KOREA – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON STAINLESS STEEL BARS

(DS553)

RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS TO THIRD PARTIES

September 30, 2019

TABLE OF REPORTS

Short Title	Full Case Title and Citation
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003
EU – Footwear (China)	Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012
US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, WT/DS282/AB/R, adopted 28 November 2005
US – Corrosion-Resistant Steel Sunset Review (AB)	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Oil Country Tubular Goods Sunset Reviews (AB)	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) (Panel)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW

WRITTEN QUESTIONS FROM THE PANEL TO ALL THIRD PARTIES AFTER THE THIRD PARTY SESSION

1. <u>To all third parties</u>: Whether an interested party has raised a matter during an investigation has been a relevant consideration in a number of contexts in countervailing and anti-dumping disputes (see, e.g. Panel Reports, *EC – Countervailing Measures on DRAM Chips*, para. 7.229; *EU – Fatty Alcohols (Indonesia)*, para. 7.196, 7.204, and footnote 500; and *Egypt – Steel Rebar*, paras. 7.382 and 7.386; *China – Autos (US)* paras. 7.30 and 7.292).

(a) Do you accept that, if an interested party raises a matter with sufficient evidence and argumentation in a sunset review under Article 11.3 of the Anti-Dumping Agreement, an investigating authority is required to address it explicitly in its determination? If so, what factors should guide a panel in determining whether an interested party has adduced sufficient evidence and argumentation on a given matter to warrant its explicit consideration in the authority's determination?

1. Whether an investigating authority must address an interested party's argument in its public notice of an affirmative sunset review determination, continuing an anti-dumping duty order, will depend on whether the party's argument is "relevant" and "considered material by the investigating authorit[y]" within the meaning of Article 12 of the Anti-Dumping Agreement, which applies to reviews pursuant to Article 11.[1]

2. Article 12.2.2 requires investigating authorities to issue a public notice of final affirmative determinations containing "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters or importers." The chapeau of Article 12.2 requires investigating authorities to "set forth" in such notices "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Therefore, Article 12 does not require investigating authorities to address in their public notices of final determinations each and every argument raised by interested parties over the course of an investigation or review, but only those arguments that are relevant and considered material by the investigating authority.

3. Accordingly, the panel in *EU – Footwear (China)* rejected the view that whether information and reasons for the acceptance or rejection of arguments must be provided should be judged from the perspective of the interested parties. The panel explained that arguments "of importance to individual interested parties" may not be "'material' within the meaning of Article 12.2.2."[2] Similarly, in *China – GOES*, the Appellate Body reasoned that "[t]he obligation of disclosure under Article [ ] 12.2.2…is framed by the requirement of 'relevance', which entails

[1] Anti-Dumping Agreement, Article 12.3 ("The provisions of [Article 12] shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11…").

[2] *EU – Footwear (China)*, para. 7.844; *see also EC – Tube or Pipe Fittings (AB)*, para. 7.424 ("We understand a 'material' issue to be an issue that has arisen in the course of the investigation that must necessarily be resolved in order for the investigating authorities to be able to reach their determination.").

the disclosure of the matrix of facts, law and reasons that logically fit together to render the decision to impose final measures."[3]

4. In sum, an investigating authority need not address an argument made by an interested party that the authority deems not relevant or material to its determination, irrespective of the importance of the argument to the interested party or the amount of evidence and argumentation it has adduced with respect to the argument.

(b) If an interested party does not object to, or challenge, a certain matter during a sunset review under Article 11.3, does this have any implications for whether an authority has acted consistently with Article 11.3?

5. In evaluating whether an investigating authority has acted consistently with Article 11.3, a panel must consider whether the authority reached a reasoned conclusion in light of the facts and circumstances.[4] In some cases, evidence that interested parties failed to raise matters related to the claims or provide sufficient evidence during the underlying investigation may be relevant to a Member's claim of inconsistency before a WTO panel. However, interested parties need not object to or challenge a certain matter during a sunset review proceeding to preserve a Member's right to claim in dispute settlement proceedings that an investigating authority acted inconsistently with Article 11.3 with respect to the matter.

