

BEFORE THE  
WORLD TRADE ORGANIZATION  
APPELLATE BODY

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

(AB-2003-5)

APPELLEE'S SUBMISSION  
OF THE UNITED STATES OF AMERICA

October 10, 2003

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**SERVICE LIST**

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## Table of Contents

I.	Introduction and Executive Summary . . . . .	1
II.	Argument . . . . .	3
	A. The Appellate Body Should Disregard Japan’s Claims and Allegations That the Panel Failed to Apply the Correct Standard of Review . . . . .	3
	B. The Panel Correctly Found That Article 11.3 Does Not Impose A Particular Methodology That Must Be Followed in Determining Likelihood of Continuation or Recurrence of Dumping . . . . .	5
	1. Commerce Met Its Obligation Under Article 11.3 to Determine That Dumping Was Likely to Continue or Recur Upon Revocation Of the Order . . . . .	8
	2. There is No Obligation Under Article 11.3 or Elsewhere in the AD Agreement to Determine Likelihood on a Company- Specific Basis . . . . .	14
	3. The Appellate Body Should Dismiss Japan’s Claim That Commerce Improperly Relied Upon Margins Calculated Using “Zeroing” Because It is Premised Upon Findings of Fact That the Panel Did Not Make . . . . .	16
	C. The Panel Correctly Found That the <i>Sunset Policy Bulletin</i> is Not a Measure That Can Be Challenged As Such . . . . .	23
	1. The <i>Sunset Policy Bulletin</i> is Not a Binding Legal Instrument Under U.S. Law . . . . .	24
	2. The <i>Sunset Policy Bulletin</i> Does Not Mandate WTO- Inconsistent Action . . . . .	30
	3. The Panel Correctly Declined to Consider Japan’s “As Such” Claims . . . . .	34
III.	Conclusion . . . . .	36

## I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In its appellant's submission, Japan has appealed five findings of the Panel in this dispute, three of which concern the United States Department of Commerce's ("Commerce") determination of likelihood of continuation or recurrence of dumping and two of which concern the status of Commerce's *Sunset Policy Bulletin*. The Panel's findings with respect to these five issues were correct. Therefore, the Appellate Body should affirm all five findings.

2. First, the Panel correctly found that the evidentiary basis for Commerce's determination of likelihood of continuation or recurrence of dumping in the sunset review of the antidumping duty order on corrosion-resistant carbon steel flat products from Japan was sufficient. Based on the facts that were established on the record – which Japan is now improperly asking the Appellate Body to reconsider – the Panel correctly found that Commerce had a sufficient factual basis from which to reasonably draw the conclusions that it did concerning the likelihood of continuation or recurrence of dumping.

3. Second, the Panel correctly found that Commerce's determination of likelihood on an order-wide basis was not inconsistent with Articles 11.3 and 6.10 of the *WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). Given that Article 11.3 does not require Commerce to calculate a dumping margin in a sunset review, the Panel correctly declined to interpret the incorporation of the evidentiary provisions of Article 6.10 to create new substantive obligations in Article 11. Article 6.10 regulates the *process* of calculating margins of dumping; therefore, because Article 11 has no substantive requirement to calculate a margin of dumping, any procedural or evidentiary requirement related to calculating a margin of dumping, including Article 6.10's requirement that margins be calculated on a company-specific basis, simply does not apply.

4. Third, the Panel correctly found that Commerce's reliance on administrative review dumping margins as a basis for its likelihood determination was not inconsistent with Articles 2.4 or 11.3 of the AD Agreement. 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. Therefore, it was not necessary for the Panel to examine further Japan's claim that Commerce's reliance upon margins calculated using "zeroing" made Commerce's likelihood determination inconsistent with Article 2.4 of the AD Agreement.

5. Fourth, the Panel correctly found that Commerce's *Sunset Policy Bulletin* is not a measure that can be challenged as such and that the United States did not act inconsistently with Article 18.4 of the AD Agreement. The *Sunset Policy Bulletin* is not a legal instrument under U.S. law – it is not a "measure." Accordingly, it cannot mandate WTO-inconsistent behavior.

6. Finally, the Panel correctly found that Japan has failed to show that the *Sunset Policy Bulletin* as such is inconsistent with Article 11.3 of the AD Agreement regarding the investigating authorities' obligation to determine likelihood in sunset reviews or with Article 6.10 of the AD Agreement regarding the basis of likelihood determinations in sunset reviews. The Panel correctly concluded that the Bulletin did not constitute a measure that can be challenged in WTO dispute settlement proceedings. As such, the Panel was not required to consider Japan's "as such" claims in respect of particular provisions of the *Sunset Policy Bulletin*.

## II. ARGUMENT

### A. The Appellate Body Should Disregard Japan's Claims and Allegations that the Panel Failed to Apply the Correct Standard of Review

7. In this proceeding, the Panel correctly identified and followed the standard of review applicable to disputes under the AD Agreement.<sup>1</sup> The Panel correctly summarized its obligations in examining the claims before it as follows:

In light of this standard of review, in examining the claims under the *Anti-dumping Agreement* in the matter referred to us, we must evaluate whether the United States measures at issue are consistent with relevant provisions of the *Anti-dumping Agreement*. We may and must find them consistent if we find that the United States investigating authorities have properly established the facts and evaluated the facts in an unbiased and objective manner, *and* that the determinations rest upon a "permissible" interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor to substitute our judgment for that of the US authorities, even though we might have arrived at a different determination were we examining the record ourselves.<sup>2</sup>

The Panel faithfully followed this framework in assessing Japan's claims, as well as the facts and arguments presented by the parties.

8. Japan alleges, however, that the Panel "failed" to apply the proper standard of review in examining Japan's claims.<sup>3</sup> Japan's claims, concerning inconsistent action by the Panel with Article 11 of the DSU and Article 17.6 of the AD Agreement (which it cites in its Appellant

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<sup>1</sup> Panel Report, paras. 7.1-7.5 (discussing Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article 17.6 of the AD Agreement).

<sup>2</sup> Panel Report, para. 7.5.

<sup>3</sup> Japan Appellant Submission, paras. 3-15.

Submission), are outside the scope of appellate review because Japan failed to include them in its notice of appeal.

9. Rule 20(2)(d) of the *Working Procedures* requires a notice of appeal to include “a brief statement of the nature of the appeal, including the allegations of error in the issues of law covered in the panel report and legal interpretations developed by the panel.”<sup>4</sup> Japan’s notice of appeal does not include any reference to either Article 11 of the DSU or Article 17.6 of the AD Agreement. Nor does it include any allegation, either explicit or implied, that the Panel may have failed to apply the correct standard of review.

10. Japan’s claims of error are serious allegations that should not have been made without proper notification to the United States and third parties in the notice of appeal. As such, the Appellate Body should find that Japan’s notice of appeal does not provide adequate notice that a claim that the Panel failed to apply the proper standard of review would be argued by Japan on appeal.<sup>5</sup>

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<sup>4</sup> *Working Procedures for Appellate Review* (“*Working Procedures*”), WT/AB/WP/3 (28 February 1997).

<sup>5</sup> *United States - Countervailing Measures Concerning Certain Products from the European Communities* (“*US - Countervailing Measures*”), WT/DS212/AB/R, Report of the Appellate Body, adopted 8 January 2003, paras. 74-75 (“[I]f appellants intend to argue [an] issue on appeal, they must refer to it in Notices of Appeal in a way that will enable appellees to discern it and know the case they have to meet.” In *US - Countervailing Measures*, the issue was an Article 11 claim not made in the notice of appeal, but made in the submission.); *United States - Continued Dumping and Subsidy Offset Act of 2000* (“*US - CDSOA*”), WT/DS217/AB/R, WT/DS234/AB/R, Report of the Appellate Body, adopted 27 January 2003, paras. 190-206 (“[I]f an appellee has not received sufficient notice in the Notice of Appeal that a particular claim will be advanced by the appellant, that claim normally will be excluded from the appeal.”).

