Article 2.4 or Article 11.3 by relying on dumping margins calculated in previous administrative reviews allegedly using a zeroing methodology.

## 2. Review of the Panel Findings

123. In making its findings on this issue, the Panel correctly noted that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review.<sup>141</sup> Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination. Thus, Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past.<sup>142</sup> This silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.

124. We consider that it is consistent with the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand, to interpret the *Anti-Dumping Agreement* as requiring investigating authorities to calculate dumping margins in an original investigation, but not in a sunset review. In an original investigation, if investigating authorities of a Member do not determine a positive dumping margin, the Member may not impose anti-dumping measures based on that investigation. In a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping.

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<sup>139</sup>Japan states that, in calculating these margins, "DOC zeroed—literally, DOC ignored—negative margins." (Japan's appellant's submission, para. 39)

<sup>140</sup>*Supra*, para. 118.

<sup>141</sup>Panel Report, para. 7.166.

<sup>142</sup>Neither Japan nor the United States suggests that investigating authorities are required in a sunset review under Article 11.3 to calculate likely *future* dumping margins. (*Ibid.*, para. 7.162)

125. The Panel observed that the technique of cross-referencing is frequently used in the *Anti-Dumping Agreement*. For example, Article 11.4 indicates that the "provisions of Article 6 regarding evidence and procedure shall apply" to reviews under Article 11. Similarly, Article 11.5 applies the provisions of Article 11 to price undertakings accepted under Article 8. The Panel observed that, by contrast, Article 11 contains no cross-reference to Article 2<sup>143</sup>, which prescribes how to calculate a dumping margin. In this context, we agree with the Panel that the absence of a cross-reference in Article 11 to Article 2 may be of some significance.

126. However, as we have already observed, the opening words of Article 2.1 ("[f]or the purpose of this Agreement") go beyond a cross-reference and indicate that Article 2.1 applies to the entire *Anti-Dumping Agreement*.<sup>144</sup> By virtue of these words, the word "dumping" as used in Article 11.3 has the meaning described in Article 2.1. We do not read the Panel Report as suggesting otherwise.<sup>145</sup>

127. Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier<sup>146</sup>, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.

128. It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3.<sup>147</sup> Accordingly, we reverse the Panel's consequential finding, in paragraph 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.<sup>148</sup>

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<sup>143</sup>Panel Report, para. 7.166.

<sup>144</sup>*Supra*, paras. 108-109.

<sup>145</sup>Panel Report, para. 7.174 and footnote 144 thereto.

<sup>146</sup>*Supra*, paras. 123-124.

<sup>147</sup>Panel Report, para. 7.168.

<sup>148</sup>See also *ibid.*, para. 7.170.

129. We now turn to the Panel's alternative finding that the United States did not act inconsistently with *Article 11.3* in the CRS sunset review by relying on these dumping margins.<sup>149</sup> The Panel based this finding primarily on two factors: first, that NSC did not object in the CRS sunset review to USDOC relying on the dumping margins from the administrative reviews; and second, that NSC relied on these margins in the CRS sunset review in support of its argument that USDOC should make a negative likelihood determination.<sup>150</sup>

130. As explained above<sup>151</sup>, if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with *Article 2.4*, then this defect taints the likelihood determination too. Thus, the consistency with *Article 2.4* of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with *Article 11.3* of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews.<sup>152</sup> If these margins were indeed calculated using a methodology that is inconsistent with *Article 2.4*—an issue that we examine below<sup>153</sup>—then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under *Article 11.3*. Moreover, a legal defect of this kind cannot be cured by NSC's failure to take issue with it in the CRS sunset review or the administrative reviews. It follows that we cannot agree with the United States' suggestion that Japan's appeal on this issue must fail because: (i) NSC did not object, in either the CRS sunset review or the administrative reviews, to the methodology USDOC used to calculate the dumping margins in question; and (ii) Japan did not initiate dispute settlement proceedings in the WTO regarding USDOC's calculation of those margins in the context of the administrative reviews.<sup>154</sup>

131. We note that the Panel's reasoning would effectively preclude Japan from successfully challenging in the present WTO dispute settlement proceedings USDOC's use, in the CRS sunset review, of the dumping margins from the administrative reviews, simply because NSC did not raise

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<sup>149</sup>Panel Report, para. 7.184.

<sup>150</sup>*Ibid.*, para. 7.183.

<sup>151</sup>*Supra*, paras. 126-127.

<sup>152</sup>"Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final Results", p. 6. (Exhibit JPN-8(e) submitted by Japan to the Panel) See also Panel Report, paras. 7.150 and 7.155.

<sup>153</sup>*Infra*, paras. 133-138.

<sup>154</sup>United States's appellee's submission, para. 40 and footnote 57 thereto, as explained further at the oral hearing.



this issue in the CRS sunset review. We cannot agree with this reasoning. We recall our previous finding that:

In arguing claims in dispute settlement, a *WTO Member* is not confined merely to rehearsing arguments that were made to the competent authorities by the *interested parties* during the domestic investigation, even if the *WTO Member* was itself an interested party in that investigation.<sup>155</sup> (original emphasis)

132. For these reasons, we also reverse the Panel's finding, in paragraph 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins calculated in previous administrative reviews allegedly using a "zeroing" methodology.<sup>156</sup>

### 3. Completing the Analysis

133. We now consider whether we can complete the analysis and rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 in the CRS sunset review in relation to this issue. Japan argues that the United States acted inconsistently with these provisions by relying on the dumping margins from the administrative reviews because these margins had been calculated using a zeroing methodology.<sup>157</sup> We begin by recalling our findings in *EC – Bed Linen*, and then we examine the implications of those findings for the present appeal.

134. In *EC – Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using a "zeroing" methodology<sup>158</sup> in the anti-dumping investigation at issue in that case.<sup>159</sup> We held that the European Communities' use of this methodology "inflated the result from the calculation of the margin of dumping."<sup>160</sup> We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a "fair comparison" between export price and normal value as required by Articles 2.4 and 2.4.2.<sup>161</sup>

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<sup>155</sup>Appellate Body Report, *US – Lamb*, para. 113. See also Appellate Body Report, *Thailand – H-Beams*, para. 94.

<sup>156</sup>See also Panel Report, para. 7.184.

<sup>157</sup>Japan states that, in calculating these margins, "DOC zeroed—literally, DOC ignored—negative margins." (Japan's appellant's submission, para. 39)

<sup>158</sup>The methodology used by the European Communities is described in paragraph 47 of our Report in *EC – Bed Linen*.

<sup>159</sup>Appellate Body Report, *EC – Bed Linen*, para. 66.

<sup>160</sup>*Ibid.*, para. 55.

<sup>161</sup>*Ibid.*

135. When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing ... may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing."<sup>162</sup> Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.

136. In evaluating whether the United States acted inconsistently with the *Anti-Dumping Agreement* in the CRS sunset review by relying on the dumping margins from the administrative reviews, we note that the United States seemed to accept that USDOC's methodology in the administrative reviews was "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".<sup>163</sup> It appears, therefore, that there was some similarity between the methodology used by USDOC in the administrative reviews and the methodology used by the European Communities and examined in *EC – Bed Linen*. However, the United States does not accept Japan's characterization of USDOC's methodology as "zeroing".<sup>164</sup> The United States also maintains that our Report in *EC – Bed Linen* is not relevant to USDOC's methodology because, *inter alia*, USDOC calculated dumping margins on an "average-to-transaction" basis, whereas the European Communities calculated dumping margins on an "average-to-average" basis.<sup>165</sup>

137. Turning to the Panel's description of the methodology used by USDOC in the administrative reviews, we note that the Panel merely stated that USDOC "applied a weighted average-to-transaction methodology in establishing the dumping margins in administrative reviews."<sup>166</sup> This does not appear to be in dispute. However, the details of the alleged "zeroing" in the methodology used by USDOC in the administrative reviews are less clear. The Panel Report contains no other factual findings about the particular methodology used by USDOC in the administrative reviews, nor any clear indication of whether the Panel considered that this methodology entailed "zeroing" of some

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<sup>162</sup>Panel Report, para. 7.159.

<sup>163</sup>United States' first submission to the Panel, para. 125. In addition, the United States stated before the Panel that, under USDOC's methodology, "no dumping duty—positive or negative—was computed for US sales made at non-dumped prices." (United States' response to Question 27 posed by the Panel, para. 62; Panel Report, p. E-66)

<sup>164</sup>United States' first submission to the Panel, para. 144 (referring to USDOC's use of "allegedly 'zeroed' dumping margins").

<sup>165</sup>United States' appellee's submission, footnote 56 to para. 40, as clarified by the United States at the oral hearing.