2. <u>To all third parties</u>: Korea contends that "*[m]oreover, Japan has not challenged the like product definition in this dispute, nor did the Japanese respondents raise any such questions in the underlying investigation*" (Korea's first written submission, paras. 152). Would the failure to challenge the "like product definition" provide a legal defence against Japan's claims regarding the conditions of competition between general-purpose steel and special steel in respect of the authorities' the likelihood-of-injury assessment? If so, please explain the basis for this legal defence by reference to the text of the Anti-Dumping Agreement and any other relevant covered agreements. Please also address the considerations in paras 7.278 and 7.343 of Panel Report, *China – Autos* and para. 7.66 of Panel Report, *China – X-Ray Equipment*.

6. Each claim of inconsistency must be assessed on its own merits. The fact that a complaining party could have raised an additional claim would not itself prevent a panel from making a finding of inconsistency with a claim that has been raised. Further, as discussed above, interested parties need not necessarily object to or challenge a matter in a sunset review proceeding to preserve a Member's right to claim in dispute settlement proceedings that an investigating authority acted inconsistency with respect to Article 11.3. However, if interested parties have failed to raise particular issues during the underlying investigation, the Panel could take such failure into an account in evaluating whether the determination by the investigating authority contains a sufficient degree of detail in reaching conclusions on the issues of law and

[3] *China – GOES (AB)*, para. 258.

[4] *See US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 283-284 (indicating that the ordinary meaning of the terms "determine" and "review" in Article 11.3 require a "reasoned conclusion on the basis of information gathered as part of a process of reconsideration and examination" (internal citation omitted)); *see also* Anti-Dumping Agreement, Art. 17.6 (requiring an assessment be based on an unbiased and objective evaluation of the facts).

fact. For example, if certain issues were not raised by interested parties during the investigation, an explanation regarding certain aspects of the determination may be less detailed than in a situation when interested parties have raised arguments regarding such issues before the investigating authority.

3. <u>To all third parties</u>: Do any aspects of Article 11.3 or any other provisions in the Anti-Dumping Agreement provide guidance as to whether either macro-level (i.e. country-wide) data or producer-specific data should be preferred when assessing the capacity utilization of entities subject to anti-dumping duties as part of the broader assessment of whether lifting anti-dumping duties would likely lead to the continuation or recurrence of injury?

7. Article 11.3 of the Anti-Dumping Agreement – the provision of the Anti-Dumping Agreement applicable to sunset reviews – does not address whether an investigating authority should evaluate macro-level or producer-specific data in assessing the capacity utilization of subject foreign producers. Thus, that provision does not limit the data on which investigating authorities may rely when making such an assessment. Therefore, the relevant evidence to be examined in a particular case will depend on the specific facts and circumstances at issue.

4. <u>To all third parties</u>: What is the relationship between the meaning of "injury" reflected in footnote 9 of the Anti-Dumping Agreement, and the meaning of "injury" in Article 11.3 of the Anti-Dumping Agreement? Does this relationship have any bearing on whether evidence on "other known factors" should be addressed in assessing whether the lifting of anti-dumping duties would be likely to lead to the recurrence or continuation of injury under Article 11.3?

8. The definition of "injury" in footnote 9 of the Anti-Dumping Agreement is applicable for the whole Anti-Dumping Agreement (unless otherwise specified), including in the context of sunset reviews pursuant to Article 11.3. Footnote 9 provides:

> Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3].

9. While the definition of "injury" in footnote 9 provides that the term "shall be interpreted in accordance with the provisions of [Article 3]", it does not follow that an investigating authority must comply with the requirements for original investigations set out in Article 3, including the obligation to consider "other known causes" of injury under Article 3.5.

10. The Anti-Dumping Agreement distinguishes between original determinations of injury pursuant to Article 3 and determinations of the likelihood of continuation or recurrence of injury pursuant to Article 11.3. Thus, the applicability of the definition of "injury" in footnote 9 of the Anti-Dumping Agreement to the term as used in Article 11.3 does not suggest an obligation for investigating authorities to follow the requirements of Article 3, including the requirement in Article 3.5 to consider "any known factors other than the dumped imports which at the same time are injuring the domestic industry."