**B. The Panel Correctly Found That Article 11.3 Does Not Impose a Particular Methodology That Must Be Followed in Determining Likelihood of Continuation or Recurrence of Dumping**

11. Customary rules of treaty interpretation dictate that the words of a treaty are the starting point.<sup>6</sup> The text of Article 11.3 of the AD Agreement provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that “the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.” Specifically, Article 11.3 provides:

Notwithstanding the provisions of paragraphs 1<sup>[7]</sup> and 2<sup>[8]</sup>, any definitive anti-dumping duty [(“antidumping duty order” in U.S. parlance)] shall be terminated on a date not later than five years from its imposition . . . unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated

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<sup>6</sup> The Appellate Body has recognized that Article 31 of the *Vienna Convention* reflects a customary rule of interpretation. Article 31(1) provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the *terms of the treaty* in their context and in the light of its object and purpose.” (Emphasis added.) In applying this rule, the Appellate Body has cautioned that an interpreter is limited to the words and concepts used in the treaty, and that the principles of interpretation set out in Article 31 “neither require nor condone the imputation into a treaty of words that are not there[.]” *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, Report of the Appellate Body, adopted 16 January 1998, para. 45.

<sup>7</sup> Paragraph 1 of Article 11 provides that “[a]n anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.”

<sup>8</sup> Paragraph 2 of Article 11 is relevant to types of reviews other than sunset reviews, such as antidumping duty assessment reviews.



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.

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

12. Article 11.3 is a specific implementation of the general rule, found in Article 11.1 of the AD Agreement, that an antidumping duty order shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.<sup>10</sup>

13. The focus of a sunset review under Article 11.3, therefore, is on future behavior, *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping currently exists. Thus, neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is of central significance to the results of the review; in any case, Article 11.3 does not require such precision.<sup>11</sup> This is reinforced by note 22 of Article 11.3, which provides that “[w]hen the amount of the anti-dumping duty is determined on a retrospective basis, a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the

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<sup>9</sup> Article 9.3.1 addresses annual administrative duty reviews.

<sup>10</sup> *United States - Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea (“Korea DRAMs”)*, WT/DS99/R, Report of the Panel, adopted 19 March 1999, para. 6.40; *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany (“German Steel Sunset”)*, WT/DS213/AB/R, Report of the Appellate Body, adopted 19 December 2002, para. 70 (making the same point with respect to the parallel provision in the SCM Agreement).

<sup>11</sup> *See, e.g., Korea DRAMs*, para. 6.43 (discussing prospective analysis, albeit in the context of a different type of review).

authorities to terminate the definitive duty.” In other words, no specific amount of dumping – even the most current – is decisive as to whether dumping is likely to continue or recur.

14. The Panel correctly articulated what is required in making a sunset review determination as follows:

Article 11.3 does not impose a particular methodology that must be followed for the "likelihood" determination to be made in a sunset review. This does not mean that the Anti-dumping Agreement is devoid of any obligation governing the requisite nature of a sunset review determination. 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>12</sup>

15. Japan claims that the Panel's findings concerning Commerce's likelihood determination are legally flawed. Specifically, Japan claims that, contrary to the Panel's findings, the evidentiary basis for Commerce's likelihood determination is insufficient,<sup>13</sup> that Commerce's determination of likelihood on an order-wide basis is inconsistent with Articles 11.3 and 6.10 of the AD Agreement,<sup>14</sup> and that Commerce improperly relied upon dumping margins calculated

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<sup>12</sup> Panel Report, para. 7.271 (footnotes omitted).

<sup>13</sup> Japan Appellant Submission, paras. 53-87.

<sup>14</sup> Japan Appellant Submission, paras. 88-106.

using the “zeroing” methodology in making its likelihood determination.<sup>15</sup> As demonstrated below, Japan is wrong on all three counts.

**1. Commerce Met Its Obligation Under Article 11.3 to Determine That Dumping Was Likely to Continue or Recur Upon Revocation of the Order**

16. In its sunset review of the antidumping duty order on corrosion-resistant carbon steel flat products from Japan, consistent with Article 11.3 of the AD Agreement, Commerce considered whether revocation of the order would be likely to lead to continuation or recurrence of dumping. In analyzing likelihood, Commerce considered the existence of dumping throughout the history of the order as well as the volume of imports before and after issuance of the order.<sup>16</sup>

17. The Panel correctly found, on the basis of the facts on the record before Commerce, that “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>17</sup>

18. Japan criticizes the Panel’s fact finding, though makes no claim that the Panel has failed to discharge its functions under Article 11 of the DSU.<sup>18</sup> However, it is clear that Japan’s complaint lies in the Panel’s assessment of the facts before it and the weight it accorded those

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<sup>15</sup> Japan Appellant Submission, paras. 16-52.

<sup>16</sup> Decision Memorandum (“*Commerce Sunset Preliminary Decision Memorandum*”) (Exhibit JPN-8(c)), pp. 11-13, accompanying *Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Sunset Review* (“*Commerce Sunset Preliminary*”), 65 FR 16169 (March 27, 2000) (Exhibit JPN-8(b)).

<sup>17</sup> Panel Report, para. 7.283 (footnote omitted).

<sup>18</sup> Japan Appellant Submission, paras. 59-86.

facts, and that there is no basis to disturb this finding. Under the circumstances, review of the Panel's fact finding is beyond the scope of appellate review.<sup>19</sup> Thus, Japan's objections regarding the sufficiency of the evidentiary basis upon which Commerce made its likelihood determination should, for this reason alone, be rejected, and the Panel's finding that Commerce's likelihood determination was not inconsistent with Article 11.3 of the AD Agreement should be affirmed.

19. Japan claims that the Panel erred by failing to review whether Commerce determined likelihood based on positive evidence, evaluated in an objective manner. Japan is wrong. The Panel examined whether Commerce based its likelihood determination on positive evidence, evaluated in an objective manner, of dumping by Japanese companies and the trend in import volumes was not inconsistent with Article 11.3 of the AD Agreement, and determined that it had.<sup>20</sup> Furthermore, the Panel found that Commerce was not obligated under Article 11.3 to collect and consider additional evidence of "future facts."<sup>21</sup>

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<sup>19</sup>DSU Article 17.6. In *EC – Measures Affecting Meat and Meat Products (Hormones)*, Report of the Appellate Body, adopted 13 February 1998, WT/DS26/AB/R, the Appellate Body explained,

Under Article 17.6 of the DSU, appellate review is limited to appeals on questions of law covered in a panel report and legal interpretations developed by the panel ... Determination of the credibility of the weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of the panel as the trier of facts ... Whether or not a panel has made an objective assessment of the facts before it, as required by Article 11 of the DSU, is . . . a legal question which, *if properly raised on appeal*, would fall within the scope of appellate review.

para. 132 (emphasis added).

<sup>20</sup> Panel Report, paras. 7.278-7.283.

<sup>21</sup> Panel Report, para. 7.279.

20. Furthermore, as the Panel found, the meaning given to the word “determine” in Article 11.3 is its ordinary meaning - “to decide” something.<sup>22</sup> In the context of Article 11.3, the Panel determined that the administering authority must decide, on the basis of “positive evidence,” whether there is a likelihood of continuation or recurrence of dumping and injury if the duty were removed.<sup>23</sup> In other words, the administering 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>24</sup>

21. The Panel found that Commerce’s determination of likelihood of continuation or recurrence of dumping with respect to the antidumping duty order on corrosion-resistant carbon steel flat products from Japan is consistent with this standard in all respects.<sup>25</sup>

22. The Panel determined that Commerce was correct in finding that there was evidence of dumping after imposition of the order.<sup>26</sup> Indeed, Commerce considered the results of the two administrative reviews of the order on certain corrosion-resistant carbon steel flat products from Japan that had been conducted and completed prior to the sunset review. In the first administrative review, for the period August 1996-July 1997, Commerce found that NSC was dumping corrosion-resistant steel in the United States and calculated a dumping margin for NSC of 12.51 percent.<sup>27</sup>

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<sup>22</sup> Panel Report, para. 7.271.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Panel Report, paras. 7.272, 7.283.

