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

I. INTRODUCTION

The final Appellate Body Report of the World Trade Organization (WTO) for 2003, *United States – CRS Sunset Review,* is remarkable for two very disparate reasons. On one hand, this Report sees the likely expansion of the scope of the WTO's review of internal administrative procedures of member states through a broad interpretation of the kinds of "measures" that can be challenged under WTO covered agreements. On the other hand, the complainant in this case, Japan, failed to obtain a satisfactory outcome because of restrictions on the role of the Appellate Body preventing the original Panel's flawed analysis from being mended.[1] Overall, the Report is an example of the haltering yet persistent development of the WTO's dispute settlement system as an effective international tribunal.

II. THE DISPUTE

The dispute concerned a challenge to a sunset review conducted by the United States Department of Commerce (USDOC) of an anti-dumping duty imposed on two Japanese importers of corrosion-resistant steel.

(a) What is a Sunset Review?

WTO member states impose anti-dumping tariffs to protect local industries from dumping, namely, when importers sell products for less than their normal price. A sunset review is an investigation by the relevant domestic authority to determine if anti-dumping tariffs may continue after the maximum prescribed period ends. As an exception to the WTO's aim of encouraging free trade by removing tariffs, the Anti-Dumping Agreement regulates closely anti-dumping tariffs. Under this

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* World Trade Organization, Appellate Body Report, WT/DS244/AB/R, circulated on 15 December 2003, adopted by Dispute Settlement Body on 9 January 2004 (US – CRS Sunset Review).

[1] United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan "Report of the Panel", 14 August 2003, WT/DS244/R [multi-part] (03-4104) (Panel Report).

Agreement, member states have to prove that dumping exists and local industries are injured before such tariffs may be imposed.[2] Further, anti-dumping tariffs may only apply while dumping continues, which must be terminated after five years at the latest. This restriction is lifted if a further investigation or "sunset review" is conducted, to determine whether dumping and injury are likely to continue or re-occur if tariffs are terminated. This is known as a "likelihood determination".[3]

(b) Details of the Dispute

The issue in this dispute was whether USDOC's conduct of the sunset review into anti-dumping tariffs on imports of corrosion-resistant steel from Japan was consistent with the Anti-Dumping Agreement. In 1993, the United States had imposed a 36% *ad valorem* tariff on imports of two Japanese steel producers, Nippon Steel Corporation and Kawasaki Steel Corporation, which USDOC had found were dumping steel on the domestic United States market and injuring local industry. A sunset review was therefore conducted in 1999 pursuant to the procedures found in the Sunset Policy Bulletin drafted by USDOC detailing sunset review procedures.[4]

Significantly, the Bulletin was not part of a United States statute or regulation. Instead, it was used in conjunction with certain other legislation, particularly the 1930 Tariff Act (US) and associated Regulations. Despite the submissions of one Japanese importer against the existence of dumping, USDOC's sunset review found it likely that dumping and injury would continue if the tariff was lifted, and the anti-dumping tariff was accordingly continued. Since Japan disagreed with the outcome of that sunset review, it notified a dispute before the WTO

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[2] See generally Articles 2-3, 5-6 of the Agreement on Implementation of Article VI of the 1994 General Agreement on Tariffs and Trade (Anti-Dumping Agreement).

[3] Ibid.

[4] The Appellate Body noted that while a five-year review of a 1993 tariff should have occurred in 1998, the anti-dumping tariffs in this dispute were classified as "transition orders" and deemed imposed when the WTO was established on 1 January 1995. This meant a review was required by 2000: United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan Appellate Body Report, WT/DS244/AB/R, note 4.

Dispute Settlement Body (DSB).[5] After consultations failed, the DSB referred the matter to a Panel.

III. THE PANEL PROCESS[6]

(a) WTO Dispute Settlement Procedures

The 1994 WTO Agreement allows member states to challenge the acts, laws and measures of other member states before the DSB when the measures are inconsistent with the various WTO covered agreements such as the Anti-Dumping Agreement. Acting in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the DSB must establish a Panel to investigate a complaint by a member state if consultations between the disputants fail to resolve the dispute. Operating to a strict timeframe, the Panel reports to the DSB on a member state's consistency with its obligations and, if necessary, the Panel Report may recommend that a member state's actions be aligned with its obligations. Applying the "negative consensus" rule, the DSB must adopt the Panel Report unless there is an appeal to the WTO Appellate Body.[7]

(b) Arguments before the Panel

Japan claimed that the Bulletin and the conduct of the sunset review were inconsistent with the Anti-Dumping Agreement and, as such, the United States' continuation of anti-dumping tariffs was inconsistent with the Agreement. Japan argued that this was because the Bulletin "as such" restricted unlawfully the factors considered in the likelihood determination. In addition, the Bulletin "as applied" used unlawful techniques to determine the level of dumping ("dumping margins"). Responding, the United States argued that the Bulletin could not be the

[5] United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan "Request for Consultations by Japan", 4 February 2002, WT/DS244/1 (02-0523).