11. The Appellate Body in *US – OCTG Sunset Reviews* also rejected the view that the applicability of the definition of "injury" in footnote 9 has the effect of extending all obligations applicable to original investigations under Article 3 to sunset reviews under Article 11.3.[5] As the Appellate Body explained, "[g]iven the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the "review" of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3."[6]

5. <u>To all third parties</u>: Japan appears to contend that authorities must ensure that the "*<u>entire</u> likelihood-of-injury to the domestic industry… is attributable to the imports of the product under investigation*" *(Japan's first written submission, para. 179).* Would you agree that *all* likely sources of injury to domestic industry must stem from the lifting of the anti-dumping duties in order for the conditions in Article 11.3 to be met?

12. Article 11.3 of the Anti-Dumping Agreement provides that an investigating authority must determine that the "expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury." The text of that provision does not require investigating authorities to establish that the *entire* likelihood-of-injury to the domestic industry is attributable to subject imports. Therefore, it is possible for an investigating authority to render an affirmative determination under Article 11.3 even where factors other than subject imports render a domestic industry vulnerable to the continuation or recurrence of material injury after revocation such that subject imports would not be the sole cause of an industry's distress.

6. <u>To all third parties</u>: Japan appears to consider it significant (Japan's first written submission, para. 181) that the Korean authorities found there to be a likelihood of *recurrence* of injury, as opposed to a likelihood of *continuation* of injury. What is the significance of this distinction? If there is a finding of "recurrence", does that necessarily presuppose that the domestic industry is not presently experiencing material injury from any source (dumping or otherwise)? If there is a finding of "continuation", is it necessary for the pre-existing material injury to be attributable to dumping (despite the application of anti-dumping duties)?

13. Article 11.3 requires investigating authorities to determine whether "the expiry of the duty would be likely to lead to continuation or recurrence of…injury." Thus, an investigating authority may predicate an affirmative sunset determination on the finding that revocation of an order would be likely to lead to "continuation or recurrence" of injury, without specifying whether its determination is based upon the likely continuation of injury or the likely recurrence of injury. Nor is the United States aware of panel or Appellate Body findings in which a distinction was drawn, or was required to be drawn, between the continuation of injury and the recurrence of injury.

[5] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 277 ("It does not follow, however, from this single definition of 'injury', that all of the provisions of Article 3 are applicable in their entirety to sunset review determinations under Article 11.3.").
[6] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 280.

7. <u>To all third parties</u>: Article 6.8 of the Anti-Dumping Agreement provides, in relevant part, that: "*In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, <u>may</u> be made on the basis of the facts available." (emphasis added)*

(a) Do you accept that whether to have recourse to the "facts available" mechanism is a matter of discretion for an investigating authority?

14. The use of the word "may" in Article 6.8 indicates that, while authorities have the ability to use facts available under appropriate circumstances, they are not required to do so.[7] Other provisions of Article 6 of the Anti-Dumping Agreement that provide mandatory obligations on authorities, such as Articles 6.3, 6.4, 6.5, 6.9, 6.10, 6.12, and 6.13, all use the word "shall." The permissive nature of Article 6.8 is further confirmed by the guidance in Annex II, which provides in non-mandatory terms that investigating authorities "will be free" to make determinations on the basis of the facts available.[8]

(b) In WTO dispute settlement, is a complainant making a claim under Article 6.8 required to show that an authority did, in fact, exercise discretion to have recourse to the "facts available" mechanism, and if so, what record evidence would be relevant in that regard? In your response, please comment on the relevance of the explicit decision by the Korean authorities to have recourse to the "facts available" in respect of some matters in its determination (OTI Final Report, (Exhibit KOR-5b) (BCI) pp.30-32), as compared to the particular matters alleged by Japan in its claim under Article 6.8 for which there does not appear to be such an explicit decision?

15. In WTO dispute settlement, the "burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[9] Accordingly, the complaining party must establish a *prima facie* case of inconsistency with Article 6.8 of the Anti-Dumping Agreement,[10] including by demonstrating that the authority in fact applied facts available within the meaning of that provision. If an authority has exercised its authority to do so, it would be reasonable to expect that this decision would be apparent on the face of the determination. Where an authority has chosen not to exercise its authority to apply facts available, the obligations of Article 6.8 would not apply.