<sup>26</sup> Panel Report, paras. 7.279, 7.282.

<sup>27</sup> 64 FR 12951(March 16, 1999) (POR - Aug. 1, 1996 though July 31, 1997) (Exhibit JPN-15(e)). (Kawasaki did not request to be part of the administrative review.)

23. In the second administrative review, Commerce found that both NSC and Kawasaki were dumping subject merchandise in the United States and calculated a dumping margin for NSC of 2.47 percent and a dumping margin for Kawasaki of 1.61 percent.<sup>28</sup> The final results of this second administrative review, based on NSC's and Kawasaki's sales during the period August 1997-July 1998, were issued on February 14, 2000<sup>29</sup> – just one month before Commerce issued its preliminary sunset determination.<sup>30</sup>

24. The Panel determined further that, in the sunset review, Commerce also examined import data from several sources and correctly found that U.S. imports of Japanese corrosion-resistant steel had declined substantially shortly after the order was imposed and remained at depressed levels for the entire period prior to the sunset review.<sup>31</sup> Based on these findings, the Panel agreed that Commerce reasonably concluded that dumping by Japanese producers and exporters was likely to continue or recur in the event of revocation of the order.<sup>32</sup>

25. According to Japan, the Panel erred in accepting that Commerce's analysis of the evidence was objective because that analysis was based on "limited facts" and a "predetermined methodology."<sup>33</sup> Specifically, Japan argues that the Panel failed to appreciate that Commerce's

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<sup>28</sup> 65 FR 8935 (Feb. 23, 2000) (POR - Aug. 1, 1997 though July 31, 1998) (Exhibit JPN-16(e)).

<sup>29</sup> The results were published in the Federal Register on February 23, 2000 (65 FR 8935) (Exhibit JPN-16(e)).

<sup>30</sup> *Commerce Sunset Preliminary*, 65 FR at 16169 (Exhibit JPN-8(b)).

<sup>31</sup> Panel Report, para. 7.279.

<sup>32</sup> Panel Report, paras. 7.282-7.283. Commerce's conclusions are at *Commerce Sunset Preliminary Decision Memorandum*, p. 29 (Exhibit JPN-8(c)); Decision Memorandum ("*Commerce Sunset Final Decision Memorandum*") (Exhibit JPN-8(e)) accompanying *Final Results of Full Sunset Review of Antidumping Duty Order* ("*Commerce Sunset Final*"), 65 FR 47380 (Aug. 2, 2000) (Exhibit JPN-8(d)).

<sup>33</sup> Japan Appellant Submission, paras. 59-86.

consideration of historical evidence of dumping and import volumes precludes a prospective analysis which, in turn, favors the interests of the domestic industry.<sup>34</sup> This is not an accurate representation of the facts or of Commerce's analysis of those facts.

26. The Panel found that, "to the extent it will rest upon a factual foundation, the prospective likelihood determination will inevitably rest upon a factual foundation relating to the past and present."<sup>35</sup> In this case, Commerce considered the behavior of producers/exporters and whether that behavior is likely to continue or recur. Japanese producers/exporters have continued to dump since the imposition of the antidumping order. Japan does not dispute this fundamental fact. Furthermore, there was no evidence to support an inference that Japanese producers/exporters would stop dumping if the discipline of the order were removed. No such evidence was offered by any party, and none was apparent to Commerce. Japan's specious arguments concerning bias cannot obscure this fundamental deficiency in the evidence presented to Commerce by the Japanese companies; nor can they obscure the relevance of the evidence relied upon by Commerce, especially the evidence of continued dumping over the life of the order.

27. Commerce does not conduct a counterfactual inquiry in making the likelihood determination, nor, the Panel found, does Article 11.3 of the AD Agreement require such an inquiry.<sup>36</sup> The exporter is the only party that can explain its pricing behavior, and Commerce provided the exporter with an opportunity to explain its present and possible future behavior in

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<sup>34</sup> Japan Appellant Submission, paras. 61, 67.

<sup>35</sup> Panel Report, para. 7.279.

<sup>36</sup> *Id.*

the sunset review proceeding.<sup>37</sup> NSC attempted to explain why its import volumes remained depressed and why these lesser levels were not probative of future behavior. *Significantly, however, NSC never explained or attempted to explain why, despite the fact that it has been dumping since the imposition of the order, it would stop dumping if the order were removed.*

28. Citing the Panel Report in *German Steel Sunset*, Japan suggests that the Panel's finding is flawed because it did not consider that Commerce failed to solicit relevant information during the sunset review.<sup>38</sup> Japan is wrong. Commerce's sunset questionnaire asks exporters to provide information as to whether they are likely to dump if the order is revoked.<sup>39</sup> As discussed above, the Japanese exporter NSC never stated or provided information to the effect that it would stop dumping if the order were revoked. In fact, as the Panel noted, NSC relied upon evidence of its own dumping in previous administrative reviews in making arguments about likelihood<sup>40</sup>; it never, however, affirmatively stated that it was not now dumping or that it would stop dumping if the order was revoked. In *German Steel Sunset*, the panel faulted Commerce for not considering evidence already in its possession.<sup>41</sup> In this case, the Panel agreed that Commerce

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<sup>37</sup> Commerce's sunset questionnaire explicitly requests that interested parties, which would include the Japanese exporters, provide: "A statement regarding the likely effects of revocation of the order . . . , which must include any factual information, argument, and reason to support such statement." 19 CFR 351.218(d)(3)(ii)(F) (Exhibit JPN-3). Commerce requested information from Japanese exporters; that they failed to answer the question in a thorough manner, including the types of information Japan lists, *e.g.*, in paragraphs 68 and 81 of its Appellate Submission, is not an error that can be ascribed to Commerce.

<sup>38</sup> Japan Appellant Submission, para. 82.

<sup>39</sup> 19 CFR 351.218(d)(3)(ii)(F) (Exhibits JPN-3 and JPN-5).

<sup>40</sup> Panel Report, para. 7.183.

<sup>41</sup> *German Steel Sunset*, WT/DS213/R, Report of the Panel, adopted 19 December 2002, para. 8.118.



did consider the evidence in its possession, *i.e.*, showing that NSC was dumping; NSC did not take advantage of Commerce's solicitation of evidence to the contrary.

29. Japan also suggests that the Panel erred in not requiring Commerce to consider some other unspecified evidence in Commerce's records in connection with the likelihood determination.<sup>42</sup> The Japanese producers/exporters did not point to any such evidence during the sunset review, and Japan has not pointed to any such evidence during this proceeding; Commerce should not be required to guess what that evidence might be. The Panel therefore correctly concluded that Commerce had before it the "relevant facts constituting a sufficient factual basis" to make its likelihood determination.<sup>43</sup>

30. Based on the facts that were established on the record, the Panel correctly found that Commerce had a sufficient factual basis from which to reasonably draw the conclusions that it did concerning the likelihood of continuation or recurrence of dumping. The Appellate Body, therefore, should reject Japan's claim that the Panel erred in this respect.