[6] United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan "Request for Establishment of a Panel by Japan", 5 April 2002, WT/DS244/4 (02-1902); United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan "Constitution of the Panel Established at the Request of Japan", 22 July 2002, WT/DS244/5 (02-4031).

[7] See DSU Articles 3-4, 6 and 16.

subject of a WTO dispute as it was merely a guide to bureaucratic action.

(c) Two Types of Challenges – "As Such" and "As Applied"

This dispute highlights two types of challenges to the WTO in relation to the "measures" of member states.

One method of argument is to challenge a measure "as applied". In this context, "as applied" is synonymous with "in practice" and means that the way a measure is implemented or used is inconsistent with WTO obligations. This is the traditional route used in WTO and GATT dispute settlement, which reflects the basic understanding that trade is most obviously affected by the decisions and actions of member states in applying various tariff and quota controls. This type of argument relies very heavily on the actual practice of member states and the benefits or effects of a specific decision or series of decisions.

The other method is to argue that the contested measure is inconsistent "as such" with the WTO agreements. In this context, "as such" is synonymous with "on its face" and means that the clear meaning of the text of a measure, such as a statute or regulation, is inconsistent with WTO obligations. In this context, the measure may be challenged before it has had any application to a real event. These arguments may require less evidence in order to present the dispute, but are harder to succeed since many interpretations of the text or measure may be available, some of them consistent with WTO obligations.[8]

In this dispute, Japan's arguments were a combination of the "as such" and "as applied" methods. Japan submitted that the Bulletin was inconsistent "as such" on two points – the use of an order-wide basis to the review and the restriction of relevant factors in making a likelihood determination. Japan also argued that the Bulletin was inconsistent "as applied" in using a "zeroing method" to calculate dumping margins and in the making of the likelihood determination.

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[8] It should be noted that an "as such" challenge will go beyond considering the measure "on its face" if the measure is unclear. In that case, the inquiry considers the application and interpretation of the relevant laws and instruments, including the opinion of experts in the field: see Appellate Body Report para 168.

(d) The Decision of the Panel

Rejecting Japan's complaint without considering the substantive claims, the Panel found that the Bulletin was not challengeable before the WTO as it was "not a mandatory legal instrument obligating a certain course of conduct and thus cannot in and of itself give rise to a WTO violation."[9] In other words, while Japan could challenge various United States statutes and regulations, it could not challenge what was essentially a bureaucratic guidebook used to apply such laws.

IV. THE APPELLATE BODY PROCESS

Dissatisfied with the Panel's findings, Japan appealed the Report to the WTO Appellate Body.[10]

(a) The Role of the WTO Appellate Body

Under the DSU, the Appellate Body has an important albeit circumscribed role in WTO dispute settlement. Created to counter-balance the effectively automatic adoption of Panel Reports, the Appellate Body is a standing group of eminent persons, three of whom sit on any dispute. They hear appeals from Panel Reports but only on issues of law and legal interpretation raised in the Report. Significantly, the Appellate Body can only uphold, modify or reverse the legal findings and conclusions of the Panel. It has no fact-finding power and no power to remand or remit a dispute back to a Panel for further fact finding. This means that if the Appellate Body disagrees with a Panel's interpretations and conclusions, it must attempt to complete the necessary analysis from the Panel's findings and record.[11]

(b) Appellate Body Report

The Appellate Body had to resolve three issues. First, it had to determine what instruments or measures were capable of review "as

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[9] Panel Report para 8.1.

[10] 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)", 17 September 2003, WT/DS244/7 (03-4986).

[11] See DSU Article 17.

such" under the WTO Agreements. Secondly, it had to clarify the role and calculation of dumping margins in sunset reviews under the Anti-Dumping Agreement. Thirdly, it had to review the method for making likelihood determinations in a sunset review under the Agreement.

V. MEASURES SUBJECT TO WTO REVIEW

The preliminary question for the Appellate Body was whether the Bulletin is a measure that may be subject to review or challenge "as such" under the Anti-Dumping Agreement. The United States argued that WTO review is limited to mandatory measures that create legally enforceable rights. As the Bulletin was neither a statute nor a regulation but merely an "administrative procedure", it cannot be challenged under the Dispute Settlement Understanding or the Anti-Dumping Agreement. Japan, along with several third parties, had argued that the Bulletin, as the actual basis of a USDOC sunset review, must be open to challenge for WTO review to be effective.[12]

There were two limbs to the Appellate Body's analysis of this point based on a perceived ambiguity in the Panel Report. One issue was whether there are types of measures that are not open to challenge before the WTO. The other issue was whether a measure that is not mandatory may be a violation "as such" of WTO obligations.

