UNITED STATES - SUNSET REVIEW OF ANTIDUMPING DUTIES ON CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM JAPAN

WT/DS244

EXECUTIVE SUMMARY

OF THE

ORAL PRESENTATION OF THE

UNITED STATES OF AMERICA

AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

November 12, 2002

1. This proceeding presents essentially six basic questions. First, did the United States act inconsistently with Article 11.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") by self-initiating a sunset review without regard to the evidentiary provisions of Article 5.6 of the AD Agreement? Second, did the United States act inconsistently by not applying the Article 5.8 *de minimis* standard in sunset reviews? Third, did the United States apply a "not likely" standard in its determination of likelihood of continuation or recurrence of dumping? Fourth, did the United States act inconsistently with Article 11.3 in its use of dumping margins calculated prior to the WTO agreements? Fifth, did the United States act inconsistently with Article 11.3 by making its likelihood determination on an "order-wide" basis? Finally, did the United States act inconsistently with Article 11.3 by not applying a quantitative negligibility analysis before it cumulated imports in making its likelihood of injury determination? The answer to all six of these questions is "no." There is no support in the AD Agreement for any of these claims for a simple, yet fundamental reason – it is impossible to act inconsistently with obligations that do not exist.

2. First, however, we address generally Japan's claims with respect to the U.S. Department of Commerce's ("Commerce") final sunset determination and whether Commerce's determination was based on an appropriately conducted review of all relevant and properly submitted facts. An "objective assessment" of Commerce's findings and actions supports an answer in the affirmative.

3. Article 11.3 of the AD Agreement defines the point in time at which the authorities must take stock of or terminate a duty – that is every five years. Article 11.3 also defines the circumstances under which maintaining a duty may be considered "necessary" – that is when continuation or recurrence of dumping and injury is likely. An authority's decision to maintain a duty must be supported by evidence of these requisite circumstances.

4. What does it mean to determine likelihood of continuation or recurrence of dumping and injury? First, consider the words establishing the circumstances under which maintaining a duty may be considered necessary. The word "continuation" expresses a temporal relationship between past and future; something that is happening may continue in the future. The word "recurrence" also expresses a temporal relationship between past and future; something that happened in the past may happen again in the future.

5. Considered together then, these words indicate that in making a determination of the likelihood of continuation or recurrence of dumping and injury, the administering authority must determine what are the prospects of dumping and injury in the future. Without the discipline of the duty, are dumping and injury likely to continue or recur? The analysis required in a sunset review, therefore, is necessarily prospective in nature.

6. In Commerce's final sunset determination, Commerce found likelihood based on two unrefuted facts. The first fact is the continued existence of dumping by the Japanese producers despite the imposition of the discipline. The second fact is the significantly reduced import levels of the Japanese producers evident after the imposition of the discipline. Based on these facts, Commerce determined that dumping was likely to continue if the duty were revoked.

7. Japan also argues that there are a number of substantive and procedural flaws in Commerce's sunset determination. Japan's main procedural claim concerns whether the Japanese producer, NSC, was afforded "ample opportunity" to participate in the underlying sunset review.

8. Rather than demonstrating that Commerce's findings or procedural actions were inconsistent with the AD Agreement, Japan essentially presents a story that is not supported by the record. Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article 17.6 of the AD Agreement, however, direct panels to make an "objective assessment" of the facts of the case and of the applicability and conformity with relevant agreements. This "objective assessment" must necessarily focus on the consistency of the sunset review with the requirements of Article 11.3 and Article 6 of the AD Agreement.

9. Japan has not demonstrated how Commerce's actions in this regard are inconsistent with any of the evidentiary and procedural requirements of Article 6. NSC was on notice of the relevant information requirements and options, as well as the applicable deadlines, at least 15 months prior to the initiation date for the sunset review. Fifteen months provides "ample opportunity" to gather and present any evidence NSC considered pertinent to Commerce's sunset determination. Also, fifteen months is longer than the normal deadline in Article 11.4 for the conduct and completion of sunset reviews. That NSC failed to avail itself of the opportunity to present evidence cannot be blamed on Commerce's actions in this case.