## **2. There is No Obligation Under Article 11.3 or Elsewhere in the AD Agreement to Determine Likelihood on a Company-specific Basis**

31. The Panel correctly found that the provisions of Article 6.10 of the AD Agreement 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 of the AD Agreement be made on a company-specific basis.<sup>44</sup> Japan claims that the Panel erred in

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<sup>42</sup> Japan Appellant Submission, paras. 60, 68.

<sup>43</sup> Panel Report, para. 7.283.

<sup>44</sup> Panel Report, paras. 7.203-7.208.

this regard. According to Japan, Article 11.4 of the AD Agreement incorporates the substantive obligations of Article 6.10 concerning calculation of dumping margins for individual companies, which in turn creates an obligation under Article 11.3 to make a likelihood determination on a company-specific basis.<sup>45</sup> Japan is wrong. The provisions of Article 6 that are incorporated into Article 11 do not operate to create new substantive obligations in sunset reviews.

32. Article 11.4, which contains the procedural requirements for sunset reviews, incorporates by reference “[t]he provisions of Article 6 regarding evidence and procedure” into Article 11; *i.e.*, it makes only certain provisions applicable to reviews carried out under Article 11. And, given that there is “no substantive requirement imposed by Article 11.3 or any other provision of the *Anti-Dumping Agreement*, that an investigating authority must actually calculate the (likely) margin of dumping in a sunset review,” the Panel determined that the incorporation of the evidentiary provisions of Article 6 do not create new substantive obligations within Article 11.<sup>46</sup> Article 6.10, as the Panel pointed out, regulates the *process* of calculating margins of dumping.<sup>47</sup> Therefore, where there is no substantive requirement to calculate a margin of dumping, any procedural or evidentiary requirement related to calculating a margin of dumping, including that margins be calculated on a company-specific basis, simply does not apply.

33. Furthermore, there is nothing in Article 11 of the AD Agreement, including in Article 11.4, that even suggests standards or criteria for a likelihood of dumping determination that would focus on individual companies' likelihood of continuation or resumption of dumping. In

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<sup>45</sup> Japan Appellant Submission, paras. 88-106.

<sup>46</sup> Panel Report, para. 7.207.

<sup>47</sup> *Id.* (Emphasis added.)

particular, the text of Article 11.3 does not distinguish between the specificity required for the likelihood of dumping determination and the specificity required for the likelihood of injury determination, and the latter determination is *inherently* order-wide.

34. The text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, also makes no reference to determining the likelihood of dumping for individual companies; rather, it refers to review of the “definitive” duty. Article 9.2 of the AD Agreement makes clear that the definitive duty is imposed on a product-specific (*i.e.*, order-wide) basis, not a company-specific basis.<sup>48</sup> In addition, Article 9.4 of the AD Agreement, assumes that the definitive antidumping duty is imposed with respect to a “product,” *i.e.*, on an order-wide basis, not with respect to individual companies found to be dumping. This assumption is what enables Article 9.4 to permit antidumping duties to be applied to “imports from exporters or producers not included in the examination” conducted in the context of the antidumping duty investigation. This assumption undermines Japan’s claim that the definitive antidumping duty is necessarily reviewed under Article 11.3 of the AD Agreement on a company-specific basis.

35. In sum, there is no basis in the AD Agreement for Japan’s claim that a determination of likelihood of continuation or recurrence of dumping under Article 11.3 of the AD Agreement must be made on a company-specific basis. The Appellate Body, therefore, should reject Japan’s claim that the Panel erred in this respect.

### **3. The Appellate Body Should Dismiss Japan’s Claim That Commerce Improperly Relied Upon Margins Calculated Using “Zeroing”**

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<sup>48</sup> Article 9.2 begins with the following phrase: “When an anti-dumping duty is imposed in respect of *any product* . . . .” (Emphasis added.)

**Because It is Premised Upon Findings of Fact That the Panel Did Not Make**

36. The Panel correctly found that Article 11.3 of the AD Agreement does not require a determination of dumping as set forth in Article 2 of the AD Agreement. In particular, the Panel found that 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. Therefore, the Panel determined it was not necessary to examine further Japan's claim that Commerce's reliance upon margins calculated using "zeroing" made Commerce's determination that dumping was likely to continue inconsistent with Article 2.4 of the AD Agreement.<sup>49</sup>

37. Japan claims that the Panel erred in this regard, asserting that the margins of dumping relied upon by Commerce are flawed because they were calculated using zeroing. According to Japan, without Commerce's use of zeroing, the relevant margin would be zero, *i.e.*, there would be no evidence of existing dumping and, as such, no evidence to support a determination of likelihood of continuation of dumping.<sup>50</sup> Japan's specific claim is *not* whether a precise calculation is required; indeed, Japan admits that no such calculation is required under Article 11.3. Rather, "the question is whether the evidence on which the determination is based is established properly."<sup>51</sup>

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<sup>49</sup> Panel Report, paras. 7.167-7.169.

<sup>50</sup> Japan Appellant Submission, para. 41.

<sup>51</sup> Japan Appellant Submission, para. 38; *see also* paras. 41, 44, 47.

38. In support of its claim, Japan maintains that the Panel “acknowledged” that without zeroing, Commerce would have calculated negative dumping margins.<sup>52</sup> This is patently false. The Panel simply restated that, “Japan alleges in this case that there would have been no finding of dumping in at least the most recent administrative review in question had the DOC not zeroed.”<sup>53</sup>

39. After rejecting Japan’s claim with respect to zeroing based on the lack of any requirement in Article 11.3 that a dumping margin relied upon as evidence in a sunset review be determined in accordance with Article 2 of the AD Agreement, the Panel went on to state:

We therefore do not believe that it is necessary to examine further Japan’s claim based on the allegation that the use of margins obtained in the administrative reviews calculated on the basis of zeroing rendered the DOC’s determination of likelihood of continuation or recurrence of dumping inconsistent with Article 2.4.<sup>54</sup>

Accordingly, the Panel specifically refrained from making factual findings on this issue.

40. Japan premises its entire claim upon the assumptions that the evidence of dumping upon which Commerce relied was, *as a factual matter*, calculated using the “zeroing” methodology proscribed by the Appellate Body’s ruling in *EC Bed Linen*, and that, if the dumping margin had been calculated without the application of “zeroing,” it would, *as a factual matter*, have been zero. However, there were no findings of fact in this regard by the Panel. There is no basis for Appellate Body review of a claim premised upon factual findings that the Panel did not make or

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<sup>52</sup> Japan Appellant Submission, para. 20; *see also* paras. 39, 40, 50.

<sup>53</sup> Panel Report, para. 7.159.

<sup>54</sup> Panel Report, para. 7.169.

upon facts that are not undisputed.<sup>55</sup> Therefore, the Appellate Body should dismiss Japan's claim under Section III of its Appellant Submission in its entirety.<sup>56</sup> If the Appellate Body were to allow Japan's claims, it would result in Members using challenges to sunset reviews as a back door to challenge other separate measures.<sup>57</sup>

41. Japan also argues that, based on the use of the word "dumping" in Article 11.3, the substantive disciplines of Article 2 governing calculation of dumping margins are applicable to the determination of "likelihood of continuation or recurrence of dumping" in a sunset review under Article 11.3.<sup>58</sup> The Panel correctly found that the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of dumping* do not

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<sup>55</sup> *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R, Report of the Appellate Body, adopted 6 November 1998, para. 255 (Appellate Body unable to determine whether action violated WTO provision where there were no factual findings or undisputed facts).