(a) Types of Measures

In determining whether there are types of measures outside the scope of WTO review, the Appellate Body considered the meaning of "measures" in both the DSU and the Anti-Dumping Agreement. A particular instrument, policy or statute cannot be the subject of review if it cannot be characterised as a "measure" under the WTO Agreements. Citing the reference to "measures" in Article 3.3 of the

[12] Brazil made third party submissions under Article 10 of the DSU, arguing against the zeroing technique for calculating margins. A host of other parties (Chile, the European Community, Korea and Norway) argued that the Bulletin should be the subject of a challenge and that the Anti-Dumping Agreement places similar obligations on sunset reviews as it does for initial anti-dumping investigations. Note that the United States also argued that, traditionally, GATT-law has always used state practice to help interpret the meaning of domestic legislation, and that the usual role of a document such as the Bulletin cannot help to interpret the 1930 Tariff Act (US). As such, the Bulletin itself cannot give rise to a WTO dispute.

DSU, the Appellate Body interpreted "measures" to mean one of the following:[13]

1. any acts or omissions by a WTO Member state, including acts of the State's legislature or the executive, such as legislation or regulation;
2. specific rules applied in actual settings;
3. "general and prospective" rules without any application to an actual circumstance; or
4. any instrument containing rules or norms.

In this context, the Appellate Body said in passing that a measure need not be mandatory (in the sense of compulsory, automatic or applied, without the possibility of discretion) to be a measure capable of review.[14] In considering the scope of the Anti-Dumping Agreement, the Appellate Body noted that the Agreement allows a narrower range of reviews than the DSU, specifically curtailing the types of "acts" or statutes that may be reviewed.[15] However, the Appellate Body also stated that no such restriction exists for the review of "measures" under the Agreement that may include not just legislation but also delegated legislation and other non-legislative or non-binding measures.[16]

The Appellate Body supported the broad view it had taken on this issue by referring to the DSU. First, it noted that the WTO is meant to provide "security and predictability" for future trading, not merely to resolve past disputes.[17] Secondly, the Appellate Body suggested that a broad interpretation of "measures" would allow potential disputes to be prevented before actual trade becomes affected.[18] It supported this view by referring to the fundamental requirement in Article 18.4 of the Anti-

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[13] Several previous Panel decisions were cited: Appellate Body Report paras 81-82 note 80.
[14] Ibid paras 88-89.
[15] Generally Article 17.4 of the Anti-Dumping Agreement limits "acts" to when a definitive anti-dumping duty is imposed, when a price undertaking has been accepted, or when a provisional measure has been established.
[16] Appellate Body Report paras 84-85, citing United States – Anti-Dumping Act of 1916, WT/DS136/AB/R, adopted 26 September 2000, DSR 2000:X, 4793; and Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767.
[17] Appellate Body Report para 82.
[18] Ibid.

Dumping Agreement requiring member states to ensure that all "laws, regulations and administrative procedures" are in "conformity" with obligations under the Agreement. The Appellate Body felt that "such laws, regulations and administrative procedures" included "the entire body of generally applicable rules, norms and standards" associated with anti-dumping tariffs.[19]

After defining "measure" so broadly, the Appellate Body explained the restrictions to WTO review it had perceived in the DSU. While noting that the fundamental requirement was whether a measure however characterised could be attributed to a member state, the Appellate Body emphasised that the only real issues were: (a) whether a member state had believed that action by way of the DSB would be "fruitful", and (b) whether the action had been undertaken in good faith.[20] In other words, there was no substantive preliminary or threshold test for accessing WTO review, and any measure (mandatory or non-mandatory) could be challenged "as such".

In applying the above considerations to the Bulletin, the Appellate Body could see no reason to exclude that document from WTO review.

(b) Mandatory Measures

When considering the second limb of its analysis on this point, the Appellate Body reviewed the Panel's finding that the Bulletin was not "challengeable" since the Bulletin was not mandatory and did not create "legally binding obligations". The Panel's reasoning was to apply the "mandatory/discretionary distinction", a test long been a part of GATT jurisprudence but not found in the text of any agreement. Traditionally, the distinction differentiates between, on one hand, legislation that requires or compels a specific action or outcome by a

[19] Ibid para 87. Note that this interpretation of Article 18.4 of the Anti-Dumping Agreement is heavily reliant on the Appellate Body's decision in US – Anti-Dumping Act of 1916, which found that, while Article 18.4 restricts the types of "as applied" challenges to the WTO, it is silent on "as such" challenges which therefore does not restrict challenges to legislation.