<sup>166</sup>Panel Report, para. 7.158.

kind. In these circumstances, and in the absence of uncontested facts on the Panel record, it is not possible for us to assess whether the methodology that USDOC used in calculating the dumping margins in the administrative reviews was equivalent in effect to the methodology used by the European Communities and considered by us in *EC – Bed Linen*.

138. Given the lack of factual findings by the Panel regarding the methodology used by USDOC in the administrative reviews, we do not have a sufficient factual basis to complete the analysis of Japan's claim on this issue. For these reasons, we find that we are unable to rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying on the dumping margins from the administrative reviews in making its likelihood determination in the CRS sunset review.

D. *Order-Wide Basis of Likelihood Determination*

1. "Company-Specific" and "Order-Wide"

139. Before beginning our analysis of this issue, it is useful to explain the meaning of the terms "company-specific" and "order-wide" in the context of this appeal, as well as certain factual matters relevant to these terms.

140. In Japan's view, investigating authorities must make their likelihood determination in a sunset review under Article 11.3 on a "company-specific" basis. By this we understand Japan to argue that authorities must make a separate determination, for each individual exporter or producer, of whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping by that exporter or producer.<sup>167</sup>

141. The term "order-wide" derives from the use of the word "order" in the United States' anti-dumping system. Under this system, USDOC issues an anti-dumping duty "order" at the conclusion of an original anti-dumping investigation when it has made a final affirmative determination (regarding dumping) and USITC has made a final affirmative determination (regarding injury).<sup>168</sup> Generally, this order instructs the Customs Service, *inter alia*, to "require a cash deposit of estimated antidumping ... duties at the rates included in [USDOC's] final determination".<sup>169</sup> For example, the

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<sup>167</sup>In addition, Japan explained in response to questioning at the oral hearing that, in its view, if investigating authorities make an affirmative likelihood determination in respect of one company and a negative likelihood determination in respect of another company, they must partially revoke the order—that is, they must discontinue the duty with respect to the latter company.

<sup>168</sup>Section 351.211(a) of Title 19 of the Regulations. See also Section 735 of the Tariff Act regarding the determinations to be made by USDOC and USITC. (Exhibit JPN-1(c) submitted by Japan to the Panel)

<sup>169</sup>Section 351.211(b)(2) of Title 19 of the Regulations.

CRS order was issued with respect to certain corrosion-resistant carbon steel flat products from Japan, and it instructed customs officers to "require ... a cash deposit equal to the estimated antidumping duty margins" of 36.41 percent for KSC, 36.41 percent for NSC, and 36.41 percent for "all others".<sup>170</sup> In a sunset review of an order, USDOC determines whether revocation of the order would be likely to lead to continuation or recurrence of dumping.<sup>171</sup> Section II.A.2 of the Sunset Policy Bulletin states that "the Department will make its determination of likelihood on an order-wide basis."<sup>172</sup> We understand this to mean that, in a sunset review of a particular anti-dumping duty order, USDOC is to make a single determination of whether revocation of the order would be likely to lead to continuation or recurrence of dumping.<sup>173</sup>

142. The United States does not dispute that, under the United States' anti-dumping system, USDOC makes its likelihood determination in a sunset review on an order-wide basis.<sup>174</sup> In addition, the United States agrees that USDOC made its affirmative likelihood determination in the CRS sunset review on an order-wide basis.<sup>175</sup> In other words, USDOC made a single determination "that revocation of the [CRS order] would be likely to lead to continuation or recurrence of dumping".<sup>176</sup>

143. In addressing this issue, we first examine Japan's challenge to the Sunset Policy Bulletin as such. We then examine Japan's challenge to the Sunset Policy Bulletin as applied in the CRS sunset review.

## 2. Challenge to the Sunset Policy Bulletin "As Such"

144. Before the Panel, Japan claimed that Section II.A.2 of the Sunset Policy Bulletin, as such, is inconsistent with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement*. According to Japan, these provisions of the *Anti-Dumping Agreement* require investigating authorities to make their likelihood

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<sup>170</sup>CRS order, p. 44163.

<sup>171</sup>Section 751(c)(1) of the Tariff Act; Section 351.218(b) of Title 19 of the Regulations. (Exhibits JPN-1(d) and JPN-3 submitted by Japan to the Panel)

<sup>172</sup>Sunset Policy Bulletin, p 18872.

<sup>173</sup>In turn, under Section 751(d)(2) of the Tariff Act, USDOC is required to revoke the order unless it makes an affirmative likelihood determination regarding dumping and USITC makes an affirmative likelihood determination regarding injury. (Exhibit JPN-1(d) submitted by Japan to the Panel)

<sup>174</sup>United States' first submission to the Panel, para. 162. Before the Panel, the United States referred in this context to Section 751(c)(1) of the Tariff Act. (Panel Report, footnote 161 to para. 7.193)

<sup>175</sup>Panel Report, para. 7.199 and footnote 165 thereto.

<sup>176</sup>Final Results of the CRS sunset review, p. 47380. Nevertheless, USDOC reported to USITC "the original margins from the final determination as the magnitude of the margin likely to prevail if the order were revoked"—that is, the specific dumping margins for NSC, KSC, and "all others". (Final Issues and Decision Memo, p. 8) See also United States' response to Question 26(a) posed by the Panel, para. 58; Panel Report, p. E-65 and Panel Report, para. 7.197.

determination in a sunset review on a *company-specific* basis<sup>177</sup>, whereas Section II.A.2 of the Sunset Policy Bulletin requires USDOC to do precisely the opposite, namely to make its likelihood determination on an *order-wide* basis.<sup>178</sup>

145. The Panel did not examine the substance of Japan's *as such* claim because it found:

Japan bases its "as such" claim solely on the Sunset Policy Bulletin. Japan has not directly invoked any provision of US law. Accordingly, we also limit our analysis to the provisions of the Sunset Policy Bulletin. We have found above (*supra*, para. 7.145) that the Sunset Policy Bulletin is not a measure that is challengeable, as such, under the *WTO Agreement*. Therefore, we examine this claim by Japan no further.<sup>179</sup>

146. We have already reversed the Panel's findings that the Sunset Policy Bulletin is not a measure that can, as such, give rise to a violation of the *Anti-Dumping Agreement* or the *WTO Agreement*.<sup>180</sup> These findings provided the sole basis for the Panel's additional finding that:

- (e) In respect of determination of likelihood of continuation or recurrence of dumping on an order-wide basis in sunset reviews:
  - (i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Articles 6.10 and 11.3 of the *Anti-dumping Agreement* regarding the basis of the likelihood of continuation or recurrence of dumping determinations in sunset reviews.<sup>181</sup>

As we have reversed the findings on which it was based, we must also reverse this finding by the Panel.

147. We therefore consider whether we can complete the analysis and rule on Japan's claim that Section II.A.2 of the Sunset Policy Bulletin, as such, is inconsistent with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* because it states that "the Department will make its determination of likelihood on an order-wide basis."<sup>182</sup>

148. We consider it useful to begin our analysis of this "as such" claim by examining the relevant provisions of the *Anti-Dumping Agreement* invoked by Japan. We first examine the requirements of

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<sup>177</sup>Japan's first submission to the Panel, paras. 203-206.

<sup>178</sup>*Ibid.*, paras. 202 and 207.

<sup>179</sup>Panel Report, para. 7.195.

<sup>180</sup>*Supra*, para. 100.

<sup>181</sup>Panel Report, para. 8.1(e)(i).

<sup>182</sup>Sunset Policy Bulletin, p.18872.

Article 11.3 in relation to the basis on which investigating authorities make their likelihood determination in a sunset review. We then consider how Article 6.10 and the other provisions of Article 6 affect these requirements. Having identified the obligations imposed on investigating authorities in a sunset review, we consider the nature of the specific measure at issue, namely Section II.A.2 of the Sunset Policy Bulletin, and assess whether this measure complies with the relevant obligations under the *Anti-Dumping Agreement*.

149. We turn first to Article 11.3, which is the main provision of the *Anti-Dumping Agreement* addressing sunset reviews. As discussed above<sup>183</sup>, Article 11.3 requires the termination of an anti-dumping duty after five years unless investigating authorities determine in a sunset review that the expiry of the duty would be likely to lead to continuation or recurrence of dumping.<sup>184</sup> We reiterate that Article 11.3 does not prescribe any particular methodology to be used by investigating authorities in making a likelihood determination in a sunset review.<sup>185</sup> In particular, Article 11.3 does not expressly state that investigating authorities must determine that the expiry of the duty would be likely to lead to dumping *by each known exporter or producer concerned*. In fact, Article 11.3 contains no express reference to individual exporters, producers, or interested parties. This contrasts with Article 11.2, which does refer to "any interested party" and "[i]nterested parties". We also note that Article 11.3 does not contain the word "margins", which might implicitly refer to individual exporters or producers.<sup>186</sup> On its face, Article 11.3 therefore does not oblige investigating authorities in a sunset review to make "company-specific" likelihood determinations in the manner suggested by Japan.