<sup>56</sup> In any event, Japan's reliance on the Appellate Body's findings in *EC Bed Linen* is misplaced. *European Communities, Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC Bed Linen")*, WT/DS141/AB/R, Report of the Appellate Body, adopted 12 March 2001. The Appellate Body's finding that the EC's zeroing methodology was inconsistent with Article 2.4.2 of the AD Agreement is not controlling with respect to the United States' methodology. Indeed, the rationale behind *EC Bed Linen* simply does not apply to Commerce's methodology. *EC Bed Linen* involved a calculation of dumping margins on an average-to-average basis, not the average-to-average transaction basis used in the administrative reviews that were considered in the instant sunset review. In fact, the average-to-average basis of the price comparisons in *EC Bed Linen* was a key factor in the Appellate Body's analysis of the "zeroing" issue. Furthermore, *EC Bed Linen* arose from an investigation, not a sunset review. Thus, the analysis in *EC Bed Linen* is legally and factually irrelevant to the determination that Japan is attempting to challenge in this case, and so provides no basis to overturn the Panel's decision.

<sup>57</sup> The United States notes that Japan is not challenging the results of the annual administrative reviews, including the calculation of dumping margins allegedly using "zeroing." If any of the interested parties participating in the annual administrative reviews (including Japanese exporters) believed that Commerce's dumping calculations were inaccurate or otherwise contrary to U.S. law, they could have filed judicial challenges to those calculations in domestic proceedings. See also Panel Report, paras. 7.182-7.183.

<sup>58</sup> Japan Appellant Submission, paras. 22-37.

apply in making a *determination of likelihood of continuation or recurrence of dumping* under Article 11.3.<sup>59</sup> As discussed below, Japan's arguments concerning the explicit application of the provisions of Article 2 are inconsistent with its own concession that "a precise calculation is not required for an Article 11.3 'likelihood' determination."<sup>60</sup>

42. The text of Article 11.3 provides that a definitive antidumping duty must be terminated after five years unless the authorities determine that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The focus of a sunset review under Article 11.3 is therefore on future behavior, *i.e.*, whether dumping and injury are likely to continue or recur in the event of expiry of the duty, not whether or to what extent dumping currently exists. Thus, neither the precise amount of dumping in any one year, nor the precise amount of likely future dumping, is of central significance to the results of the review.<sup>61</sup>

43. Furthermore, Article 11.3 does not set forth specific factors or a particular methodology to be used in performing a likelihood analysis. Nor does Article 11.3 explicitly require quantification of past or future amounts of dumping.<sup>62</sup> This is reinforced by note 22 of Article 11.3, which provides that "[w]hen the amount of the anti-dumping duty is determined on a

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<sup>59</sup> Panel Report, paras. 7.167-7.168.

<sup>60</sup> Japan Appellant Submission, para. 38.

<sup>61</sup> *See, e.g., Korea DRAMs*, para. 6.43 (discussing prospective analysis, albeit in the context of a different type of review).

<sup>62</sup> The Appellate Body has found that when an article is silent with respect to an issue, it cannot impute words that are not there or import concepts that were not intended. *See, e.g., United States - Anti-Dumping Measures On Certain Hot-Rolled Steel Products from Japan ("Japan Hot-Rolled Steel")*, WT/DS184/AB/R, Report of the Appellate Body, adopted 23 August 2001, para. 166 (for purposes of determining normal value, Article 2.1 is silent as to how to determine the parties to the relevant sales transactions; the Appellate Body therefore refused to read into Article 2.1 any conditions on this aspect of the dumping determination).

retrospective basis, a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty.” No specific amount of dumping – even the most current – is decisive as to whether dumping is likely to continue or recur.

44. Japan itself seems to recognize no one specific amount of dumping is decisive. In particular, Japan states that: “Japan’s claim . . . has nothing to do with whether a precise calculation is required for determining the ‘likelihood’ of dumping,”<sup>63</sup> and “the point is not whether sunset reviews require a precise calculation of ‘likely’ dumping margins. Rather, the question – particularly in a case involving the likely ‘continuation’ of dumping – is whether the evidence of existing dumping is valid.”<sup>64</sup> In other words, Japan concedes that the likelihood of dumping determination in sunset reviews under Article 11.3 is not tied to any *specific* amount of dumping. The fact that Japan acknowledges that any amount of dumping could be sufficient to make a likelihood determination cannot be reconciled with its claim that the substantive disciplines of Article 2, governing the calculation of dumping margins, are applicable in sunset reviews. As the Panel correctly notes, the introductory language in Article 2.1 describes a concept which is generally relevant throughout the AD Agreement.<sup>65</sup> The language in Article 2.1

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<sup>63</sup> Japan Appellate Submission, para. 41.

<sup>64</sup> Japan Appellate Submission, para. 44.

<sup>65</sup> Panel Report, n.144 (Article 2.1 states, in part: “For the purposes 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[.]”).



does not mean, as Japan assumes, that every other provision of Article 2 also applies “throughout the Agreement.” Indeed, certain provisions of Article 2 expressly do not apply to reviews.<sup>66</sup>

45. As Japan recognizes, there is no *obligation* in a sunset review under Article 11.3 to calculate precisely either a current or future amount of dumping. Specifically, under Articles 11.3 there is no requirement to consider specific *amounts* of dumping, or to use specific *methodologies*, in order to determine that dumping is likely to continue or recur. Consequently, the obligations stemming from Article 2 of the AD Agreement with respect to the calculation of dumping margins are not applicable in the context of sunset reviews.

46. In addition, the various panel reports cited by Japan do not address sunset reviews under Article 11.3 of the AD Agreement.<sup>67</sup> Rather, they all concern quantification of dumping margins *in antidumping investigations*. The United States does not dispute that quantification of dumping margins is required in antidumping investigations. However, quantification of likely future dumping margins is not required in sunset reviews under Article 11.3 of the AD Agreement.

47. Finally, Japan's argument – that the Panel failed to reconcile what Japan believes to be the Panel's interpretation of the applicability of Article 3 of the AD Agreement with the Panel's interpretation in fact of Article 2 of the Agreement<sup>68</sup> – is based on an erroneous characterization of what the Panel found with respect to Article 3. The only question the Panel was addressing in the passages cited by Japan was whether Article 3.3 is, by its terms, limited in application to

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<sup>66</sup> *E.g.*, Article 2.4.2 of the AD Agreement (“[T]he existence of margins of dumping *during the investigation phase* shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions[.]”). (Emphasis added.)

<sup>67</sup> Japan Appellant Submission, paras. 32, 33, 40, 42, n.35.

<sup>68</sup> Japan's Appellant Submission, para. 26, *citing* Panel Report, paras. 7.99-7.101.

investigations and does not apply to reviews. The Panel found that Article 3.3 was so limited, thereby dispelling Japan's efforts to extend the requirements of that Article to reviews under Article 11.<sup>69</sup> The Panel explicitly stated that there was no need for it to address, and that it was declining to address, the question of whether the provisions of Article 3 may be generally applicable throughout the AD Agreement.<sup>70</sup> The Panel merely explained that it would have reached the same finding with respect to the Article 3.3 question even if it assumed solely for argument's sake that the other provisions of Article 3 were generally applicable.<sup>71</sup> Japan buries this salient point in a footnote.

48. In sum, Japan has failed to demonstrate that Article 11.3 requires a determination of dumping as set forth in Article 2 of the AD Agreement. The Appellate Body should, therefore, affirm the findings of the Panel in this regard.

**C. The Panel Correctly Found That the *Sunset Policy Bulletin* is Not a Measure**

49. Japan claims that the Panel erred in concluding that the *Sunset Policy Bulletin* "as such" is not an actionable administrative procedure.<sup>72</sup> Specifically, Japan alleges that the *Sunset Policy Bulletin* is an "administrative procedure" under Article 18.4 of the AD Agreement, actionable "as such" because the Bulletin sets "pre-established rigid rules" that mandate a WTO-inconsistent outcome in every case.<sup>73</sup> Japan's reasoning is flawed in a number of respects. As discussed

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<sup>69</sup> Panel Report, para. 7.102.

<sup>70</sup> Panel Report, para. 7.101.