[20] Appellate Body Report paras 86 and 89. It should be noted that the Report does raise the perplexing question of member state liability for private entities that may exercise a regulatory role, such as the Australian Stock Exchange in the Australian context. It also leaves unanswered the question of member state liability for regional and local governments: ibid note 78.

decision-maker of a member state, and on the other hand, legislation that allows a range of possible actions or choices to a decision-maker.

The Appellate Body in *US – Anti-Dumping Act of 1916* explained that the distinction arose in the context of "as such" complaints before GATT panels when they had to determine what legislation could be challenged "as such". In that context, since mandatory legislation had one certain outcome, it could result in a GATT violation and therefore could be challenged "as such". However, discretionary legislation could only be challenged on the "as applied" basis, that is, on the basis of actual decisions made under the legislation.[21] Further, unlike mandatory legislation, discretionary legislation could have several outcomes, some of which might not be a violation. If so, it could not be challenged on the "as such" basis.

In this dispute, the Appellate Body did not criticise the Panel's use of the mandatory/discretionary distinction although it did caution against its application in a "mechanistic fashion".[22] This caution accords with previous Appellate Body Reports where the Appellate Body had questioned the use of the distinction and studiously avoided determining the validity of the test. However, the Appellate Body criticised the Panel's approach to determining whether the Bulletin was mandatory or discretionary, and reversed the Panel's finding that it was not mandatory. In particular, the Appellate Body rejected the very limited textual basis on which the Panel had based the Bulletin's characterisation,[23] with the result that it concluded that the Bulletin could be reviewed in light of Japan's complaints.

VI. DUMPING MARGINS IN SUNSET REVIEWS

The Appellate Body was required to determine several related issues concerning dumping margins in sunset reviews. One issue was whether dumping margins are required in a sunset review. A second issue was,

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[21] See US – Anti-Dumping Act of 1916, Appellate Body Report paras 60-68.
[22] Appellate Body Report para 93.
[23] The Appellate Body noted that the Panel appeared to rely solely on a few phrases from the Introduction to the Bulletin for its characterisation. The Appellate Body stated that it expected to see reference to the specific provisions of the Bulletin, a comparison between the Bulletin and the supervening legislation, and an evaluation of the extent to which the Bulletin was seen as binding by USDOC: ibid paras 95-99.

if dumping margins are used, whether they should be calculated in accordance with particular obligations. A third related issue was, if there are obligations, whether a specific obligation required dumping margins to be calculated for individual importers or producers. Japan had argued that the Bulletin was inconsistent with the Anti-Dumping Agreement because it had adopted a method for calculating margins in violation of the Agreement. The United States argued that the Anti-Dumping Agreement is silent on the role of dumping margins in sunset reviews and, therefore, there cannot be any requirement or obligation on their use.

(a) Sunset Review under the Anti-Dumping Agreement

Reviewing the role of sunset reviews in the Anti-Dumping Agreement, the Appellate Body noted the differences between sunset reviews and original investigations. It placed particular emphasis on the "likelihood determination" of a sunset review as required in Article 11.3 of the Agreement to find that "the expiry of the duty would be likely to lead to continuation or recurrence of dumping". The Appellate Body identified several requirements for sunset reviews flowing from Article 11.3 including as follows:

1. a sunset review should be a predictive or forecasting decision;
2. the task should be to determine the likelihood of dumping in the future, which differs from the "fact-finding" or contemporary nature of an original investigation's determination of dumping;[24]
3. the authority conducting the sunset review should have "investigatory and adjudicatory" roles;
4. a review should require reconsideration and re-gathering of information that the Appellate Body characterised as an "active" rather than a "passive" process; and
5. the determination of "likelihood" should find the dumping "probable", not merely "possible or plausible".[25]

The Appellate Body found support for these requirements in Article 11.4 and Article 12.3 of the Agreement. Article 11.4 applies the

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[24] Ibid paras 105-107.
[25] Ibid paras 110-111.

evidence and procedure requirements of initial investigations to sunset reviews, whereas the latter applies the notice provisions of initial investigations to sunset reviews.[26] Also, this provision recognises that the review process may take up to a year, pointing to an assumed rigorous process.[27] It also recognises that the Panel should characterise the sunset review as being "reasoned" and having an evidential basis.[28]

(b) Use of Dumping Margins in a Sunset Review

The Appellate Body agreed with the Panel's reasoning that there are no prescribed methods for making a likelihood determination in a sunset review under the Anti-Dumping Agreement. In particular, there is no obligation on member states to calculate dumping margins in sunset reviews, unlike initial investigations. While Article 11.3 identifies the nature and role of a sunset review, it is silent on methodology, which the Appellate Body interpreted as allowing member states to choose the appropriate methodology, which may or may not include the use of dumping margins. The Appellate Body supported this position and observed that dumping margins may be inconclusive in determining whether dumping would continue or re-occur if anti-dumping tariffs were to be lifted.[29]