150. The United States argues that the meaning of the word "duty" in Article 11.3 is explained in Article 9.2 of the *Anti-Dumping Agreement*, which "makes clear that the definitive duty is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis."<sup>187</sup> As the United States points out, Article 9.2 refers to the imposition of "an anti-dumping duty ... in respect of any product", rather than the imposition of a duty in respect of individual exporters or producers. We agree that this reference in Article 9.2 informs the interpretation of Article 11.3. We also note that Article 9.2 allows investigating authorities, in imposing a duty in respect of a product, to "name the supplier or suppliers of the product concerned" or, in certain circumstances, "the supplying country concerned." This suggests that authorities may use a single order to impose a "duty", even though the *amount* of the

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<sup>183</sup>*Supra*, paras. 102-115.

<sup>184</sup>The other conditions for continuing a duty are summarized *supra*, para. 104.

<sup>185</sup>*Supra*, para. 123.

<sup>186</sup>We have previously found that the word "margins" in Articles 2.4.2 and 9.4 of the *Anti-Dumping Agreement* means "the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product." (Appellate Body Report, *US – Hot-Rolled Steel*, para. 118, referring to Appellate Body Report, *EC – Bed Linen*, para. 53)

<sup>187</sup>United States' appellee's submission, para. 34.

duty imposed on each exporter or producer may vary. Therefore, Article 9.2 confirms our initial view that Article 11.3 does not require investigating authorities to make their likelihood determination on a company-specific basis.<sup>188</sup>

151. Japan's contentions on this issue rely on Article 6 of the *Anti-Dumping Agreement*. We observe that certain provisions in Article 6 are expressly applied to sunset reviews by virtue of the cross-reference contained in Article 11.4, which provides:

The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.

152. In contrast to Article 11.3, several provisions of Article 6 refer expressly or by implication to individual exporters or producers. Article 6 requires all interested parties to have a full opportunity to defend their interests. In particular, Article 6.1 requires authorities to give all interested parties notice of the information required and ample opportunity to present in writing evidence that those parties consider relevant. Articles 6.2, 6.4, and 6.9 provide other examples of the kind of opportunities that investigating authorities must give each interested party. These references suggest that, when the drafters of the *Anti-Dumping Agreement* intended to impose obligations on authorities regarding individual exporters or producers, they did so explicitly. These provisions of Article 6 apply to Article 11.3 by virtue of Article 11.4. They therefore confirm that investigating authorities have certain specific obligations towards each exporter or producer in a sunset review. However, these provisions of Article 6 are silent on whether the authorities must make a separate likelihood determination for each exporter or producer.

153. According to Japan, the Sunset Policy Bulletin is inconsistent with the specific requirements of Article 6.10, which provides in relevant part:

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<sup>188</sup>We have previously held that Article 9.4 is of little relevance for interpreting Articles 2 and 3 of the *Anti-Dumping Agreement* because "the right to impose anti-dumping duties under Article 9 is a *consequence* of the prior determination of the existence of dumping margins, injury, and a causal link." (Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 123-124 (original emphasis), referring to Appellate Body Report, *EC – Bed Linen*, footnote 30 to para. 62) In contrast, the requirement to terminate an anti-dumping duty under Article 11.3 unless investigating authorities make an affirmative likelihood determination in a sunset review is a *consequence* of the prior imposition of that duty under Article 9.

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

154. The first sentence of Article 6.10 requires investigating authorities, "as a rule", to determine an individual margin of dumping "for each known exporter or producer concerned of the product under investigation." The reference in this sentence to "the product under investigation" suggests that it is primarily directed to original investigations. However, even in these investigations, we have recognized that investigating authorities are not always required to calculate separate dumping margins for each known exporter or producer.<sup>189</sup> Thus, the remainder of Article 6.10, as well as Articles 6.10.1 and 6.10.2, provide guidance to investigating authorities regarding the exceptional circumstances in which they may limit their examination and refrain from determining individual margins for each known exporter or producer.

155. We have already concluded that investigating authorities are not *required* to calculate or rely on *dumping margins* in making a likelihood determination in a sunset review under Article 11.3.<sup>190</sup> This means that the requirement in Article 6.10 that dumping margins, "as a rule", be calculated "for each known exporter or producer concerned" is not, in principle, relevant to sunset reviews. Therefore, the reference in Article 11.4 to "[t]he provisions of Article 6 regarding evidence and procedure" does not import into Article 11.3 an obligation for investigating authorities to calculate dumping margins (on a company-specific basis or otherwise) in a sunset review. Nor does Article 11.4 import into Article 11.3 an obligation for investigating authorities to make their likelihood determination on a company-specific basis. We therefore agree with the Panel that "[t]he provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis."<sup>191</sup>

156. We now return to the measure at issue, namely Section II.A.2 of the Sunset Policy Bulletin and its statement that "the Department *will* make its determination of likelihood on an order-wide

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<sup>189</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 116.

<sup>190</sup> *Supra*, paras. 123-124.

<sup>191</sup> Panel Report, para. 7.207. (original emphasis)



basis."<sup>192</sup> The Sunset Policy Bulletin does not expressly provide any exception to this statement, and the use of the word "will" (as opposed to "may" or "should generally") seems to indicate that USDOC has no discretion to do otherwise. This interpretation is supported by a comparison between Section II.A.2 and other provisions of the Sunset Policy Bulletin that use the phrase "normally will".<sup>193</sup> In our view, "normally will" seems to allow for a greater degree of discretion than "will" alone. Moreover, the United States has not suggested that USDOC could make a likelihood determination on anything other than an order-wide basis, nor that USDOC has ever done so in practice.<sup>194</sup> In any event, even if USDOC makes its likelihood determination in a sunset review on an order-wide basis, we do not regard this, in and of itself, as creating an inconsistency with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement* because we do not read those articles as requiring investigating authorities to make company-specific likelihood determinations in sunset reviews.

157. For these reasons, we find that Section II.A.2 of the Sunset Policy Bulletin, as such, is not inconsistent with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement* in stating that USDOC will make its likelihood determination in a sunset review on an order-wide basis.

158. Our conclusions regarding the consistency of this aspect of the Sunset Policy Bulletin "as such" with Article 11.3 do not imply that Article 11.3 precludes authorities from making separate likelihood determinations for individual exporters or producers in a sunset review and then continuing or terminating the relevant duty for each company according to the determination for that company. WTO Members are free to structure their anti-dumping systems as they choose, provided that those systems do not conflict with the provisions of the *Anti-Dumping Agreement*. In particular, these provisions include: the requirement in Article 11.3 that a duty be terminated after the period specified in that article unless investigating authorities have properly determined, on the basis of sufficient evidence, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping<sup>195</sup>; the obligations under Article 6 to provide interested parties with a full opportunity to defend their interests in a sunset review; the rule in Article 9.3 that the "amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2"; and the rule in Article 11.1 that an "anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury". In this regard, we observe that the United States indicated in the oral hearing in this appeal that, under the United States' anti-dumping system,

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<sup>192</sup>Sunset Policy Bulletin, p. 18872. (emphasis added)

<sup>193</sup>For example, Section II.A.3 of the Sunset Policy Bulletin, as discussed in Section VI.E of this Report.

<sup>194</sup>The United States suggested, in response to questioning at the oral hearing, that this is a legal requirement under Section 751(d)(2) of the Tariff Act. See also *supra*, footnote 174.

<sup>195</sup>The other conditions for continuing a duty are summarized *supra*, para. 104.

an exporter or producer may request that an anti-dumping duty order be revoked in part (that is, with respect to that exporter or producer) in review proceedings separate from a sunset review.

3. Challenge to the Sunset Policy Bulletin "As Applied"

159. We turn now to Japan's challenge to the Sunset Policy Bulletin as applied in the CRS sunset review. Before the Panel, Japan claimed that the United States acted inconsistently with Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* in the CRS sunset review by making its likelihood determination on an order-wide basis pursuant to the Sunset Policy Bulletin.

160. The Panel found that the United States did not act inconsistently with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement* by making its likelihood determination in the CRS sunset review on an order-wide basis<sup>196</sup> on the ground that Article 6.10 does not impose an obligation on investigating authorities to make their likelihood determination in a sunset review under Article 11.3 on a company-specific basis.<sup>197</sup>

161. On appeal, Japan asks us to reverse this finding of the Panel and to find that the United States acted inconsistently with Articles 6.10 and 11.3, in conjunction with Article 2, of the *Anti-Dumping Agreement* by making its likelihood determination in the CRS sunset review on an order-wide basis.

