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

WT/DS244

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

October 14, 2002

I. INTRODUCTION

1. In this proceeding, Japan challenges the findings of the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("USITC") in the sunset review of the antidumping duty order on corrosion-resistant carbon steel flat products from Japan, in which the United States determined that revocation was likely to lead to the continuation or recurrence of dumping and injury and, as a result, continued the order. Japan claims that those findings are inconsistent with various provisions of the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement"), the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). Japan also purports to challenge certain "practices" of the United States with respect to sunset reviews, without explaining how those practices are *mandatory* and, therefore, subject to review by this Panel. Finally, Japan challenges certain U.S. statutory and regulatory requirements regarding sunset reviews, claiming that these are inconsistent with various provisions of the WTO Agreement, GATT 1994, and the AD Agreement.

2. Article 11.3 is the only provision of the AD Agreement that sets forth the substantive requirements for determining whether an order should be revoked five years after its imposition. In other words, Article 11.3 establishes the standards and criteria required by the AD Agreement with respect to sunset reviews. The terms of Article 11.3 are, however, very limited. They require simply that the authorities determine whether revocation of the order is likely to lead to the continuation or recurrence of dumping and injury. The United States, in the determination challenged by Japan, as well as in its antidumping law, has complied with the requirements of Article 11.3.

3. Nowhere does Article 11.3 address the type of evidence to be used or indicate the types of calculations, if any, that are necessary to determine whether, absent the order, dumping and injury is likely to continue or recur. Nevertheless, the terms of Article 11.3 make it clear that the purpose of a sunset review is to determine, based on a *predictive* analysis, whether the conditions necessary for the continued imposition of an antidumping duty exist. Thus, the focus of a sunset review under Article 11.3 is likely *future* behavior if the remedial measure were removed, not whether or to what extent dumping or injury currently exists or has existed in the past.

4. Almost every aspect of Japan's first submission – including its claims that the United States has reversed the "presumption of revocation," has engaged in WTO-prohibited "zeroing," and has failed to apply the *de minimis* "rule" – is permeated with a basic misapprehension about the object and purpose of sunset reviews. For Japan, the fundamental operating assumption is that a sunset review is a proxy for a new antidumping investigation. Japan is unable to cite any textual support in the AD Agreement or the WTO Agreement for this supposition, because no such support exists. Japan's view is, moreover, inconsistent with the object and purpose of sunset reviews as reflected in Article 11.3. Plainly stated, a sunset review is not a proxy for an investigation, nor is it a proxy for an annual administrative review; the sunset review procedure stands on its own.

5. Japan's concerns are nothing more than attempts to read obligations into the agreements that are not there, and to seek to obtain through the dispute settlement process results which may only be obtained at the negotiating table. That, however, is not the function of the dispute resolution process as established by the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). As is made clear in Article 3.2 of the DSU, recommendations and rulings of a panel "cannot add to or diminish the rights and obligations provided in the covered agreements." This Panel should reject Japan's effort to add to its rights at the expense of the United States.

6. In sum, the United States has met its WTO obligations and is not in violation of Article X of GATT 1994, Articles 2, 3, 5, 6, 11, 12, 18.3, 18.4 of the AD Agreement, or Article XVI:4 of the WTO Agreement.

II. FACTUAL BACKGROUND

7. On July 9, 1993, Commerce published its final affirmative antidumping duty determination on certain steel products from Japan, including corrosion-resistant carbon steel flat products. On August 9, 1993, the USITC notified Commerce of its final affirmative determination that imports of certain corrosion-resistant carbon steel flat products from Japan were causing injury to the U.S. domestic industry. On August 17, 1993, Commerce issued the antidumping duty order on these products.

8. On September 1, 1999, Commerce and the USITC published notices of initiation of the sunset review of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan. On August 2, 2000, Commerce published its final sunset determination, finding that continuation or recurrence of dumping was likely. On November 13, 2000, the USITC published its final sunset determination, finding that continuation or recurrence of injury was likely. On December 15, 2000, the United States published notice of the continuation of the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan based on the decisions by Commerce and the USITC.

III. SUBSTANTIVE ARGUMENT

A. Japan Bears the Burden of Proving Its Claims

9. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a violation. If the balance of evidence and argument is inconclusive with respect to a particular claim, the Panel must find that the complaining party, Japan, failed to establish that claim. The United States believes that Japan has failed to meet its burden to establish a *prima facie* case in this dispute.

