Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars
(DS553)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

October 7, 2019

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

I. CUMULATIVE ASSESSMENT IN SUNSET REVIEWS PURSUANT TO ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

1. Japan suggests that an investigating authority may be required to consider certain differences between imports and the domestic like product in evaluating their competitive relationship to justify a cumulative assessment in a sunset review consistent with Article 11.3 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

2. Article 11 of the Anti-Dumping Agreement concerns the duration and review of anti-dumping duties, or sunset reviews. In particular, Article 11.3 requires an order to be terminated five years after its imposition, unless a Member conducts a review to determine whether revocation would be likely to lead to continuation or recurrence of dumping and injury. If a Member in conducting a sunset review concludes that revocation would be likely to lead to continuation or recurrence of dumping and injury, then the Member may continue the order.

3. Unlike Article 3 of the Anti-Dumping Agreement (Determination of Injury), which explicitly provides certain preconditions for making a cumulative assessment in the context of original investigations, Article 11.3 does not prescribe the methodology by which a sunset review must be conducted. Nor does Article VI of the GATT 1994 require any specific analysis for the assessment of injury in sunset reviews.

4. Consistent with the applicable standard of review in Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU, the Panel need only consider whether the Korean investigating authority's evaluation of the facts was unbiased and objective. Article 17.6 provides that a panel:

> [S]hall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned…

5. What is adequate will depend on the facts and circumstances of the case, recognizing that an investigating authority may have to consider conflicting arguments and evidence. The Appellate Body recognized in *US – Anti-Dumping Measures on Oil Country Tubular Goods* that because "Article 11.3 does not prescribe any particular methodology to be followed by an investigating authority in conducting a sunset review," investigating authorities need only "arrive at a reasoned and adequate conclusion" with respect to cumulation, which may "in certain cases" require "an examination of whether imports are in the market together and competing against each other."

6. Consequently, an investigating authority may make a cumulative assessment in a sunset review so long as the decision to cumulate is based upon an unbiased and objective evaluation of the facts.

II. EVALUATION OF PRODUCT DIFFERENCES IN SUNSET DETERMINATIONS

7. The United States will next address Japan's argument that the Korean investigating authority acted inconsistently with Article 11.3 of the Anti-Dumping Agreement by not analyzing "the effects of the product under investigation on the domestic like products . . . on a type-by-type basis" including "a comparison of prices and other factors between the product under investigation and the domestic like products for general-purpose steel and special steel in separate analyses."

8. The United States understands that the Korean investigating authority defined a single domestic like product, as well as a single domestic industry corresponding to the domestic producers "as a whole" of the like products.

9. Given its definition of a single domestic industry, the Korean investigating authority was only required to make a single determination as to whether revocation of the orders was likely to result in the continuation or recurrence of injury to the industry.

10. As explained by the panel in *EU – Footwear (China)* in the context of material injury, "consideration of the performance of a particular type as opposed to other types within one like product is not necessarily relevant" because "the industry is defined as producers of the like product, and the determination to be made is whether the industry as a whole is materially injured by dumped imports."

11. However, depending on the facts and circumstances, an analysis of different types of merchandise produced by a single domestic industry may be appropriate in the context of a sunset determination. For example, if an investigating authority assesses the significance of likely price undercutting by comparing the average unit values (AUVs) of subject imports to the AUVs of the domestic like product, and the AUVs are based on baskets whose product mixes are not comparable, an investigating authority may control for differences in physical characteristics affecting price comparability.

12. Investigating authorities may also need to consider the degree of competitive overlap between subject imports and the domestic like product where the "differentiation of goods . . . affects the competition between them in ways that have an impact on the assessment of" likely injury.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

I. THE PROPER INTERPRETATION OF ARTICLE 11.3 OF THE ANTI-DUMPING AGREEMENT

13. Japan suggests that the Korean investigating authority failed to address certain evidence presented by the interested parties in the underlying investigation. 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.

14. 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.

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

16. 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.

17. With respect to the Korean investigating authority's decision to cumulate in the sunset review at issue, Korea observes that Japan has not challenged the definition of the like product in this dispute, and suggests that the Japanese interested parties should have raised objections to the like product definition in the underlying investigation. 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, 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 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.

18. With respect to an investigating authority's examination under Article 11.3, 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].

19. 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.

20. 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."

21. 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. 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."

22. Further, 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.

II. THE INTERPRETATION AND APPLICATION OF ARTICLE 6.8 OF THE ANTI-DUMPING AGREEMENT IN THE CONTEXT OF SUNSET REVIEWS

23. 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. 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.

24. 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." 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."

25. 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.

26. 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. Article 6.8 further permits an investigating authority to reply on facts available where the respondent party has been non-cooperative and where the information requested is necessary and the information provided is either deficient or unreliable.

27. 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 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.