162. We have already held that Articles 6.10 and 11.3 of the *Anti-Dumping Agreement* do not require investigating authorities to make company-specific likelihood determinations in sunset reviews under Article 11.3.<sup>198</sup> For this reason, we uphold the Panel's finding that:

the DOC did not act inconsistently with Articles 6.10 and 11.3 of the *Anti-dumping Agreement* by making its likelihood determination in this sunset review on an order-wide basis.<sup>199</sup>

163. We also note that it is not contested that, in making its likelihood determination in the CRS sunset review, USDOC relied on the dumping margins calculated in previous administrative reviews (including individual margins calculated for NSC and KSC)<sup>200</sup> as well as statistics on import volumes<sup>201</sup> provided by domestic interested parties and "company-specific export figures provided by

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<sup>196</sup>Panel Report, para. 8.1(e)(ii).

<sup>197</sup>*Ibid.*, para. 7.208.

<sup>198</sup>*Supra*, paras. 149-156.

<sup>199</sup>Panel Report, para. 8.1(e)(ii). See also Panel Report, para. 7.208.

<sup>200</sup>Final Issues and Decision Memo, p. 6; United States' first submission to the Panel, para. 162; Panel Report, para. 7.155; Japan's appellant's submission, paras. 64 and 88; United States' appellee's submission, paras. 22-23.

<sup>201</sup>Panel Report, para. 7.279; Japan's appellant's submission, para. 72; United States' appellee's submission, para. 24.

NSC".<sup>202</sup> Thus, USDOC did take into account certain company-specific information, including company-specific information concerning NSC, in making its likelihood determination. Moreover, Japan does not suggest that USDOC should have considered information about additional exporters or producers in making its likelihood determination.<sup>203</sup> Nor does Japan claim in this appeal that the United States acted inconsistently in the CRS sunset review with any provisions of Article 6 other than Article 6.10, for example with the obligation in Article 6.1 to provide exporters and producers with notice of the information required from them.

E. *The Factors Considered by USDOC in Making a Likelihood Determination*

1. Challenge to the Sunset Policy Bulletin "As Such"

164. Before the Panel, Japan claimed that certain provisions of the Sunset Policy Bulletin, as such, are inconsistent with Article 11.3 of the *Anti-Dumping Agreement* as regards the factors to be considered by USDOC in making a likelihood determination in a sunset review. First, Japan argued that Section II.A.3 of the Sunset Policy Bulletin improperly limits USDOC's ability to consider the facts of a particular sunset review because it requires USDOC to make an affirmative likelihood determination in every case in which one of three scenarios exists. Conversely, Section II.A.4 allows USDOC to make a negative likelihood determination only if a single "virtually impossible" scenario exists.<sup>204</sup> Second, Japan argued that the provisions of the Sunset Policy Bulletin imposing on interested parties the burden of showing "good cause" before USDOC will consider evidence of certain other factors submitted by that party, also support Japan's claim of inconsistency.<sup>205</sup>

165. The Panel did not examine the substance of Japan's *as such* claim because it found:

Regarding both arguments, Japan exclusively invokes the provisions of the Bulletin (as opposed to the Statute or the Regulations). Japan has referred to no provision under US law to support its arguments. We have found above (*supra*, para. 7.145) that the Sunset Policy Bulletin is not challengeable as such under the *WTO Agreement*. We therefore examine no further Japan's "as such" allegations relying solely on the Sunset Policy Bulletin.<sup>206</sup> (footnote omitted)

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<sup>202</sup>"Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results", p. 6. (Exhibit JPN-8(c) submitted by Japan to the Panel) See also Final Issues and Decision Memo, p. 5.

<sup>203</sup>The only other exporter or producer that was individually identified in the CRS order (KSC) did not participate in the CRS sunset review.

<sup>204</sup>Japan's first submission to the Panel, paras. 118-124.

<sup>205</sup>*Ibid.*, paras. 127-129.

<sup>206</sup>Panel Report, para. 7.246.

166. We have already reversed the Panel's findings that the Sunset Policy Bulletin is not a measure that can, as such, give rise to a violation of the *Anti-Dumping Agreement* or the *WTO Agreement*.<sup>207</sup> These findings provided the sole basis for the Panel's additional finding that:

- (f) In respect of the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping in sunset reviews:
  - (i) Japan has failed to show that the Sunset Policy Bulletin as such is inconsistent with Article 11.3 regarding the investigating authorities' obligation to determine likelihood of continuation or recurrence of dumping in sunset reviews.<sup>208</sup>

As we have reversed the findings on which it was based, we must also reverse this finding by the Panel.

167. We therefore consider whether we can, in this appeal, complete the analysis and rule on Japan's claim that Sections II.A.3 and 4 of the Sunset Policy Bulletin, as such, are inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. We will be able to do so only if there are sufficient findings of fact by the Panel or uncontested facts in the Panel record.

168. When a measure is challenged "as such", the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required. It was in this context that we said, in our Report in *US – Carbon Steel*, that:

The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.<sup>209</sup> (footnote omitted)

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<sup>207</sup>*Supra*, para. 100.

<sup>208</sup>Panel Report, para. 8.1(f)(i).

<sup>209</sup>Appellate Body Report, *US – Carbon Steel*, para. 157.

169. The measure at issue here consists of specific provisions of the Sunset Policy Bulletin, namely Sections II.A.3 and 4, which relate to the determination of likelihood of continuation or recurrence of dumping. Japan also invokes, in support of its claim against these provisions, Section II.C of the Sunset Policy Bulletin, which we refer to as the "good cause" provision, and which relates to USDOC's consideration of "other factors". The relevant parts of Section II of the Sunset Policy Bulletin provide:

II Sunset Reviews in Antidumping Proceedings

A. *Determination of Likelihood of Continuation or Recurrence of Dumping*

...

3. Likelihood of Continuation or Recurrence of Dumping

...

[T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is likely to lead to continuation or recurrence of dumping where—

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

The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, may not be conclusive with respect to likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.

4. No Likelihood of Continuation or Recurrence of Dumping

[T]he Department normally will determine that revocation of an antidumping order or termination of a suspended dumping investigation is not likely to lead to continuation or recurrence of dumping where dumping was eliminated after issuance of the order or the suspension agreement, as applicable, and import volumes remained steady or increased. Declining margins alone normally would not qualify because the legislative history makes clear that continued margins at any level would lead to a finding of likelihood. See section II.A.3, above. In analyzing whether import volumes remained steady or increased, the Department normally will consider companies' relative market share. Such information should be provided to the Department by the parties.

The Department recognizes that, in the context of a sunset review of a suspended investigation, the elimination of dumping coupled with steady or increasing import volumes may not be conclusive with respect to no likelihood. Therefore, the Department may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation.

...

### C. *Consideration of Other Factors*

Section 752(c)(2) of the Act provides that, if the Department determines that good cause is shown, the Department also will consider other price, cost, market or economic factors in determining the likelihood of continuation or recurrence of dumping. The SAA at 890, states that such other factors might include,

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

The SAA at 890, also notes that the list of factors is illustrative, and that the Department should analyze such information on a case-by-case basis.

Therefore, the Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. With respect to a sunset review of a suspended investigation, where the Department determines that good cause exists, the Department normally will conduct the sunset review consistent with its practice of examining likelihood under section 751(a) of the Act.<sup>210</sup>

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<sup>210</sup>Sunset Policy Bulletin, pp. 18872-18874.

170. In Japan's view, the four "rules" set forth in Sections II.A.3 and 4 of the Sunset Policy Bulletin constitute "predetermined standards for finding likelihood".<sup>211</sup> Japan contends that these provisions restrict USDOC, in a sunset review, to considering only two factors, namely historical dumping margins and import volumes, and set forth mechanical rules creating a bias in favour of an affirmative likelihood determination. Moreover, the Sunset Policy Bulletin contains no provision for confirming that the presumptions underlying the rules are warranted on the basis of the specific facts in any given sunset review. To the contrary, the "good cause" standard that must be satisfied before other factors can be considered confirms that the Sunset Policy Bulletin establishes a process that, according to Japan, is biased. Japan also points to the fact that, in a total of 227 sunset reviews, USDOC has consistently applied the above rules and has never reached a negative determination in a case where the domestic industry had argued that the duty should be continued.<sup>212</sup>

171. The United States responds that the Sunset Policy Bulletin "simply addresses the limited universe of practical scenarios that could arise in the period after imposition of the order"<sup>213</sup>, without predetermining the outcome of a sunset review. Rather, the "outcome in each case is determined on the facts of that particular case and must be supported by the evidence on the record of the sunset review at issue".<sup>214</sup> Before the Panel, the United States agreed that the "primary standard" for making a determination in a sunset review is "the existence of dumping margins" and "depressed import levels", and explained that this is because USDOC considers these elements "highly probative" to the determination.<sup>215</sup>

172. In examining these provisions ourselves, we first note that, on its face, Section II.A.3 states that USDOC "normally will" make an affirmative determination in the following circumstances:

- (a) dumping continued at any level above 0.5 percent after the issuance of the order;
- (b) imports ceased after issuance of the order; or
- (c) dumping was eliminated after the issuance of the order and import volumes declined significantly.