8. <u>To all third parties</u>: Korea contends that the Korean authorities were examining "*the likely increase in exports based on <u>countrywide</u> excess capacity and utilization*", and while producer-specific data on their own production capacity and utilization "*may be*

[7] *See EC Salmon (Norway)*, para. 7.348 (Article 6.8 does not require investigating authorities to use "facts available" when the conditions for resorting to "facts available" have been satisfied"); *EU Footwear (China)*, para. 7.816 ("Article 6.8 merely **allows** the investigating authority to make determinations on the basis of facts available. We consider it evident that the use of the term "may" in this provision precludes the view that an investigating authority is required to use facts available, even if the conditions in Article 6.8 are satisfied.") (emphasis in original).
[8] Anti-Dumping Agreement, Annex II, para. 1.
[9] *US – Wool Shirts and Blouses (AB)*, p. 14. *See also China – Autos (US)*, para. 7.6.
[10] *EC – Hormones (AB)*, para. 109 (*citing US – Wool Shirts and Blouses (AB)*, pp. 14-16). *See also China – Broiler Products*, para. 7.6.

***relevant to consider*", it does not constitute *"necessary"* information under Article 6.8 for the purposes of a countrywide assessment under Article 11.3 (see Korea's first written submission, paras. 339-340 (emphasis added)). Is there anything in the Anti-Dumping Agreement to show that countrywide data would constitute the "necessary" information under Article 6.8 in the context of ascertaining production/export capacity and capacity utilization in an analysis under Article 11.3 of the Anti-Dumping Agreement?**

16. In resorting to "facts available" under Article 6.8, the missing information must be "necessary." The use of the term "necessary" as a qualifier carries significance because it ensures that Article 6.8 is "not directed at mitigating the absence of 'any' or 'unnecessary' information, but rather is concerned with overcoming the absence of information required to complete a determination."[11] If such "necessary" information is absent, "the process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record."[12]

17. When an investigating authority must rely on "facts available" under Article 6.8, "[t]here has to be a connection between the 'necessary information' that is missing and the particular 'facts available'" on which a determination is based.

9. To all third parties: In response to Japan's production capacity/capacity utilization claim under Article 11.3 of the Anti-Dumping Agreement, Korea contends *inter alia* as follows. Rather than responding to the "*specific and grave concerns*" that the Korean authorities conveyed about the Japanese respondents' data, the "*Japanese respondents repeatedly changed their explanations for the method employed in calculating the production capacities during the course of the review",* and according to Korea, *"no convincing explanation was offered by the respondents for these different estimation methods – the [KIA] noted that the respondents did not submit other objective and reliable material to support their arguments in favor of using their production and capacity data", and they "rendered it impossible to verify the data".* (Korea's first written submission, paras. 190 and 216-217).

Can Korea permissibly rely on the apparent non-cooperation of the Japanese respondents as a basis for rejecting their data under Article 11.3 of the Anti-Dumping Agreement, whilst simultaneously arguing that it did not have recourse to the "facts available" under Article 6.8 of the Anti-Dumping Agreement despite that non-cooperation? Why/why not?

18. The application of "facts available" under the circumstances described by Article 6.8 is at the discretion of the investigating authority. Where that authority has been exercised, the requirements of Article 6.8 and Annex II will apply. An investigating authority may reject information because it is not relevant or inaccurate. The facts available provisions further permit an investigating authority to replace information where the respondent party has been non-cooperative and where the information requested is necessary and the information provided is either deficient or unreliable.

19. A claim under Article 11.3 must be assessed on its own merits and does not formally relate to an evaluation under Article 6.8. In analyzing likely injury, an investigating authority

[11] *US – Carbon Steel (India) (AB)*, para. 4.416.
[12] *US – Carbon Steel (India) (AB)*, para. 4.416.

may rely on any source of data available to it, so long as the investigating authority's analysis is based on positive evidence and an objective examination. Therefore, the task of the Panel would be to determine whether the investigating authority's findings with respect to the likelihood of continuation or recurrence of injury were supported by the record evidence such that a reasonable and unbiased authority could have reached the same conclusion. This evaluation will depend on the particular facts and circumstances of the case, including, for example, the findings made by the authority with respect to the reliability and probative value of the evidence.