B. Article 11.3 of the AD Agreement Does Not Require an Antidumping Duty Order To Be Terminated after Five Years

10. Japan argues that Article 11.3 of the AD Agreement requires antidumping duty orders to be terminated after five years. Article 11.3 creates no such requirement.

11. Article 11.3 permits the authorities to evaluate an antidumping duty order five years from its imposition, and does not require the termination of an antidumping duty order after five years if a sunset review results in a determination that terminating the order would be likely to lead to continuation or recurrence of dumping and injury. Japan's assertions to the contrary misstate the explicit terms of Article 11.3.

C. The AD Agreement Does Not Impose Evidentiary Requirements on the Self-Initiation of Sunset Reviews Under Article 11.3

12. Article 11.3 contains no reference to evidentiary requirements for the self-initiation of sunset reviews. Nonetheless, Japan argues that an evidentiary requirement is a "procedural rule" and because Article 11, including Article 11.3, has no "procedural rules," such rules can and must be found elsewhere throughout the AD Agreement and then applied to Article 11.3 sunset reviews.

13. Japan fails to explain why, in this case, the absence of any reference to evidentiary requirements where authorities initiate a sunset review means anything other than the plain meaning: that the Members did not agree to assume any such requirements. When Article 11 contemplates procedural requirements, it states such requirements explicitly.

14. Japan next attempts to rely on the object and purpose of Article 11 to establish that the "sufficient evidence" standard of Article 5.6 is the evidentiary standard for self-initiation of sunset reviews under Article 11.3. Rather than reading the terms of the provision and interpreting them *in light of* the object and purpose of the AD Agreement, however, Japan effectively calls for the ascertainment of the object and purpose of a particular provision of the AD Agreement and then applies that object and purpose *in spite of* the ordinary meaning of the words. The initiation of a review is the necessary beginning of a process leading to a determination of whether or not dumping and injury are likely to continue or recur. Japan's argument is based upon an incorrect equation of the standards for initiation with those for the substantive determination to be made in a review.

15. Japan also makes the argument that the context of Article 11.3 confirms that the evidentiary requirement for self-initiation of sunset reviews under Article 11.3 is the "sufficient evidence" standard found in Article 5.6. However, consideration of the ordinary meaning to be given to the terms of Article 11.3 in their context and in light of the object and purpose of the AD Agreement provides no support for Japan's contention. Japan simply seeks to read into Article 11.3 "words that are not there."

16. Consequently, U.S. law is not WTO-inconsistent in providing for automatic self-initiation

of sunset reviews, and Commerce's automatic self-initiation in the case of the Japan steel sunset review is therefore not WTO-inconsistent.

D. U.S. Regulations and Commerce's *Sunset Policy Bulletin* Are Not Inconsistent with the Article 11.3 Obligation to Determine Whether Dumping is Likely to Continue or Recur

17. Japan asserts that Section 351.222(i)(1)(ii) of Commerce's *Sunset Regulations* is inconsistent with the Article 11.3 obligation to determine likelihood. Japan misconstrues the purpose, and, consequently, the meaning of that regulatory provision. 19 C.F.R 351.222(i)(1)(ii) is ministerial in nature and addresses the timing of a revocation after Commerce has made a negative final sunset determination under section 751(d)(2).

18. Section 751(d)(2) of the Tariff Act of 1930 is the provision of U.S. law governing full sunset reviews. Section 751(d)(2) clearly and unambiguously states that Commerce must determine that dumping "would be likely" in the context of a sunset review before an order could be maintained. Contrary to Japan's assertions, in accordance with the U.S. statute, Commerce must use a "likely" standard in determining whether dumping will continue or recur.

19. Japan identifies the "Statement of Administrative Action" ("SAA") and the *Sunset Policy Bulletin* as the "practice and procedures" establishing an alleged "irrefutable" presumption that dumping is likely to continue in violation of Article 11.3 of the AD Agreement. Neither the SAA nor the *Sunset Policy Bulletin*, however, mandate or preclude actions subject to the AD Agreement. Moreover, neither the SAA nor the *Sunset Policy Bulletin* does anything concrete, independently of any other instrument. Therefore, neither gives rise to an independent violation of WTO obligations. Instead, Japan may only challenge Commerce's actual actions in the context of the final sunset determination of corrosion-resistant steel from Japan.

20. Commerce applied a "likely" standard in the sunset review in this case. Commerce found dumping and depressed import volumes in the period prior to the sunset review. Consequently, in accordance with the obligations of Article 11.3, Commerce drew a reasonable and logical inference that this evidence was indicative of likely continuation or recurrence of dumping in the absence of a duty.

