

***KOREA – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON STAINLESS STEEL BARS***  
**(DS553)**

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA  
AT THE THIRD-PARTY SESSION OF  
THE FIRST SUBSTANTIVE MEETING OF THE PANEL**

**September 10, 2019**

Madame Chairperson, Members of the Panel,

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute.
2. Our statement will focus on (1) cumulative assessment of the effects of subject imports from multiple countries in the context of sunset reviews under Article 11.3 of the Anti-Dumping Agreement;<sup>1</sup> and (2) Japan’s argument that Korea acted inconsistently with Article 11.3 by not analyzing the effects of the product under investigation on the domestic like products on a “type-by-type” basis, particularly by failing to conduct separate analyses with respect to “general-purpose” steel and “special” steel.
3. The United States does not take a position on the facts of the dispute. The following comments concern the proper legal interpretation of the relevant provisions of the Anti-Dumping Agreement and the GATT 1994.<sup>2</sup>

**I. Cumulative Assessment in the Context of a Sunset Review Pursuant to Article 11.3 of the Anti-Dumping Agreement**

4. 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.<sup>3</sup>

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<sup>1</sup> *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Anti-Dumping Agreement”).

<sup>2</sup> *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

<sup>3</sup> Japan’s First Written Submission, para. 88.

5. 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.

6. 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,<sup>4</sup> 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.

7. Consistent with the applicable standard of review in Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU,<sup>5</sup> 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...

8. 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.<sup>6</sup> The

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<sup>4</sup> Anti-Dumping Agreement, Article 3.3.

<sup>5</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

<sup>6</sup> See *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 93.

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.”<sup>7</sup>

9. 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**

10. 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

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<sup>7</sup> *US – Anti-Dumping Measures on Oil Country Tubular Goods (AB)*, paras. 152-53.

under investigation and the domestic like products for general-purpose steel and special steel in separate analyses.”<sup>8</sup>

11. The United States understands that the Korean investigating authority defined a single domestic like product,<sup>9</sup> as well as a single domestic industry corresponding to the domestic producers “as a whole” of the like products.<sup>10</sup>

12. 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.

13. 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.”<sup>11</sup>

14. 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

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<sup>8</sup> Japan’s First Written Submission, para. 167.

<sup>9</sup> Korea’s First Written Submission, para. 150.

<sup>10</sup> Korea’s First Written Submission, para. 103.

<sup>11</sup> *EU – Footwear (China) (Panel)*, para. 7.533.

not comparable, an investigating authority may control for differences in physical characteristics affecting price comparability.

15. 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.<sup>12</sup>

#### **IV. Conclusion**

16. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of our views.

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<sup>12</sup> *China – Autos (US) (Panel)*, para. 7.343.