10. Next, with respect to each of the six legal issues in this dispute, Japan's arguments run afoul of the fundamental proposition that the customary rules of treaty interpretation neither require nor condone the imputation into a treaty of words that are not there.

11. With respect to the self-initiation issue and the *de minimis* issue, Japan's argument places the legitimate expectations of the Members as a whole, as expressed in the agreed text of the treaty, at risk. According to Japan, the requirements of Article 5 of the AD Agreement are made applicable to Article 11.3 sunset reviews by virtue of the fact that Article 12.1 mentions Article 5, and Article 12.3 applies to reviews under Article 11. Apparently, according to Japan, the mere mention of Article 5 in Article 12 creates an obligation to apply Article 5 in Article 11.3 sunset reviews. Treaty interpretation does not and cannot work that way. Rather, the basis for interpreting a treaty is the ordinary meaning of the words of the treaty.

12. In the AD Agreement, the drafters cross-referenced particular provisions to make them applicable in the context of Article 11 reviews. If the Members had actually agreed that various provisions of Article 5 should apply in sunset reviews carried out under Article 11, the text would reflect that agreement, just as it does with respect to the application of Article 6 in Article 11 reviews. The Article 5.6 evidentiary prerequisite simply does not apply to Article 11.3 sunset reviews, and neither does the Article 5.8 *de minimis* standard. For this reason, Japan's claims concerning self-initiation and *de minimis* must fail.

13. With respect to the likelihood standard in Article 11.3, Japan has raised a number of

issues about the manner in which the United States determines whether dumping is likely to continue or recur. In this regard, Japan claims that Commerce's regulations do not provide for a determination consistent with the obligations of Article 11.3, and effectively create a "not likely" standard for sunset reviews. Japan is wrong. The applicable U.S. law, on its face, requires that Commerce determine whether there is a likelihood that dumping will continue or recur in sunset reviews. In this case, Commerce affirmatively found that dumping was likely to continue, were the duty to be revoked, based on the undisputed fact that the Japanese producers continued to dump even with the duty in place.

14. With respect to Commerce's treatment of antidumping margins in the sunset review, the likelihood analysis required by Article 11.3 of the AD Agreement is a qualitative analysis, not a quantitative analysis. Article 11.3 requires an administering authority to determine likelihood of continuation or recurrence of dumping. Article 11.3 does not require the calculation of dumping margins.

15. Moreover, the United States determines likelihood of dumping on an order-wide basis, which is consistent with Article 11.3. Article 11.3 provides for the review of the "definitive" duty. The definitive duty is imposed on a product-wide (that is, order-wide) basis, not on a company-specific basis. This is made clear by the reference in Article 9.2 to "any product." In addition, there is no basis in Article 11.3 for distinguishing between the required specificity of the likelihood of injury determination and the required specificity of the likelihood of dumping determination. Thus, because likelihood of injury is determined, by necessity, on an order-wide basis, it follows that likelihood of dumping should be determined on the same basis. The fact that Article 11.4, makes the evidentiary and procedural provisions of Article 6 applicable to sunset reviews under Article 11.3 does not create a substantive obligation to determine likelihood on a company-specific basis.

16. Finally, with regard to the injury determination made in this sunset review, consideration of the text of Articles 11.3, 3.3 and 5.8 of the AD Agreement, as well as the structure of the AD Agreement as a whole, shows that the AD Agreement does not require any quantitative negligibility analysis in a sunset review. Like the AD Agreement, U.S. law does not require the application of a quantitative negligibility test in sunset reviews.

17. By its plain language, Article 11.3 does not contain a negligibility test nor does it incorporate negligibility concepts from Article 5.8 and Article 3.3. On its face, Article 3.3 of the AD Agreement applies to investigations. Moreover, Article 3.3 refers to present events, whereas Article 11 refers to future or likely events. Article 3.3 does not refer in any manner to Article 11.3 reviews. Similarly, the plain language of Article 5.8 indicates that it applies only to investigations.

18. Japan's reliance on footnote 9 to Article 3 to show that Article 3 requirements are somehow applicable to sunset reviews does not advance Japan's argument. That footnote simply provides that any reference in the AD Agreement to the term "injury" incorporates the definition of injury in Article 3. The fact that "injury" should be interpreted in accordance with Article 3

does not automatically mean that all provisions of Article 3 are applicable to Article 11. Furthermore, the text of the AD Agreement provides no support for the view that the provision to terminate an investigation when imports are negligible was based on the notion that negligible imports are non-injurious.