21. Japan argues that Commerce's focus on evidence of "historical dumping" is insufficient to support Commerce's finding in this case. Here, Commerce found that the subject merchandise was dumped in several periods prior to the sunset review. It stands to reason, therefore, that dumping will likely continue when there is no order in place because dumping occurred when there *was* an order in place. In fact, historical dumping in the presence of a discipline can be highly probative of the behavior of exporters in the absence of a discipline.

22. Japan also argues that Commerce's rejection of certain information that addressed reasons

for the depressed import volumes was improper. Japan is incorrect in its assertion. In the first instance, Commerce decided not to consider the information because neither the information itself nor a justification of its relevance had been supplied in a timely fashion. Consequently, Commerce did not apply the requirement for "good cause" in this case. Second, Commerce explained that, even had the information been considered, it would not have affected Commerce's ultimate determination that it was likely that dumping would continue or recur because, whatever the circumstances concerning the import volumes, there remained the evidence that exporters were dumping after issuance of the order.

23. Finally, Japan's claim that Commerce applied a different "likely" standards in this case than it does in Article 11.2 reviews is simply incorrect. Commerce's analysis, exactly like that in an Article 11.2 review, focused on the existence of dumping in the period prior to the sunset review and the likelihood of future dumping by the Japanese producers of corrosion-resistant steel. Japan has failed to identify and articulate how Commerce's application of the policies set forth in the SAA and Commerce's *Sunset Policy Bulletin* is inconsistent with the obligation to determine likelihood under Article 11.3 of the AD Agreement.

E. Commerce's Analysis of Dumping In the Context of the Likelihood and "Margin Likely to Prevail" Determinations in this Case Was Consistent With The AD Agreement

24. Japan further attempts to undermine the determinations in this case by asserting that Commerce's reliance on pre-WTO Agreement dumping margins in analyzing the likelihood of continuation or recurrence of dumping is inconsistent with Articles 2, 11.3, and 18.3 of the AD Agreement, both as a general practice and as applied in this case. In the same vein, Japan challenges, both in general and as applied in this case, Commerce's reliance on margins from the original investigation because of the application of allegedly WTO-inconsistent methodologies in that segment of the proceeding. Japan also maintains that Commerce's sunset practice, both in general and as applied in this case, violates the AD Agreement by relying on dumping margins from the original investigation and the two completed administrative reviews which were calculated using what Japan refers to as a "zeroing" methodology, *i.e.*, a methodology in which no offset is granted to the respondent for negative differences between the normal value and export price (or constructed export price) of individual transactions. Finally, Japan contends that the approach Commerce uses to identify the rate of dumping likely to prevail in the event of revocation, both as a general practice and as applied in this case, violates Articles 2, 11.3, and 18.3 of the AD Agreement.

25. As an initial point, Japan has not demonstrated that Commerce is required by any aspect of U.S. law to rely on any of the margin information to which Japan objects for purposes of sunset reviews. Consequently, Japan may only challenge Commerce's reliance on such information *in this case.*

26. Japan's arguments further fail because they are based on the incorrect assumption that a sunset review is a proxy for a new investigation, and that the applicable test under Article 11.3 is therefore whether, in a current investigation of the subject merchandise, the authorities could rely on the information in question. Under Article 11.3 of the AD Agreement, however, Commerce is not required to (1) conduct a new investigation, (2) quantify current or past dumping margins, or (3) apply any particular methodology to the consideration of dumping margins. Moreover, Japan's arguments regarding the use of pre-WTO margins from the investigation fail for the additional reason that the investigation was not subject to the AD Agreement. Accordingly, and consistent with its obligations under the AD Agreement, Commerce in this case *reasonably* relied on evidence of dumping and import volumes over the life of the order.

F. There is No *De Minimis* Standard for Sunset Reviews

27. Under Article 5.8 of the AD Agreement, Members must apply a two percent *de minimis* standard in antidumping duty *investigations*. Japan, however, argues that the Article 5.8 *de minimis* standard is also applicable in sunset reviews under Article 11.3.

28. Nothing in the text of Articles 5.8 or 11.3 requires application of the Article 5.8 two percent *de minimis* standard in Article 11.3 sunset reviews, or any other type of review. In particular, there is no reference in Article 11.3 to a *de minimis* standard and the text of Article 5.8 makes no reference to Article 11.3. Nor do the context or the object and purpose arguments Japan makes lend any support to its theory.