(c) Calculation of Dumping Margins I – "Zeroing Methods"

Although the Anti-Dumping Agreement does not mandate dumping margins in sunset reviews, the Appellate Body found that if member states used dumping margins in making a likelihood determination, then the calculation of those margins must comply with the Agreement. Reversing the Panel's contrary statement on this point, the Appellate Body found that the disciplines established by Article 2.4 of the Agreement applied to sunset reviews. The Appellate Body justified this interpretation by reference to the broad language in Article 2 ("For the purposes of this Agreement") and the absence of any other definition of "dumping" in the Agreement. One specific discipline of Article 2.4

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[26] Ibid para 112.
[27] Ibid para 113.
[28] Ibid para 114, quoting the Panel Report at para 7.271.
[29] Appellate Body Report paras 123-124.

identified by the Appellate Body is the restriction on using a "zeroing method" in calculating dumping margins.[30]

While the Appellate Body noted that use of a zeroing method would be inconsistent with Article 2.4 and therefore with Article 11.3, the Appellate Body concluded that there was insufficient information in the Panel's Report for the Appellate Body to complete the necessary analysis on this point. This was because Japan's appeal on this point was restricted to an "as applied" argument. In other words, the Appellate Body could not determine whether USDOC in the sunset review used a zeroing methodology, and could not rule on the consistency of the calculation of dumping margins.[31]

(d) Calculation of Dumping Margins II – "Individual Margin Calculations"

Besides the initial finding that sunset reviews need not include the calculation of dumping margins, the Appellate Body upheld the Panel's statement that if dumping margins were used, then member states should be free to adopt order-wide or individual margin calculations.[32]

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[30] A "zeroing method" for calculating dumping margins means that, when specific margins are combined to determine the aggregate or average margin of dumping, only those margins that reveal an importing price below the "normal" price are included in the calculated dumping margin (a indicator of possible dumping). Margins that reveal an importing price above the normal benchmark (an indicator of no dumping) are given a value of zero in the calculated margin, effectively excluding them from the calculation. Thus, the zeroing method may over-estimate or even falsely "find" dumping by not balancing under-priced and over-priced imports: for a more detailed explanation see Appellate Body Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2291 (EC Bed Linen) para 47, where the Appellate Body upheld a Panel Report that found this method inconsistent with WTO obligations.

[31] A related argument raised by the United States was that one Japanese importer had failed to challenge the use or calculation of these dumping margins during the sunset review or a subsequent domestic administrative review. The Appellate Body dismissed this point, suggesting that WTO dispute settlement would be meaningless if member states were barred from raising issues at the WTO that were not raised before a domestic tribunal by parties, referring for support to its previous decision in US – Lamb, Appellate Body Report, WT/DS177-178/AB/R, adopted 16 May 2001, para 130-131,

[32] In the context of this dispute, "order-wide calculations" referred to the practice of USDOC to calculate a dumping margin in a sunset review for all producers covered by the anti-dumping tariff order. "Individual margin calculations" referred to the

Japan had argued that just as individual calculations were required in initial investigations, so too they were required in sunset reviews. As a result, the Bulletin's requirement of an order-wide calculation was an "as such" violation.

The Appellate Body rejected this view basing its decision on Article 11.3 that does not expressly require individual calculations in sunset reviews. It supported this view by adding that the Anti-Dumping Agreement tends to expressly impose obligations on individual producers, and that its absence in Article 11 is probative. It also referred to Article 9 that allows but does not mandate individual or order-wide tariffs to be declared. Further, although Article 11.4 applies the evidence and procedure requirements of initial investigations to sunset reviews, the Appellate Body found that the need to calculate individual dumping margins in initial investigations is not one of the requirements applying to sunset reviews.[33]

VII. THE LIKELIHOOD DETERMINATION

Does the Anti-Dumping Agreement mandate how factors may be considered when making a likelihood determination in a sunset review? This was the final question for the Appellate Body. It meant that the issue was whether member states could limit the factors to be considered in the sunset review by declaring certain factors to be "sufficient" for a finding that dumping would be likely and by "restricting" the use of other factors. The concern was that such limits would effectively pre-determine the likelihood determination and outcome of the sunset review.

Japan argued that the Bulletin "as such" restricted USDOC to only two factors in making a likelihood determination – dumping margins and import volumes. This violated the Anti-Dumping Agreement as it placed too much weight on two inconclusive factors. Moreover, the Bulletin's "good cause" test limited severely the means by which interested parties could compel other factors to be considered.[34]

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requirement in initial investigations under Article 6.10 of the Anti-Dumping Agreement to calculate, as a rule, dumping margins for each individual importer or producer.