<sup>71</sup> *Id.*

<sup>72</sup> Japan Appellant Submission, paras. 107-170.

<sup>73</sup> Japan Appellant Submission, paras. 108, 120-125, 131-132.

below, the *Sunset Policy Bulletin* is not a legal instrument under U.S. law – it is therefore not a “measure.” Accordingly, it cannot mandate WTO-inconsistent behavior.

**1. The *Sunset Policy Bulletin* is a Not a Legal Instrument Under U.S. Law**

50. For something to be a measure for purposes of the WTO, it must “constitute an instrument with a functional life of its own”– *i.e.*, it must “do something concrete, independently of any other instruments.”<sup>74</sup> Before the Panel, Japan claimed that the *Sunset Policy Bulletin* had its own operational life under U.S. law, independent from other legal instruments such as the statute and regulations. According to Japan, the *Sunset Policy Bulletin* is a “de facto mandatory” legal instrument which requires WTO-inconsistent action.<sup>75</sup>

51. The Panel correctly found that the *Sunset Policy Bulletin* does not constitute a measure that can be challenged in WTO dispute settlement proceedings because, in and of itself, it is not a legal instrument that operates on its own.<sup>76</sup> The Panel found that the text of the bulletin itself states that the *Sunset Policy Bulletin* operates on the basis of, and within the parameters set by, the statute and regulations. Furthermore, the Panel found that Japan had not identified any U.S. legal instrument that would suggest that the *Sunset Policy Bulletin* can in fact operate independently from other legal instruments under U.S. law in such a way as to mandate a particular course of action.<sup>77</sup>

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<sup>74</sup> *United States - Measures Treating Export Restraints as Subsidies* (“U.S. Export Restraints”), WT/DS194/R, Report of the Panel, adopted 23 August 2001, para. 8.85.

<sup>75</sup> Panel Report, para. 7.120.

<sup>76</sup> Panel Report, para. 7.125.

<sup>77</sup> *Id.*

52. Japan claims that the *Sunset Policy Bulletin* is a binding legal instrument, *i.e.*, an “administrative procedure” under Article 18.4 of the AD Agreement, because it “believes” the Bulletin establishes rigid rules that Commerce must follow in every case.<sup>78</sup> What Japan “believes” is immaterial. Rather, Japan must “prove” its claim, and it has not done so before the Panel.

53. Before the Panel, the United States demonstrated that the *Sunset Policy Bulletin* is evidence of Commerce’s understanding of sunset-related issues not explicitly addressed by the statute and regulations.<sup>79</sup> The *Sunset Policy Bulletin* has no independent legal status, but is rather comparable to agency precedent. The purpose of the *Sunset Policy Bulletin* is to set out, in as comprehensive terms as possible, guidance with respect to sunset reviews and Commerce’s conduct of them, both in terms of the procedural and substantive issues that may arise. As a result, Commerce does not “follow” the provisions of the *Sunset Policy Bulletin*; rather Commerce assesses the facts in each case, in light of the statutory and regulatory provisions, and in consideration of the guidance in the *Sunset Policy Bulletin* on methodological or analytical issues not expressly addressed by the statute or the regulations. Moreover, as with its administrative precedent, Commerce may depart from its policy bulletin in any particular case, so long as it explains the reasons for doing so.<sup>80</sup> Japan has pointed to no evidence under U.S.

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<sup>78</sup> Japan Appellant Submission, para. 108.

<sup>79</sup> Panel Report, paras. 7.124-7.125, analyzing the *Sunset Policy Bulletin*, 63 FR at 18871 (“This policy bulletin proposes *guidance* regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory provisions by providing *guidance* on methodological or analytical issues not explicitly addressed by the statute and regulations.”) (emphasis added) (Exhibit JPN-6).

<sup>80</sup> Panel Report, paras. 7.121-7.122, 7.126-7.127. As a matter of U.S. administrative law, Commerce practice cannot be binding because Commerce is not obliged to follow its own

municipal law that would refute the United States' assertions and the Panel's findings with respect to the status under U.S. law of a Commerce policy bulletin.

54. Japan also claims that the *Sunset Policy Bulletin* is a "pre-established rule" which sets forth "specific and fixed methods" for Commerce's sunset review determinations.<sup>81</sup> Japan maintains that because the *Sunset Policy Bulletin* was published in the Federal Register *before* the initiation of the first sunset review, it meets the definition of an actionable "administrative procedure".<sup>82</sup> Furthermore, Japan alleges that Commerce's "strict and consistent adherence" to the provisions in the *Sunset Policy Bulletin* is evidence that the bulletin is an actionable legal instrument under Article 18.4 of the AD Agreement.<sup>83</sup>

55. Japan's claim that the form and timing of the *Sunset Policy Bulletin* is dispositive fails for several reasons. First, the burden was on Japan before the Panel to establish that, as a matter of U.S. municipal law, publication in the Federal Register (whether before or after the start of sunset reviews) transforms policy guidance into a measure. Japan has failed to do so. As the Panel correctly found,<sup>84</sup>

[T]he *form* in which the Sunset Policy Bulletin is maintained does not transform it into a mandatory legal instrument. The fact that the contents have been compiled

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precedent so long as it explains departures from such precedent. See Response of the United States to Questions 9 (para. 29, n.22) and 82 (para. 17) from the Panel, stating that "The U.S. Court of International Trade has held, 'As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve.' *Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253 (CIT 2002); *see also, Zenith Electronics Corporation v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996)."

<sup>81</sup> Japan Appellant Submission, paras. 122-125.

<sup>82</sup> Japan Appellant Submission, paras. 123-124.

<sup>83</sup> Japan Appellant Submission, paras. 126-137.

<sup>84</sup> Panel Report, paras. 7.139-7.140.

in a single instrument does not affect our view as to its nature or function . . . . We find it neither appropriate nor legally justifiable to infer that the Bulletin obligates the investigating authority to follow its provisions in sunset reviews, from the mere fact that it has been reduced to writing in a single instrument. Such a conclusion should rather be based on the nature, operation and discernable substance of the practice, considered in the overall context of the legal framework of the Member concerned.

56. The timing of publication of the *Sunset Policy Bulletin*, *i.e.*, prior to the commencement of sunset reviews in the United States, likewise does not resolve the issue of whether the bulletin is a measure.<sup>85</sup> The United States agrees with the Panel's finding that the *Sunset Policy Bulletin* "is not a legal instrument that operates so as to mandate a course of action."<sup>86</sup> As discussed above, Japan has failed before the Panel to demonstrate as a matter of U.S. law that the *Sunset Policy Bulletin* does anything other than provide policy guidance on sunset review issues.

57. Furthermore, Japan's reliance on the number of affirmative likelihood determinations as evidence of Commerce "strict adherence" to the "directives" of the *Sunset Policy Bulletin* is misplaced.<sup>87</sup> An administrative "practice"<sup>88</sup> does not evolve into an "administrative procedure" (or a "measure") simply based on the fact Commerce has issued a particular number of

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<sup>85</sup> Japan alleges that the Panel conclusions on this issue are internally inconsistent. Japan Appellant Submission, para. 122. Japan is wrong. The Panel noted correctly that the *Sunset Policy Bulletin* was promulgated before the start of sunset reviews, *i.e.*, it was "pre-established." Panel Report, para. 7.131. However, the Panel disagreed with Japan that the *Sunset Policy Bulletin* was a "rule" that mandates certain conduct. Panel Report, para. 7.137.

<sup>86</sup> Panel Report, para. 7.126.

<sup>87</sup> Japan Appellant Submission, para. 133.