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<sup>211</sup>Japan's appellant's submission, para. 170.

<sup>212</sup>Japan's claims in this regard and the United States' response are discussed in more detail *infra*, para. 183.

<sup>213</sup>United States' appellee's submission, para. 67.

<sup>214</sup>*Ibid.*

<sup>215</sup>United States' response to Question 58(c) posed by the Panel, para. 96; Panel Report, p. E-75.

173. Section II.A.4 explains that USDOC "normally will" make a negative determination if, after the order was issued, dumping was *eliminated* and import volumes remained steady or increased. Japan refers to Sections II.A.3 and 4 as setting out "rules", whereas the United States prefers the term "practical scenarios".<sup>216</sup> In this section of our Report, where necessary, we will refer to the provisions of Sections II.A.3 and 4 as "instructions" to USDOC in the event that one of the "scenarios" exists.<sup>217</sup>

174. Within this general framework, it seems to us that in order properly to assess the consistency of Section II.A.3 of the Sunset Policy Bulletin with the *Anti-Dumping Agreement*, it is necessary to answer at least two questions: (i) does Section II.A.3 oblige USDOC to treat evidence relating to dumping margins and/or import volumes as a *sufficient* basis for an affirmative likelihood determination; and (ii) does Section II.A.3, in conjunction with Section II.C (the "good cause" provision), *restrict* USDOC's consideration of evidence relating to factors other than dumping margins and import volumes in a particular sunset review? We address these questions in turn.

175. With respect to the first question, Section II.A.3 clearly instructs USDOC to consider evidence that dumping has continued or ceased since the imposition of the original duty, as well as evidence relating to import volumes over the same period. Section II.A.3 also reveals, by quoting from the SAA, that this is because the United States considers evidence of these two factors to be "highly probative" of the likelihood that dumping will continue or recur.<sup>218</sup> We see no problem, in principle, with the United States instructing its investigating authorities to examine, in every sunset review, dumping margins and import volumes. These two factors will often be pertinent to the

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<sup>216</sup>United States' appellee's submission, para. 67.

<sup>217</sup>Although Japan's claim relates to the "rule" in Section II.A.4 as well as the three "rules" in Section II.A.3, our discussion will focus on the provisions of Section II.A.3, which in our view lie at the heart of Japan's claim.

<sup>218</sup>The introductory language in Section II.A.3 includes the following excerpts from the SAA:

[D]eclining import volumes accompanied by the continued existence of dumping margins after the issuance of the order may provide a strong indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.

...

[E]xistence of dumping margins after the order, or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the United States without dumping and that, to reenter the U.S. market, they would have to resume dumping.

(Sunset Policy Bulletin, p.18872)



likelihood determination, and Japan itself does not dispute the relevance of at least one of them, namely dumping margins.<sup>219</sup>

176. At issue, however, is whether Section II.A.3 goes further and instructs USDOC to attach decisive or preponderant weight to these two factors in every case. To us, the significance and probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case. The *degree* to which import volumes or dumping margins have decreased will be relevant in making an inference that dumping is likely to continue or recur. Whether the historical data is recent or not may affect its probative value, and *trends* in data over time may be significant for an assessment of likely future behaviour. Similarly, it is possible that in a particular case one of these factors may support an inference of likely future dumping, while the other factor supports a contrary inference.

177. We would have difficulty accepting that dumping margins and import volumes are always "highly probative" in a sunset review by USDOC if this means that either or both of these factors are presumed, by themselves, to constitute sufficient evidence that the expiry of the duty would be likely to lead to continuation or recurrence of dumping. Such a presumption might have some validity when dumping has *continued* since the duty was imposed (as in the first scenario identified in Section II.A.3 of the Sunset Policy Bulletin), particularly when such dumping has continued with significant margins and import volumes. However, the second and third scenarios in Section II.A.3 relate to the situation where there is *no dumping* (either because imports ceased or because dumping was eliminated after the duty was imposed). The cessation of imports in the second scenario and the decline in import volumes in the third scenario could well have been caused or reinforced by changes in the competitive conditions of the market-place or strategies of exporters, rather than by the imposition of the duty alone. Therefore, a case-specific analysis of the factors behind a cessation of imports or a decline in import volumes (when dumping is eliminated) will be necessary to determine that dumping will recur if the duty is terminated.

178. We believe that a firm evidentiary foundation is required in each case for a proper determination under Article 11.3 of the likelihood of continuation or recurrence of dumping. Such a determination cannot be based solely on the mechanistic application of presumptions. We therefore consider that the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin with Article 11.3 of the *Anti-Dumping Agreement* hinges upon whether those provisions instruct USDOC to treat dumping margins and/or import volumes as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of future dumping.

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<sup>219</sup>Japan's statement at the oral hearing.

179. On the face of Section II.A.3, the "instructions" given to USDOC in the three "factual scenarios" are qualified by the word "normally": USDOC "*normally* will" make an affirmative determination in those three scenarios. (emphasis added) This qualifying word seems to suggest that there is some scope for USDOC not to make an affirmative determination, even if the factual scenarios identified in Section II.A.3 exist. Section II.A.3 of the Sunset Policy Bulletin identifies also certain circumstances in which these "normal" rules will *not* apply, namely in the context of a review of a suspended investigation.<sup>220</sup>

The Department recognizes that, in the context of a sunset review of a suspended investigation, the data relevant to the criteria under paragraphs (a) through (c), above, [dumping margins and import volumes] *may not be conclusive* with respect to likelihood.<sup>221</sup> (emphasis added)

This statement may suggest, by negative implication, that data relevant to the two factors mentioned in Section II.A.3(a)–(c) (namely, import volumes and historical dumping margins) *will* be regarded as conclusive in sunset reviews of final anti-dumping duties (as opposed to reviews of suspended investigations, that is, of price undertakings). In our view, however, the language of Section II.A.3 is not altogether clear on this point.

180. In this connection, we observe that the "Overview" section of the Sunset Policy Bulletin explains:

In developing these policies, the Department has drawn on the guidance provided by the legislative history accompanying the URAA, specifically the Statement of Administrative Action.<sup>222</sup>

181. Although the Sunset Policy Bulletin makes this general assertion, we are struck by an apparent difference in the wording of the SAA and of Section II.A.3 of the Sunset Policy Bulletin on this particular point. Whereas Section II.A.3 of the Sunset Policy Bulletin treats—at least by negative implication—dumping margins and import volumes as normally being "*conclusive* with respect to likelihood", the SAA states that interested parties may "provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily *indicative* of

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<sup>220</sup>Pursuant to Articles 8.1 and 8.2 of the *Anti-Dumping Agreement*, an investigation may be suspended after preliminary affirmative determinations of dumping and injury have been made if the exporter(s) concerned and the investigating authorities agree on price undertakings. In these circumstances, no duty is imposed.

<sup>221</sup>Sunset Policy Bulletin, p. 18872. A similar sentence is contained in Section II.A.4 of the Sunset Policy Bulletin, pp. 18872-18873.

<sup>222</sup>*Ibid.*, p. 18872.

the likelihood of dumping."<sup>223</sup> Although certain sentences from the SAA are quoted in Section II.A.3 of the Sunset Policy Bulletin, this particular statement of the SAA is not among them. Thus, when read in conjunction with the SAA, it seems that Section II.A.3 might *not* instruct USDOC to treat these two factors as "conclusive" in every case.