[33] Appellate Body Report paras 149-158, particularly paras 154-155.

[34] It should be noted that the United States argument raised the non-binding nature of

The Appellate Body stated that, while member states were free to prescribe particular factors for consideration when making a likelihood determination in a sunset review, they could not give such factors *a priori* conclusive weight in a likelihood determination.[35] According to it, the danger was that such weightings could effectively become presumptions in favour of positive likelihood determinations. Such restriction in the factors could therefore contravene the need for a sufficient factual or evidential basis for a likelihood determination under Article 11.3 of the Anti-Dumping Agreement.[36] The Appellate Body referred to previous reports where requirements that were effectively presumptions had been found to be inconsistent with WTO obligations when they had become "irrebuttable".[37]

The Appellate Body identified that the critical question was whether the Bulletin placed conclusive weight on only two factors – dumping margins and import volumes. Despite a very close textual and contextual analysis of the Bulletin and related legislation, as well as statistics presented by Japan on the outcome of past reviews by USDOC, the Appellate Body found that due to the lack of factual findings by the Panel and the absence of uncontested facts on USDOC's use of the Bulletin, it could not complete the necessary analysis to determine whether the weight placed on the two factors was inconsistent with the Anti-Dumping Act.[38]

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the Bulletin and its lack of definitive language emphasising that USDOC was free to make the likelihood determination based on the facts of the particular case. Also, the Panel did not consider this issue since it found that the argument was based solely on the Bulletin, which could not be challenged.

[35] Appellate Body Report paras 175, 178.

[36] Ibid. Note that the Appellate Body criticised specifically the use of dumping margins in sunset reviews only to prove the likelihood of future dumping. While dumping margins may be conclusive in instances of continued dumping, other factors may be relevant to determine the likelihood of renewed dumping, such as "competitive changes [in] the marketplace or strategies of exporters" where dumping ceased on the imposition of the anti-dumping duty: ibid para 177.

[37] See ibid para 191 where the following cases were cited: (a) US – Lead and Bismuth II Appellate Body Report, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601; (b) EC – Bed-Linen (Article 21.5 – India) Appellate Body Report, WT/DS141/AB/RW, adopted 24 April 2003; and (c) US – Countervailing Measures on Certain EC Products Appellate Body Report, WT/DS212/AB/R, adopted 8 January 2003.

[38] Appellate Body Report paras 169-175, 179-184.

On the related question of the Bulletin's requirement for interested parties to show "good cause" before other factors would be considered by USDOC, the Appellate Body again found the lack of factual findings in the Panel Report and the absence of uncontested facts meant that it could not complete the necessary analysis to determine whether the "good cause" requirement violated the Anti-Dumping Agreement.[39] However, when considering the use of the Bulletin "as applied" in the CRS sunset review, the Appellate Body found that USDOC's actions were consistent with the Anti-Dumping Agreement. Recognising that the standard of review for an "as applied" challenge under the Agreement is restricted, the Appellate Body concluded that USDOC and the Panel had not been "unreasonable".[40]

VIII. OUTCOME OF APPELLATE BODY REPORT

Although the Appellate Body had reversed several Panel findings, its inability to complete the necessary analysis on many points meant that it could not make recommendations to the DSB on the dispute. The USDOC sunset review was accordingly upheld and the anti-dumping tariffs on corrosion-resistant steel were re-applied.

IX. COMMENTS

While the Appellate Body Report may help domestic authorities to implement a variety of sunset reviews, it has several significant aspects highlighting the developing but challenging nature of dispute settlement in the WTO. The Report contains a number of possible implications for the application of judicial economy in future Panel Reports. Further, it suggests an expansion in the scope of WTO review, particularly on the domestic or internal administrative practices of member states. Most significantly, it reveals the Appellate Body's need for a remittal or remand power in the face of inadequate Panel findings.

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[39] Ibid paras 185-190.

[40] Ibid paras 192-205. As discussed earlier, "as applied" challenges under the Anti-Dumping Agreement are first limited by Article 17.4 on the types of acts, and then by Article 17.6(i) on the standard of review, namely, whether the facts had been properly established, and whether the evaluation of the facts was unbiased and objective.

(a) Remittal Power for the Appellate Body

In domestic court systems, the power to remit enables higher courts to return cases to lower courts in order to find further relevant facts or to re-determine the case in light of new rulings or new interpretations of the relevant law. The ability to remit or remand is significant because it supports and maintains a distinction between the functions of trial courts and appellate courts. It allows lower courts to focus on the roles of fact-finding and dispute resolution. The distinction allows higher courts to develop a particular focus on law and legal interpretations without undue concern for the facts of the case.