<sup>88</sup> Administrative agencies in the United States use the term "practice" to refer collectively to their past precedent. That precedent is *not* binding. The U.S. Court of International Trade has held, "As long as Commerce properly explains its reasons, and its practice is reasonable and permitted by the statute, Commerce's practice can and should continue to change and evolve." *Rhodia, Inc. v. United States*, 240 F. Supp. 2d at 1253 (CIT 2002); *see also, Zenith Electronics Corp. v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996).

affirmative sunset determinations all in which it considered guidance set forth in the *Sunset Policy Bulletin*.<sup>89</sup> The panel in *Steel Plate from India* addressed this very issue, finding that the number of times a certain result is repeated does not turn the repeated pattern, or “practice”, into a “measure”<sup>90</sup>:

The practice India has challenged is not, on its face, within the scope of the measures that may be challenged under Article 18.4 of the AD Agreement. In particular, we do not agree with the notion that the practice is an “administrative procedure” in the sense of Article 18.4 of the Agreement. It is not a pre-established rule for the conduct of anti-dumping investigations. Rather, ... a practice is a repeated pattern of similar responses to a set of circumstances – that is, it is the past decisions of the USDOC . . . . India argues that at some point, repetition turns the practice into a “procedure”, and hence into a measure. We do not agree. That a particular response to a particular set of circumstances has been repeated, and may be predicted to be repeated in the future, does not, in our view transform it into a measure. Such a conclusion would leave the question of what is a measure vague and subject to dispute itself, which we consider an unacceptable outcome. Moreover, we do not consider that merely by repetition, a Member becomes obligated to follow its practice. If a Member were obligated to abide by its practice, it might be possible to deem that practice a measure. The United States, however, has asserted that under its governing laws, the USDOC may change a practice provided it explains its decision.

58. Moreover, the “future practice” of a Member simply cannot be regarded as a “measure” subject to dispute settlement, because not only is it purely speculative, but it would simply be the

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<sup>89</sup> The United States provided the Panel with a breakdown of the outcome of the 321 antidumping and countervailing duty orders and suspension agreements in place as of January 1, 1995, the effective date of the United States’ implementation of the Uruguay Round Agreements, subject to sunset review. U.S. Answer to Question 81 from the Panel, para. 16.

<sup>90</sup> Panel Report on *United States - Anti-Dumping and Countervailing Measures on Steel Plate from India* (“*Steel Plate from India*”), WT/DS206/R, adopted 29 July 2002, para 7.22 (citation omitted).

future application of the measure. The DSU applies only to measures “that exist,” not to measures “that may possibly be taken in the future.”<sup>91</sup>

59. Commerce issued the *Sunset Policy Bulletin* in an attempt to be as transparent as possible with respect to Commerce's approach to sunset reviews. In an area in which both the AD Agreement and the U.S. statute provide authorities with extremely broad discretion, the United States considered it valuable to provide interested parties with guidance as to the approach Commerce likely would take under given circumstances. The alternative and clearly less desirable approach would be a less transparent system wherein the parties in a sunset review would have little or no idea how the administering authority would address issues raised in sunset reviews. The Panel concurred.<sup>92</sup>

We do not believe that we should discourage efforts by WTO Members to provide transparency, certainty and predictability in the conduct of sunset reviews. This would run counter to the objectives of the WTO dispute settlement system as laid down in Article 3.2 of the DSU, which states: “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.”

The United States and Commerce should be commended, not faulted, for its efforts to increase transparency and provide useful guidance on the conduct of sunset reviews. Japan's contrasting of the published *Sunset Policy Bulletin* with case-by-case analysis or “informal or internal” materials does nothing to advance its claim.<sup>93</sup> As with its other claims in this appeal, Japan is

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<sup>91</sup> Articles 3.3 and 4.2 of the DSU; *see also U.S. Import Measures*, para. 70, where in finding that a particular measure was not within the panel's terms of reference, the Appellate Body considered, among other things, the fact that the measure had not yet been taken at the time the European Communities requested consultations.

<sup>92</sup> Panel Report, para. 7.140.

<sup>93</sup> Japan Appellant Submission, paras. 123-124.



simply taking issue with the Panel's findings of fact. For this and the reasons stated above, Japan's claim must fail.

**2. The *Sunset Policy Bulletin* Does Not Mandate WTO-Inconsistent Action**

60. Even if the *Sunset Policy Bulletin* were a challengeable measure, in order for a measure, as such, to be found WTO-inconsistent, the measure must be "mandatory," *i.e.*, it must require WTO-inconsistent action or preclude WTO-consistent action.<sup>94</sup> The Appellate Body and several panels have explained the distinction between mandatory and discretionary measures. A Member may challenge, and a WTO panel may find against, a measure "as such" only if the measure "mandates" action that is inconsistent with WTO obligations, or "precludes" action that is WTO-consistent.<sup>95</sup> In accordance with the normal WTO rules on the allocation of the burden of proof, it is up to the complaining party to demonstrate that any challenged measure mandates WTO-inconsistent action or precludes WTO-consistent action.<sup>96</sup>

61. In *German Steel Sunset*, the Appellate Body emphasized that the burden lies with the complaining party to produce evidence as to the scope and meaning of a challenged measure which demonstrates that it is inconsistent with an agreement obligation.<sup>97</sup> That scope and

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<sup>94</sup> *U.S. Export Restraints*, paras. 8.126-8.132.

<sup>95</sup> *United States - Anti-Dumping Act of 1916 ("1916 Act")*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body, adopted 26 September 2000, paras. 88-89; *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 2 February 2002, para. 259; *see also U.S. Export Restraints*, paras. 8.77-8.79; *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, Report of the Panel, adopted 30 August 2002, para. 6.22.

<sup>96</sup> *Brazil - Export Financing Programme for Aircraft - Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW//2, Report of the Panel, adopted 23 August 2001, paras. 5.49-5.50.

<sup>97</sup> *German Steel Sunset*, Appellate Body Report, paras. 146-148, 155-157, 162.

meaning must be determined by reference to the challenged Member's municipal law. An implication of the *German Steel Sunset* finding is that U.S. administrative practice cannot be considered a measure, and cannot be challenged as such.

62. In *German Steel Sunset*, the EC had argued that the U.S. law at issue was not "genuinely discretionary."<sup>98</sup> The Appellate Body disagreed and upheld the Panel's finding that U.S. law as such is not inconsistent with respect to the obligation under Article 21.3 of the SCM Agreement to determine likelihood of continuation or recurrence of subsidization in a sunset review.<sup>99</sup> In that case, the Appellate Body discussed the type of evidence that a party challenging the WTO-consistency of another Member's law might introduce to substantiate its assertion. The Appellate Body did suggest that it could consider the agency's "consistent application" or "consistent practice" – but only *as evidence of the meaning of the challenged law*<sup>100</sup> – not, as Japan now advocates, as evidence that the practice is itself a measure.

63. In any event, while consistent application of a law might provide evidence of its meaning, that meaning ultimately must be determined based on its meaning under municipal law. As demonstrated above, under U.S. municipal law, administrative precedent, regardless of how often repeated, has no functional life of its own.

64. Japan claims that the Panel incorrectly applied the mandatory-discretionary doctrine.<sup>101</sup> According to Japan, the Appellate Body in *United States – Countervailing Measures Concerning Certain Products from the European Communities* ("US - Countervailing Measures") "clarified"

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<sup>98</sup> *German Steel Sunset*, Appellate Body Report, para. 155.

<sup>99</sup> *German Steel Sunset*, paras. 162-63.

<sup>100</sup> *German Steel Sunset*, paras. 147-48.