182. The parties do not agree on whether Section II.A.3 of the Sunset Policy Bulletin means that the two factors are "conclusive" or merely "indicative". Japan argues that Section II.A.3 requires USDOC to make an affirmative likelihood determination whenever one of the narrow factual scenarios identified in that section exists, without any other analysis. The United States responds that the fact that Sections II.A.3 and 4 identify "scenarios" does not "mean that the outcome is predetermined, even when the facts in a particular case fit one of the scenarios."<sup>224</sup> In response to questioning at the oral hearing, the United States explained that "there is never an automatic presumption", and that the outcome "depends on the facts of the case". However, the United States also indicated that "absent evidence to the contrary, the existence of the scenarios would form the basis for [USDOC's] affirmative likelihood determination".<sup>225</sup>

183. In support of its argument that Section II.A.3 instructs USDOC to treat evidence of dumping margins and import volumes as "conclusive", Japan points to "the consistent application of [the rules in Sections II.A.3] in numerous cases over a long period of time."<sup>226</sup> The United States responds that it has, in fact, terminated many duties at the stage of sunset review and that, with respect to the cases in which USDOC made affirmative likelihood determinations, global statistics do not, by themselves, reveal how USDOC refers to and uses Sections II.A.3 and 4. Rather, it would be necessary "to consider the individual facts" in each sunset review in order to see whether those facts revealed a consistent pattern.<sup>227</sup>

184. The Panel did not examine the nature and meaning of Section II.A.3 of the Sunset Policy Bulletin. Nor did the Panel consider the evidence submitted by Japan seeking to establish USDOC's consistent application of Section II.A.3 and, thereby, its meaning. In consequence, the Panel made no factual findings in this regard. Moreover, as we have just seen, the facts relating to the nature and meaning of Section II.A.3 of the Sunset Policy Bulletin that are necessary in order to evaluate the consistency of that provision with Article 11.3 of the *Anti-Dumping Agreement* are not uncontested facts.

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<sup>223</sup>Sunset Policy Bulletin, p. 18872; SAA, p. 890. (emphasis added)

<sup>224</sup>United States' appellee's submission, para. 67.

<sup>225</sup>United States' response to questioning at the oral hearing.

<sup>226</sup>Japan's appellant's submission, para. 161.

<sup>227</sup>United States' response to questioning at the oral hearing.

185. Before the Panel and before us Japan has invoked the "good cause" standard in support of its claim that Sections II.A.3 and 4 of the Sunset Policy Bulletin are, as such, inconsistent with Article 11.3 of the *Anti-Dumping Agreement*. This brings us to the second question raised by this claim, namely whether Sections II.A.3 and 4 of the Sunset Policy Bulletin, in conjunction with Section II.C, restrict USDOC's consideration of evidence other than evidence relating to dumping margins and import volumes. According to Japan, the "good cause" requirement compounds the inconsistency with Article 11.3 of Sections II.A.3 and II.A.4 of the Sunset Policy Bulletin by erecting a hurdle that interested parties must overcome before USDOC will even consider factors other than dumping margins and import volumes since the imposition of the duty.

186. As the Sunset Policy Bulletin itself recognizes, a broad range of factors other than import volumes and dumping margins is potentially relevant to the authorities' likelihood determination. Section II.C of the Sunset Policy Bulletin (quoting from the SAA) sets out an illustrative list of the types of other factors that may be relevant in determining the future likelihood of dumping:

... the market share of foreign producers subject to the antidumping 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 relevant markets.<sup>228</sup>

Japan and the European Communities also referred to a number of other factors that may be relevant to the likelihood determination.<sup>229</sup>

187. The Sunset Policy Bulletin is unclear on its face as to the manner in which the "good cause" standard operates with respect to "other factors". Section II.C states that USDOC will consider other factors if it "determines that good cause exists". Section II.C does not shed light on the meaning of "good cause", although it does establish that the "burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question."<sup>230</sup> Furthermore, the statement in Section II.A.3 that USDOC "may be more likely to entertain good cause arguments under paragraph II.C in a sunset review of a suspended investigation" suggests, again by

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<sup>228</sup>Sunset Policy Bulletin, p. 18874.

<sup>229</sup>At paragraph 69 of its appellant's submission, Japan identifies several questions that USDOC could have asked: "Were prices going up or down? Were exchange rates going up or down? Were raw materials prices going up or down?". The European Communities agreed with Japan on this point. (European Communities' third participant's submission, para. 16 and footnote 10 thereto) The European Communities also mentioned, as examples: "the existence of unused capacity, export prices to third countries or the existence of anti-dumping measures applied by third countries". (European Communities' statement at the oral hearing)

<sup>230</sup>We note that the good cause standard is also set forth in Section 351.218(d)(3)(iv)(A) of Title 19 of the Regulations. (Exhibit JPN-3 submitted by Japan to the Panel)

negative implication, that USDOC will be *less likely* to entertain good cause arguments in a review of an anti-dumping duty.

188. Before the Panel, Japan introduced evidence seeking to show that the hurdle imposed by the "good cause" standard is a high one. Japan explained that USDOC has considered "good cause" arguments in only 15 sunset review proceedings, and that it has allowed evidence of "other factors" in only 5 of these 15 proceedings. Even of these 5 proceedings, only 2 were reviews of anti-dumping duties.<sup>231</sup> In response, the United States emphasized that in two instances USDOC *did* find good cause to exist and *did* consider other factors.<sup>232</sup>

189. For the same reasons that the Panel did not examine the nature and meaning of Sections II.A.3 and 4 of the Sunset Policy Bulletin, it did not examine the nature and meaning of the "good cause" standard and how the standard relates to those provisions. Again, the Panel made no factual findings. Here too, the facts needed to assess the meaning of the "good cause" standard and, thereby, the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin are not uncontested facts.

190. In sum, in view of the lack of relevant factual findings by the Panel or uncontested facts on the Panel record, we are unable to rule on Japan's claim that Sections II.A.3 and 4 of the Sunset Policy Bulletin are, as such, inconsistent with Article 11.3 of the *Anti-Dumping Agreement*.

191. We acknowledge that these types of instructions to an executive agency may well serve as a useful tool to the agency as well as for all participants in administrative proceedings. They tend to promote transparency and consistency in decision-making, and can help authorities and participants to focus on the relevant issues and evidence. However, these considerations cannot override the obligation of investigating authorities, in a sunset review, to determine, on the basis of all relevant evidence, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping. As we have found in other situations, the use of presumptions may be inconsistent with an obligation to make a particular determination in each case using positive evidence. Provisions that

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<sup>231</sup>The other three proceedings were reviews of price undertakings. In proceedings of this kind, the Sunset Policy Bulletin states that USDOC may be "more likely" to consider evidence of factors other than dumping margins and import volumes. (Sunset Policy Bulletin, p. 18872) See Japan's first submission to the Panel, paras. 131-135.

<sup>232</sup>United States' response to Question 58(b) posed by the Panel, para. 95; Panel Report, pp. E-74 and E-75. In response to questioning at the oral hearing in this appeal, the United States suggested that, in a majority of cases, interested parties never requested USDOC to consider evidence relating to other factors.

create "irrebuttable" presumptions, or "predetermine" a particular result, run the risk of being found inconsistent with this type of obligation.<sup>233</sup>

2. Challenge to the Sunset Policy Bulletin "As Applied"

192. Having concluded that we are unable to rule on Japan's claim that Sections II.A.3 and 4 of the Sunset Policy Bulletin are, as such, inconsistent with Article 11.3 of the *Anti-Dumping Agreement*, we turn to Japan's remaining claim that USDOC's likelihood determination in the CRS sunset review—that is, the Sunset Policy Bulletin as applied—was inconsistent with Article 11.3. The Panel characterized Japan's arguments in this respect as "two-pronged":

... first, [Japan argues] that the DOC's non-consideration of the information submitted by NSC near the end of the investigation period indicates that the DOC failed to properly determine likelihood in this sunset review; and second, that the DOC failed to make a proper, prospective likelihood determination within the meaning of Article 11.3 in that the DOC followed the factual presumptions of the Sunset Policy Bulletin and based its determination exclusively on historical data relating to dumping and the volume of dumped imports.<sup>234</sup>

193. With respect to the first element of this claim, the Panel found that USDOC "was justified in rejecting this submission on procedural grounds of untimeliness"<sup>235</sup> and, therefore:

... that the United States did not fail to determine likelihood of continuation or recurrence of dumping by declining to consider the additional information as to possible "other factors" contained in the 11 May 2000 submission of NSC.<sup>236</sup>

194. The Panel also referred to a statement in the Final Determination in the CRS sunset review, in which USDOC explained that even if it were to consider the additional information, this "would be outweighed by the margin and import volume evidence on record".<sup>237</sup> On this basis, the Panel held:

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<sup>233</sup>See, for example, Appellate Body Report, *US – Lead and Bismuth II*, paras. 61 and 62; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 146-153.

<sup>234</sup>Panel Report, para. 7.269.

<sup>235</sup>*Ibid.*, para. 7.274, referring to para. 7.263.

<sup>236</sup>*Ibid.*, para. 7.275.

<sup>237</sup>*Ibid.*, para. 7.276, quoting the Final Issues and Decision Memo, p. 6.