Those elements of domestic court systems seem implicit in the DSU. The discrete roles for Panels and the Appellate Body separate the fact-finding power from the power to interpret WTO Agreements. This reinforces the division between the determination of a specific dispute and the review of legal findings and interpretations.[41] However, the WTO structure has no method for returning disputes to Panels following reversals or recommendations by the Appellate Body. On occasion, the Appellate Body could "complete the necessary analysis" to make a recommendation in a dispute despite flaws in a Panel Report. The Appellate Body noted in *EC-Asbestos* that it could only complete the necessary analysis when there was either sufficient findings in the Panel Report or if there were uncontested facts on the Panel record.[42]

In the present dispute, the Appellate Body was unable to complete the necessary analysis on certain key issues. The failure to resolve these issues was due to the absence of relevant factual findings by the Panel and uncontested facts on the Panel record. The key issues were:

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[41] DSU Article 17.6 and 17.13.

[42] European Community – Measures Affecting Asbestos and Asbestos-Containing Products Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001 (EC-Asbestos). There have been several instances of the Appellate Body completing the necessary analysis: for example Canada – Certain Measures Concerning Periodicals Appellate Body Report, adopted 30 July 1997, WT/DS31/AB/R DSR 1999:I; European Communities – Measures Concerning Meat and Meat Products (Hormones) Appellate Body Report, WT/DS26/AB/R, adopted 13 February 1998, DSR 1998:1, 135; and Australia – Measures Affecting Importation of Salmon Appellate Body Report, WT/DS18/AB/4, adopted 6 November 1998, DSR 1998:VIII, 3327. The Appellate Body declined to complete the analysis in EC – Asbestos as there were no findings by the Panel on the relevant issues identified by the Appellate Body.

1. the use of a zeroing method in the calculation of dumping margins in the sunset review;
2. the weight to be placed on particular factors in the likelihood determination in the sunset review; and
3. the operation of the "good cause" test in allowing alternate factors in the likelihood determination in the sunset review.

Addressing the first issue, the Appellate Body appeared very close to completing the necessary analysis on the zeroing method – suggesting that there was "some similarity" with the method used in *EC–Bed Linen.* However, the Appellate Body was constrained by the Panel's limited statement on methodology and was effectively blocked by the United States refusing to accept the "zeroing" characterisation.[43]

Addressing the second issue, the Appellate Body's very extensive "as such" analysis led it to be "struck" by the far more conclusive tone in the Bulletin on weightings compared to the less conclusive wording of the supervening legislation, which suggests a weight in the Bulletin that was inconsistent with the Anti-Dumping Agreement. However, the Appellate Body was again restrained by the contrary assertions of the parties and the absence of any relevant factual findings by the Panel.[44]

Addressing the third issue, the Appellate Body recalled the evidence of Japan to the Panel on the operation of the "good cause" test, but since this was also contested, the Panel had made no finding on the issue.[45]

The significance of the Panel approach in relation to the above issues is that a factual finding on any of them was likely to have shown that the United States had violated the Anti-Dumping Agreement. Further, the inability to rely on or make additional factual findings was the main barrier to a different recommendation by the Appellate Body.

The absence of a positive recommendation in this dispute highlights a significant barrier to effective WTO appellate review. It suggests a scenario in which the more egregious the Panel decision, the less capacity the Appellate Body has to remedy the error and resolve the

[43] Appellate Body Report para 136.
[44] Ibid paras 181-184.
[45] Ibid paras 188-189.

dispute. In particular, the frustration of the Appellate Body in identifying errors in a Panel Report followed by the inability to resolve them seem contrary to the WTO ethos of resolving disputes through "positive solutions" instead of merely providing empty legal procedures.[46] In this context, a remittal power would help to ensure that disputes are resolved instead of providing hollow appeal victories.

One effect of this appeal structure is that the rulings of the Appellate Body can only ever be prospective in application. Whenever the Appellate Body clarifies the procedures to be followed or revises the meaning of the principle to be applied, the rulings can only be followed by future Panels. While the Appellate Body may highlight inadequacies in the procedures followed by an earlier Panel, there is no opportunity for that Panel to remedy the situation.

In this dispute, the Appellate Body critiqued thoroughly the Panel's deficient methodology for characterising the Bulletin. However, the Panel was not required and was not able to re-characterise the Bulletin in full awareness of the Appellate Body's expectations. This is because only future Panels would be able to use the Appellate Body's ruling on characterising allegedly mandatory measures. This future-only focus diminishes benefits for member states to participate in the WTO's institutionalised dispute resolution procedures.

Of course, there are difficulties in establishing a remittal panel in a system of *ad hoc* panelists. Nevertheless, such a panel is not without precedent. For example, members of the original panel usually conduct arbitrations under Article 21.5 and Article 22.6 of the DSU. Given that these panels are often established after an Appellate Body Report, there seems little difference between these procedures and a remittal to the original panel for supplementary findings.