<sup>101</sup> Japan Appellant Submission, paras. 138-147.

that administrative practice can be challenged “as such”.<sup>102</sup> Japan is wrong. As the Panel correctly found, Japan’s reliance on *US - Countervailing Measures* is misplaced.<sup>103</sup>

65. In *US - Countervailing Measures*, the panel’s characterization of its findings relating to Commerce’s “method” was not appealed, and the Appellate Body did no more than accept the panel’s characterization. Moreover, at the panel stage, this issue was also not disputed; the EC was challenging two Commerce privatization methodologies applied in twelve specific countervailing duty investigations, and the United States focused its argumentation on the substantive issues. That the panel referred to these methodologies in this manner, and the Appellate Body thereafter, thus provides no guidance as to how either a panel or the Appellate Body would answer the question of whether non-binding administrative precedent, or practice, can be independently challenged as a measure, and whether, if it could be so challenged, it mandates a breach of a particular obligation. To the contrary, when panels have been faced with this question, they have uniformly concluded that U.S. administrative practice cannot, as such, be challenged as a measure.<sup>104</sup> Moreover, even if administrative practice could be challenged as a measure, the Appellate Body has consistently applied the mandatory/discretionary distinction to find that measures that do not mandate a breach of an obligation do not breach that obligation. Thus, the findings in *US-Countervailing Measures*, as discussed above, do not support Japan’s conclusion that the *Sunset Policy Bulletin* may be challenged “as such” under the *Marrakesh Agreement Establishing the World Trade Organization* (“WTO Agreement”).

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<sup>102</sup> Japan Appellant Submission, paras. 141-143.

<sup>103</sup> Panel Report, paras. 7.143-7.144.

<sup>104</sup> *E.g.*, *Steel Plate from India*, paras. 7.22-7.24; *U.S. Export Restraints*, paras. 8.126, 8.129-8.130.

66. Japan argues that Commerce's "consistent" application of the *Sunset Policy Bulletin* is evidence that the Bulletin contains "fixed rules" Commerce is "mandated to follow" in every case.<sup>105</sup> As has been evident since the start of this proceeding, Japan misapprehends the nature of the *Sunset Policy Bulletin*.

67. As a factual matter, the *Sunset Policy Bulletin* simply addresses the limited universe of practical scenarios that could arise in the period after imposition of the order - *i.e.* continued existence of dumping, no dumping but depressed import volumes, total cessation of exports, and no dumping and import volumes at or near pre-order levels. That these scenarios are provided for in the *Sunset Policy Bulletin* does not mean that the outcome is predetermined, even when the facts in a particular case fit one of the scenarios. The outcome in each case is determined on the facts of that particular case and must be supported by the evidence on the record of the sunset review at issue. Consequently, each Commerce sunset determination is made on the factual record in that case and, as a result, that final determination cannot be characterized necessarily as a determination either "in accordance with" or a "departure from" the provisions of the *Sunset Policy Bulletin*.<sup>106</sup>

68. Under U.S. municipal law, an interested party would expect Commerce not to be arbitrary or capricious in Commerce's application of the law and in its analysis of identical or similar factual situations. If Commerce determined to change its analysis and to do so would represent a change from past practice, Commerce would explain its determination in the case and normally

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<sup>105</sup> Japan Appellant Submission, paras. 132-133, 135.

<sup>106</sup> See *supra* note 94.

provide parties an opportunity to comment on the change before issuing a final determination. In the final determination, Commerce would then address comments made by a party on that issue. Similar results based on similar facts is not evidence of "following fixed rules"; rather it is evidence of consistent analysis of similarly factual situations.

69. What Japan claims is "strict and consistent adherence to the directives of the *Sunset Policy Bulletin*" consists of nothing more than individual applications of the U.S. antidumping law in the context of sunset reviews. As a point of comparison, Dispute Settlement Body recommendations and rulings apply only with respect to particular parties and only with respect to *that particular dispute*. They cannot – and should not – attempt to say how the WTO agreements might apply to possible future disputes. (That would be an infringement on the exclusive right of the Ministerial Conference to interpret the WTO Agreement.) There is no *stare decisis* in the WTO. Similarly, as the panel noted in *U.S. Export Restraints*, administrative agencies are free under U.S. law to depart from past "practice" if a reasoned explanation is given for doing so.<sup>107</sup> There is no "*stare decisis*" with respect to "practice" that would indicate that it has the independent legal status of a measure.

### **3. The Panel Correctly Declined to Consider Japan's "As Such" Claims**

70. Japan claims that the Panel erred by failing to evaluate whether certain provisions of the *Sunset Policy Bulletin* are WTO inconsistent.<sup>108</sup> The Panel, however, correctly declined to

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<sup>107</sup> *U.S. Export Restraints*, para. 8.126.

<sup>108</sup> Japan Appellant Submission, paras. 148-170.

consider Japan's "as such" claims based solely on the *Sunset Policy Bulletin* in respect of the provisions set forth in sections II.A.2, 3, and 4 of the Bulletin.<sup>109</sup>

71. There are two issues to be considered in a case in which an alleged measure is being challenged before a panel – first, whether the alleged measure mandates a certain course of action; and second, whether that course of action is inconsistent with the WTO obligation cited by the complainant. The Panel correctly identified these issues and considered the sequence in which to address them, noting previous WTO panels had followed different approaches.<sup>110</sup> The Panel concluded that it made more sense to resolve the issue of whether the alleged measure, *i.e.*, the *Sunset Policy Bulletin*, is binding under U.S. law, reasoning that,<sup>111</sup>

If we find that the Bulletin is not a mandatory legal instrument containing legally binding obligations under U.S. law, we will not need to go on to analyze what is required under the WTO provision that Japan alleges to have been violated by the United States in connection with the *Sunset Policy Bulletin* alone.

Japan has failed to demonstrate that the sequence in which the alleged measure, the *Sunset Policy Bulletin* "as such," and the individual provisions of the *Sunset Policy Bulletin*, were addressed is legal error.

72. As demonstrated above, the Panel correctly 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. The Panel correctly concluded, therefore, that the Bulletin did not constitute a measure that can be challenged in WTO dispute settlement proceedings.<sup>112</sup> The Panel therefore was not required to

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<sup>109</sup> Panel Report, paras. 7.145 (use of dumping margins), 7.195 (determination of likelihood on an order-wide basis), 7.264 (obligation to determine likelihood).

<sup>110</sup> Panel Report, paras. 7.115-7.119.

<sup>111</sup> Panel Report, para. 7.118.

<sup>112</sup> Panel Report, para. 7.176.

consider Japan's "as such" claims in respect of particular provisions of the *Sunset Policy Bulletin*.

### III. CONCLUSION

73. For the foregoing reasons, the United States respectfully requests that the Appellate Body:

(A) In respect of determination of likelihood of continuation or recurrence of dumping:

- (1) affirm the Panel's finding in paragraph 8.1(f)(ii) of the Panel Report that the United States did not act inconsistently with Article 11.3 of the AD Agreement in this sunset review in making its determination regarding the likelihood of continuation or recurrence of dumping;
- (2) affirm the Panel's finding in paragraph 8.1(e)(ii) of the Panel Report that the United States did not act inconsistently with Articles 6.10 and 11.3 of the AD Agreement by making its likelihood determination in this sunset review on an order-wide basis;
- (3) affirm the Panel's finding in paragraph 8.1(d)(iii) of the Panel Report that the United States did not act inconsistently with Article 2.4, or, in the alternative, Article 11.3, of the AD 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;

(B) In respect of the *Sunset Policy Bulletin*:

- (1) affirm the Panel's finding in paragraph 8.1(h) that the United States did not act inconsistently with Article 18.4 of the AD Agreement and Article XVI:4 of the WTO Agreement;
- (2) affirm the Panel's finding in paragraph 8.1(f)(i) that 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, and affirm the Panel's finding in paragraph 8.1(e)(i) that Japan has failed to show that the *Sunset Policy Bulletin* as such is inconsistent with Articles 6.10 and 11.3 of the AD Agreement regarding the basis of the likelihood of continuation or recurrence of dumping determinations in sunset reviews.