Even assuming *arguendo* that the DOC were required to consider the information contained in NSC's 11 May 2000 submission, in our view, the above statement demonstrates that it did, in fact, consider it. It is clear that the DOC nevertheless considered the substance of the evidence and determined that it would not have changed its affirmative determination of likelihood.<sup>238</sup>

195. Japan does not appeal these findings by the Panel.

196. As to the second element of Japan's claim, the Panel quoted the following data from the record of the CRS sunset review:

In the first [administrative] review covering the period from August 1, 1996, through July 31, 1997, the Department assigned NSC a margin of 12.51 percent. In the final results of the second review, covering the period from August 1, 1997, through July 31, 1998, the Department determined margins of 2.47 percent and 1.61 percent for NSC and Kawasaki ...

...

The import statistics provided by domestic interested parties and NSC on imports of subject merchandise from 1991 to 1997, and those examined by the Department...demonstrate that imports of the subject merchandise declined from 1992 to 1993, the year of the order, and have remained at much lower levels.<sup>239</sup>

197. Observing that USDOC examined and relied on this evidence in reaching its likelihood determination, the Panel found:

With our standard of review firmly in mind, given the factual foundation and reasoning apparent in the Final Determination, and in light of the particular circumstances of this sunset review, we see no reason to conclude that the DOC did not have before it relevant facts constituting a sufficient factual basis to allow it to reasonably draw the conclusions concerning the likelihood of such continuation or recurrence that it did. We therefore find that the United States did not act inconsistently with Article 11.3 in this respect in this case.<sup>240</sup> (footnote omitted)

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<sup>238</sup>Panel Report, para. 7.277.

<sup>239</sup>*Ibid.*, para. 7.281, quoting the Preliminary Issues and Decision Memo, pp. 1 and 6. See also Final Issues and Decision Memo, p.5.

<sup>240</sup>*Ibid.*, para. 7.283.

198. On appeal, Japan asserts that the Panel erred in so finding and emphasizes that, "[b]ecause of its fixed methodology, DOC made no effort to collect or evaluate evidence that might allow prospective analysis".<sup>241</sup>

199. As explained earlier<sup>242</sup>, we consider that Article 11.3 makes clear that the role of the authorities in a sunset review includes both investigatory and adjudicatory aspects. These authorities have a duty to seek out relevant information and to evaluate it in an objective manner.<sup>243</sup> At the same time, the *Anti-Dumping Agreement* assigns a prominent role to interested parties as well and contemplates that they will be a primary source of information in all proceedings conducted under that agreement. Company-specific data relevant to a likelihood determination under Article 11.3 can often be provided only by the companies themselves. For example, as the United States points out, it is the exporters or producers themselves who often possess the best evidence of their likely future pricing behaviour—a key element in the likelihood of future dumping.

200. In this case, the notice of initiation of the CRS sunset review published in the Federal Register stated that all parties wishing to participate in the review were required to file a substantive response within 30 days of the publication of the notice. The notice further explained that the "required contents of a substantive response are set forth in the *Sunset Regulations* at 19 CFR 351.218(d)(3)." The introductory sections of the notice also provided a USDOC website address at which, *inter alia*, the following were available: "the *Sunset Regulations* and *Sunset Policy Bulletin*, [USDOC's] schedule of sunset reviews, [and] case history information".<sup>244</sup> The provisions of the Regulations referred to in the notice of initiation include the following statement of optional information that interested parties may submit:

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<sup>241</sup>Japan's appellant's submission, para. 69.

<sup>242</sup>*Supra*, para. 111.

<sup>243</sup>We have found a similar duty in the context of an investigation conducted in accordance with the *Agreement on Safeguards*: Appellate Body Report, *US – Wheat Gluten*, paras. 53-55.

<sup>244</sup>See "Initiation of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products", United States Federal Register, 1 September 1999 (Volume 64, Number 169), p. 47767 at pp. 47768 and 47769. (Exhibit JPN-8(a) submitted by Japan to the Panel) We also note that, before the Panel, the United States explained that, by letter dated 26 August 1999, USDOC had, as a courtesy, notified KSC and NSC that the sunset review would be initiated on or about 1 September 1999. (United States' first submission to the Panel, para. 42) In this letter, USDOC informed the parties of the applicable information requirements and, as in the notice of initiation, further explained that the "required contents of a substantive response are set forth in the *Sunset Regulations* at 19 CFR 351.218(d)(3)." The letter also provided a USDOC website address at which relevant instruments and information were available, and suggested that the parties consult relevant provisions of the Regulations and the Sunset Policy Bulletin. (Letters from Commerce to Interested Parties, Exhibit US-3 submitted by the United States to the Panel)



(F) A statement regarding the likely effects of revocation of the order or termination of the suspended investigation under review, which must include any factual information, argument, and reason to support such statement.<sup>245</sup>

201. We note that NSC knew of the initiation of the sunset review and of the prescribed content for its substantive response. Indeed, this is clear on the face of NSC's substantive response, which reproduces the text of Section 351.218(d)(3)(ii)(F) and then goes on to explain, over several pages, NSC's position that revocation of the CRS order would not lead to continuation or recurrence of dumping.<sup>246</sup> Thus, it is apparent from the Panel record that NSC was aware of and took advantage of the opportunity to submit information on the likely effects of revoking the CRS order.

202. Furthermore, although Japan argued before the Panel that NSC had placed certain evidence relating to "other factors" before USDOC and that USDOC had improperly declined to take account of this evidence, the Panel found that USDOC was entitled to exclude that evidence on the basis that it was not submitted in a timely fashion.<sup>247</sup> Japan has not appealed this finding. Nor has it appealed the Panel's related finding that USDOC did, in fact, consider this information and determine that this information would not, in any event, have altered its determination or outweighed the evidence regarding dumping margins and import volumes.<sup>248</sup>

203. We further observe that Japan has not, in this dispute, challenged USDOC's reliance on import volumes as one factor supporting its affirmative likelihood determination. In addition, we have already explained that we are unable, in this appeal, to rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins calculated in previous administrative reviews allegedly using a zeroing methodology.<sup>249</sup> We also recall that NSC did not take advantage of the opportunity, in its substantive response to the notice of initiation, to submit to USDOC evidence relating to other factors, and that Japan does not point to particular circumstances in this case that could have triggered USDOC's duty to solicit such information. We also note that the United States emphasizes that:

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<sup>245</sup>Section 351.218(d)(3)(ii)(F) of Title 19 of the Regulations. (Exhibit JPN-3 submitted by Japan to the Panel)

<sup>246</sup>NSC's Substantive Response to the *Notice of Initiation of Five-Year ("Sunset") Reviews*, 4 October 1999. (Exhibit JPN-19(a) submitted by Japan to the Panel, pp. 5-8)

<sup>247</sup>Panel Report, paras. 7.263 and 7.274.

<sup>248</sup>*Ibid.*, paras. 7.276-7.277.

<sup>249</sup>*Supra*, para. 138.

"NSC never explained or attempted to explain why, despite the fact that it has been dumping since the imposition of the order, it would stop dumping if the order were removed."<sup>250</sup>

204. In the Final Issues and Decision Memo, USDOC explained that "if companies continue dumping with the discipline of an order in place, [USDOC] may reasonably infer that dumping would continue if the discipline were removed" and that "margins have remained above de minimis in every administrative review since the issuance of the order".<sup>251</sup> USDOC determined that "dumping is likely to continue if the order were revoked" based on its observation that "dumping has continued to occur throughout the life of the order and import volumes have been significantly lower than pre-order volumes."<sup>252</sup>

205. Thus, in this case, there appears to be sufficient justification for USDOC's reliance on the dumping margins<sup>253</sup> and import levels as well as the inferences it drew from this data. Specifically: (i) the most recent administrative review had been conducted *immediately prior* to initiation of the CRS sunset review<sup>254</sup>; and (ii) the level of imports in the three years preceding the CRS sunset review remained *significantly lower* than pre-order volumes.<sup>255</sup> In our view, it was not unreasonable for USDOC to conclude that *both* of these factors pointed in the same direction, that is, towards likely future dumping. Nor was it unreasonable for the Panel, in the light of the standard of review set out in Article 17.6(i), to conclude that USDOC's establishment of the facts was proper and its evaluation of those facts objective. Taking into account all these factors, we have no reason to disturb the Panel's findings in this respect.

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<sup>250</sup>United States' appellee's submission, para. 27. (original emphasis)

<sup>251</sup>Final Issues and Decision Memo, p. 5.

<sup>252</sup>*Ibid.*, p. 6. See also *supra*, para. 116 and Panel Report, para. 7.272.

<sup>253</sup>Leaving aside the issue of whether USDOC acted consistently with Articles 2.4 and 11.3 of the *Anti-Dumping Agreement* as regards the dumping margins that it relied upon in the CRS sunset review. See *supra*, paras. 118-138.

<sup>254</sup>This administrative review covered the period 1 August 1997 to 31 July 1998. As the United States points out at paragraph 23 of its appellee's submission, the final results of the administrative review were published in February 2000, and the preliminary results of the sunset review were published one month later, in March 2000.