Reform has been proposed by several member states and forms part of the suggested revisions to the DSU by the Chairman of the Special Session of the DSB on the DSU. The Chairman's text, following

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[46] See for example Article 3.7 of the DSU and the comments in United States – Measures Affecting Imports of Woven Wool Shorts and Blouses from India, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I para 19.

submissions by the European Community and Jordan, suggests a revised Article 17.12 that includes a power of remand where there are insufficient findings or uncontested facts.[47] There is also a suggestion that there be a new Article 17*bis* providing the terms of reference and procedural requirements of the remand panel.[48] It should be noted that this proposal allows only the DSB to establish the remand panel. Jordan's initial submission proposed that the Appellate Body could initiate a remand panel, but this was modified in its second submission.[49] Even though the difference between these two proposals is perhaps of symbolic value only, on the whole, these amendments would be a positive benefit to the dispute settlement process.

(b) Judicial Economy

The inadequacies of a system without remittal procedures may be compounded by the inappropriate application of judicial economy. The principle of judicial economy states that judicial decisions should be restricted to only those issues and findings able to determine or resolve a dispute. The corollary is that the decision-maker need not respond to every legal issue submitted by the petitioners. While not an express requirement of the DSU, the Appellate Body has noted that Panels are not obliged to respond to every legal issue raised by member states.

The Appellate Body's writings on judicial economy emphasise that the twin focus of WTO dispute settlement is on positive outcomes and satisfactory solutions.[50] In this context, an avoidance of unnecessary legal technicality and complexity accords with an interest in resolving disputes in an effective and timely manner. Significantly, the Appellate

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[47] Report by the Chairman to the Trade Negotiations Committee, Special Session of the Dispute Settlement Body, TN/DS/9 (6 June 2003); Contribution of the European Communities to the Improvement of the WTO DSU, TN/DS/W/1 (13 March 2002), WT/DS/W/38 (23 January 2003); Jordan's Contributions towards the Improvement and Clarification of the WTO DSU TN/DS/W/43 (28 January 2003), TN/DS/W/56 (19 May 2003).

[48] Ibid.

[49] For further discussion see Sampson GP (ed), The Role of the WTO and Global Governance (2001, UN University Press, Tokyo).

[50] See comments generally in US – Wool Shorts and Blouses, Appellate Body Report at 19; and India – Patents (US), Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, para 87.

Body has criticised both "false" judicial economy and judicial economy that is not explicit, the latter resulting in partial solutions to disputes and obstructing transparency in the decision-making process.[51]

In this dispute, the Appellate Body did not characterise the Panel's findings as an example of "false" judicial economy. However, the Panel's failure to provide findings on a series of important points suggests a partial or incomplete report. The Panel's limited analysis of the Bulletin and the failure to make any factual findings on the calculation of dumping margins were significant omissions, even if the Bulletin was not capable of review in the Panel's opinion. Such findings were within the competency of the Panel and it had received evidence and submissions on these points. However, the failure to make findings meant that information had become effectively lost to the rest of the dispute settlement process.

The failure to consider these points, even in the alternative, restricted severely any future appeal to resolve the dispute effectively. If the Panel did assume, for the sake of completeness, that the Bulletin was mandatory or capable of review, then alternate findings would have allowed the Appellate Body to complete its necessary analysis. In fact, the only finding the Panel made in the alternative concerned the reasonableness of the use of pre-existing dumping margins in making the likelihood determination,[52] a point the Appellate Body had actually agreed with once the issues of the Bulletin and the use of a zeroing method were put to one side.[53] This finding not only shows the Panel's awareness of alternate interpretations, but it also suggests that there was too great a concern with judicial economy in not considering the other factors probably required by the Appellate Body, including whether the Panel's interpretation of Japan's arguments was "overly restrictive".[54]

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[51] See generally comments in Australia – Salmon, Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, para 223; Japan – Agricultural Products II Appellate Body Report, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, para 111; and Canada – Autos, Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras 116-117.

[52] Appellate Body Report para 119 and note 136.

[53] Ibid para 205 and note 153.

[54] Panel Report para 7.172, cited in Appellate Body Report note 136.

X. CONCLUSION

In conclusion, the outcome of this dispute highlights the Panel's inappropriate use of judicial economy and a more extensive report would have allowed for effective appellate review. Moreover, the failure to resolve this dispute should alert future panels to the effects of the extent of their engagement in judicial economy. A clear implication of the Appellate Body's implied criticism of the Panel was that a full and comprehensive report would have permitted the Appellate Body to complete its analysis and resolve the dispute in a more effective manner. Consequently, it is foreseeable that an increased number of future Panel Reports would determine factual findings in greater depth and provide alternate factual findings on key issues.

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