19. The negligibility requirements of Article 5.8 do not apply in sunset reviews for good reason: the focus of a review under Article 11.3 is decidedly different from that of an original investigation under Article 3. In an original investigation, the investigating authorities examine the current condition of an industry that has been exposed to the effects of unrestrained, dumped imports, and must examine whether the volume, price effects, and impact of such imports are indicative of present injury or threat to the domestic industry. In contrast, in a sunset review, in deciding whether to remove the order, the investigating authorities examine the likely volume of imports in the future, after these imports have been restrained for five years by an antidumping duty order, and their likely impact in the future on a domestic industry that has been operating with the order in place. Accordingly, Japan has failed to show that the United States International Trade Commission ("USITC") acted in a manner inconsistent with the AD Agreement when it decided to cumulate imports from various countries in this sunset review.

20. Another way of looking at the arguments raised by Japan and the third parties in this dispute is in terms of four general theories that run through their arguments. The first theory is that Article 11.3 of the AD Agreement creates a presumption of termination of antidumping duties after five years and that any extension is an exception to the agreement. This theory finds no support in the applicable provisions of the AD Agreement properly interpreted in accordance with customary rules of treaty interpretation.

21. As mentioned earlier, there is no temporal limitation on the remedial relief from unfairly trade imports afforded by the antidumping duty provisions of the AD Agreement. Rather, under Article 11.3, there is a conditional limitation on the application of antidumping measures, and Article 11.3 plainly gives authorities the option of either automatically terminating the definitive antidumping duty, or taking stock of the situation by conducting a review to determine whether continuation or recurrence of dumping and injury is likely. Nothing in Article 11.3 or elsewhere in the AD Agreement suggests a presumption as to how long antidumping duties may continue to be necessary or as to the final outcome of a sunset review.

22. Moreover, characterizing a sunset review or extension of an antidumping duty order beyond five years as some sort of "exception" does not alter the analysis of the AD Agreement provision at issue here. On its face, Article 11.3 establishes that sunset reviews are part of the overall balance of rights and obligations negotiated during the Uruguay Round.

23. The second theory advanced by Japan's arguments is essentially that any provision of the AD Agreement is potentially applicable *mutatis mutandis* to any other provision of the AD Agreement. This is a teleological approach to treaty interpretation which suffers from several fatal flaws. First, it violates the principle of effectiveness by rendering the various cross-references and scope language of the AD Agreement redundant. Second, this approach to treaty

interpretation turns a customary rule of treaty interpretation, found in Article 31(1) of the Vienna Convention, on its head. As noted earlier, where the Members wished to have obligations set forth in one provision of the AD Agreement apply in another context, they did so expressly. If accepted, Japan's approach would nullify the Members' expectations as explicitly expressed in the AD Agreement.

24. The third theory is that the concept of *de minimis* or negligible import volumes is equivalent to "non-injurious". This is simply wrong. Dumping and injury are separate concepts defined by the Agreement. In particular, whether in fact dumped imports are causing injury must be ascertained in light of the applicable provisions on determination of injury set forth in Article 3 of the AD Agreement.

25. The fourth and final theory is that Japan and the third parties' flawed approach to treaty interpretation does not just nullify Members' expectations, it confounds those expectations. The fact is the United States amended its antidumping duty statute in 1995 to include - for the first time - provisions for the conduct of sunset reviews of antidumping duty measures; the United States agreed to these new provisions subject to the conditions that were clear from the text that the new *de minimis* standard would be limited to investigations and that sunset reviews could be automatically self-initiated by authorities. Japan and the third parties are trying to undo this deal seven years after the fact.

26. Finally, despite Japan's claims during its oral presentation to the contrary, the United States has in fact revoked 139 antidumping orders of the sunset reviews conducted to date, nearly one-half of the AD orders subject to the sunset reviews.

27. For the reasons discussed in our oral presentation at the first substantive meeting of the Panel and in our first written submission, we ask that the Panel reject each of Japan's claims in this dispute.