<sup>255</sup>Final Issues and Decision Memo, p. 6.

206. We see no basis for finding that the Panel erred in concluding that:

... given the factual foundation and reasoning apparent in the Final Determination, and in light of the particular circumstances of this sunset review, we see no reason to conclude that the DOC did not have before it relevant facts constituting a sufficient factual basis to allow it to reasonably draw the conclusions concerning the likelihood of such continuation or recurrence that it did.<sup>256</sup> (footnote omitted)

207. Accordingly, we uphold the Panel's finding that the United States:

... did not act inconsistently with Article 11.3 of the *Anti-dumping Agreement* in this sunset review in making its determination regarding the likelihood of continuation or recurrence of dumping.<sup>257</sup>

**VII. Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement***

208. Japan requests us to reverse the Panel's finding, in paragraphs 7.315 and 8.1(h) of the Panel Report, that the United States did not act inconsistently with its obligations under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement*. In our view, Japan's appeal on this issue can succeed only if two conditions are satisfied:

- (a) first, that we reverse the Panel's finding that the Sunset Policy Bulletin is not "challengeable", as such, under the *WTO Agreement*; and
- (b) second, that we find Section II.A.2, 3, or 4 of the Sunset Policy Bulletin to be inconsistent, as such, with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement*.

209. Although the first of these conditions is satisfied, the second is not. We have found that Section II.A.2 of the Sunset Policy Bulletin, as such, is not inconsistent with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement*.<sup>258</sup> In addition, we have not found sufficient factual findings by the Panel or uncontested facts on the Panel record to enable us to make any finding concerning the consistency of Sections II.A.3 and 4 of the Sunset Policy Bulletin, as such, with Article 11.3 of the *Anti-Dumping Agreement*.<sup>259</sup>

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<sup>256</sup>Panel Report, para. 7.283.

<sup>257</sup>*Ibid.*, para. 8.1(f)(ii). See also Panel Report, para. 7.283.

<sup>258</sup>*Supra*, para. 157.

<sup>259</sup>*Supra*, para. 190.

210. The Panel found that Japan failed to show that Sections II.A.3 and 4 of the Sunset Policy Bulletin, as such, are inconsistent with Article 11.3.<sup>260</sup> In contrast, we have concluded that we are unable to make any finding in this regard.<sup>261</sup> Yet the implications for Japan's claims under Article 18.4 of the *Anti-Dumping Agreement* and Article XVI:4 of the *WTO Agreement* are the same.

211. In the absence of any finding that provisions of the Sunset Policy Bulletin, as such, are inconsistent with a specific obligation under the *Anti-Dumping Agreement*, we can find no inconsistency with Article 18.4 of the *Anti-Dumping Agreement* or Article XVI:4 of the *WTO Agreement*. We therefore have no ground to disturb the Panel's finding that:

The US did not act inconsistently with Article 18.4 of the *Anti-dumping Agreement* and Article XVI:4 of the *WTO Agreement*.<sup>262</sup>

### **VIII. Findings and Conclusions**

212. For the reasons set out in this Report, the Appellate Body:

- (a) reverses the Panel's findings, in paragraphs 7.145, 7.195, and 7.246 of the Panel Report, that the Sunset Policy Bulletin is not a mandatory legal instrument and thus is not a measure that is "challengeable", as such, under the *Anti-Dumping Agreement* or the *WTO Agreement*;
- (b) reverses the Panel's findings, in paragraphs 7.170, 7.184, and 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying, in the CRS sunset review, on dumping margins calculated in previous administrative reviews allegedly using a "zeroing" methodology; but finds that there is not a sufficient factual basis to complete the analysis of Japan's claims on this issue;
- (c) as regards the making of likelihood determinations on an order-wide basis:

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<sup>260</sup>Panel Report, para. 8.1(f)(i).

<sup>261</sup>*Supra*, para. 190.

<sup>262</sup>Panel Report, para. 8.1(h). See also Panel Report, para. 7.315.

- (i) reverses the Panel's finding in paragraph 8.1(e)(i) of the Panel Report because it was based solely on findings that have been reversed in paragraph (a) above; but finds that Section II.A.2 of the Sunset Policy Bulletin, as such, is not inconsistent with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement* in stating that USDOC will make its likelihood determination in a sunset review on an order-wide basis;
  - (ii) upholds the Panel's finding, in paragraphs 7.208 and 8.1(e)(ii) of the Panel Report, that the United States did not act inconsistently with Article 6.10 or Article 11.3 of the *Anti-Dumping Agreement* in making its determination in the CRS sunset review on an order-wide basis;
- (d) as regards the factors considered by USDOC in making a likelihood determination:
- (i) reverses the Panel's finding in paragraph 8.1(f)(i) of the Panel Report because it was based solely on findings that have been reversed in paragraph (a) above; but finds that there is not a sufficient factual basis to complete the analysis of Japan's claims against Sections II.A.3 and 4 of the Sunset Policy Bulletin, as such;
  - (ii) upholds the Panel's finding, in paragraphs 7.283 and 8.1(f)(ii) of the Panel Report, that the United States did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in the CRS sunset review in determining that dumping was likely to continue or recur; and
- (e) upholds, for different reasons, the Panel's finding, in paragraphs 7.315 and 8.1(h) of the Panel Report, that, with respect to the Sunset Policy Bulletin, the United States did not act inconsistently with Article 18.4 of the *Anti-Dumping Agreement* or Article XVI:4 of the *WTO Agreement*.

213. Based on these findings, the Appellate Body makes no recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original at Geneva this 28th day of November 2003 by:

谷口安平

Yasuhei Taniguchi  
Presiding Member

Georges Abi-Saab

Georges Abi-Saab  
Member

A.V. Ganesan

A.V. Ganesan  
Member

ANNEX 1

**WORLD TRADE  
ORGANIZATION**

**WT/DS244/7**  
17 September 2003

(03-4986)

Original: English

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

Notification of an Appeal by Japan  
under paragraph 4 of Article 16 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 15 September 2003, sent by Japan to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, Japan hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (WT/DS244/R, dated 14th August 2003) and certain legal interpretations developed by the Panel.

The appeal relates to the following issues of law and legal interpretations developed by the Panel in its Report.

1. The Panel erred in its legal conclusion in paragraphs 7.168 – 7.170 and 7.183 – 7.184 of the Panel Report, and the reasoning leading thereto, that the United States Department of Commerce ("DOC") acted consistently in the anti-dumping sunset review on corrosion-resistant carbon steel flat products from Japan ("CRS sunset review") with Article 2.4 or Article 11.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") by relying on the administrative review margins without making any adjustments for the "zeroed-out" negative margins. The Panel based its conclusion on an erroneous legal interpretation that the term "dumping" in Article 11.3 is not defined by Article 2, and that a responding party should have raised the zeroing issue during the course of the CRS sunset review.

2. The Panel erred in its legal conclusion in paragraph 7.283 of the Panel Report, and the reasoning leading thereto, that DOC acted consistently with Article 11.3 of the AD Agreement in the CRS sunset review in making its likelihood of continuation of dumping determination. The Panel based its conclusion on an erroneous legal interpretation of the requirement to make a determination as to the likelihood of continuation of dumping under Article 11.3.
3. The Panel erred in its legal conclusion in paragraph 7.208 of the Panel Report, and the reasoning leading thereto, that DOC acted consistently with Articles 6.10 and Article 11.3 of the AD Agreement by making its likelihood of continuation of dumping determination in the CRS sunset review on an order-wide basis. The Panel based its conclusion on an erroneous legal interpretation of the applicability of Article 6.10 to sunset reviews conducted under Article 11.3, as well as the evidentiary and substantive requirements under Article 11.3 in conjunction with Articles 2 and 6.10.
4. The Panel erred in its legal conclusions in paragraphs 7.145, 7.195, and 7.246 of the Panel Report, and the reasoning leading thereto, that the Sunset Policy Bulletin, including sections II.A.2, 3 and 4 prescribing the standards to determine the likelihood of continuation or recurrence of dumping and requiring that such a determination be based on an order-wide basis, cannot, by itself, give rise to a WTO violation, and is therefore not a measure challengeable under the WTO Agreement as such.
5. The Panel erred in its legal conclusion in paragraph 7.315 of the Panel Report, and the reasoning leading thereto, that the United States acted consistently with Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.

Accordingly, Japan requests the Appellate Body to reverse the above findings of the Panel and the corresponding conclusions reached by the Panel in paragraphs 8.1(d)(i) and (iii), 8.1(e)(i) and (ii), 8.1(f)(i) and (ii), 8.1(h) and 8.2 of the Report.

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