29. Once again, Japan completely ignores the fundamental difference between investigations, in which a *de minimis* standard is required under Article 5.8, and sunset reviews. The distinction between the purpose of an investigation and the purpose of a sunset review supports the conclusion that, absent an express reference to the contrary, there is no basis to assume or infer that the *de minimis* standard for investigations applies in sunset reviews.

30. Finally, Japan would have the Panel read into the use of the word "dumping" in Article 11 an implicit reference to Article 5.8 because authorities must terminate an investigation if the margin of dumping is *de minimis*. Nothing in the word "dumping," as defined in the AD Agreement, implies anything about a *de minimis* standard. Given the text of the AD Agreement, the only conclusion one can reach is that there is no obligation to apply the Article 5.8 *de minimis* standard in an Article 11.3 sunset review.

31. In an attempt to bolster its non-existent textual argument, Japan cites the fact that the United States applies a *de minimis* standard in sunset reviews as indicative of the requirement to apply a *de minimis* rule in the context of Article 11.3 sunset reviews. The United States' *de minimis* "practice" does not implicate the AD Agreement. As demonstrated above, there is no *de minimis* standard in sunset reviews. Thus, Members are free to determine what, if any, *de minimis* standard they will apply.

G. There Is No Obligation Under Article 11.3 Or Elsewhere In The AD Agreement To Determine Likelihood On A Company-Specific Basis

32. Japan maintains that sunset review determinations of whether revocation is likely to lead to continuation or recurrence of dumping must be made on a company-specific basis, citing Articles 11.3 and 6.10 of the AD Agreement.

33. However, the text of Article 11.3, which contains the substantive requirements for antidumping sunset reviews, makes no reference to determining the likelihood of dumping for individual companies. Moreover, the provisions of Article 6, as incorporated into Article 11 reviews by Article 11.4, are not intended to have an impact on the substantive standards or criteria to be applied in sunset reviews; they are only intended to have an impact on the *manner* in which the substantive standards or criteria are applied. Consequently, there is nothing in Article 11 that even suggests standards or criteria for the likelihood of dumping determination that focus on an individual company's likelihood of continuation or resumption of dumping. The order-wide approach required by U.S. law is therefore entirely consistent with the AD Agreement.

H. Commerce Complied with the Evidentiary and Procedural Requirements of Article 11.3 in this Case

34. There is no dispute that, based on Article 11.4, the provisions of Article 6 on evidence and procedure apply to sunset reviews under Article 11.3. Japan does not challenge the WTO-consistency of U.S. law in this regard; Japan does, however, claim that Commerce failed to comply in this case with the evidentiary and procedural requirements of Article 11.3.

35. Japan alleges in several instances that the procedures followed in this case were in some way unfair, without demonstrating how the procedures in question were inconsistent with the AD Agreement. The fact is, Commerce followed reasonable, appropriate procedures that fully comply with the evidentiary and procedural requirements of Article 6.

I. The USITC's Decision To Cumulate Imports From Various Countries In This Sunset Review Is Consistent With the AD Agreement

36. Despite Japan's assertions to the contrary, 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, much less a strict, quantitative negligibility analysis in a sunset review. U.S. law, like the AD Agreement, does not require the application of a quantitative negligibility test in sunset reviews. Moreover, U.S. law permits, but does not require, the USITC in a sunset review to cumulate imports if it finds that certain statutory elements are met.

37. By its plain language, Article 11.3 does not contain a negligibility test. Nor is there any reference to negligibility concepts elsewhere in Article 11. The plain terms of Article 11 neither implicitly nor explicitly incorporate negligibility concepts from Article 5.8 and Article 3.3. If the negotiators of the AD Agreement had wanted to incorporate into Article 11.3 the concepts of negligibility from Article 5.8 or 3.3, they could and would have done so as they did in many express cross-references in the AD Agreement.

38. On its face, Article 3.3. applies to investigations, not reviews. 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 dispels any notion that its quantitative negligibility test applies to sunset reviews. The text of that provision indicates that it applies only to investigations. Nowhere in Article 5.8, or elsewhere in Article 5, is there any reference to Article 11.3 reviews.

39. Moreover, footnote 9 to Article 3 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 any notion that negligible imports are necessarily non-injurious.

40. Additionally, an examination of footnote 9 in light of the object and purpose of the AD Agreement reveals why the negligibility requirements of Article 5.8 logically do not apply in sunset reviews. The focus of a review under 11.3 differs 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 that are competing without a remedial AD measure in place. In an original investigation, the authorities must examine the volume, price effects, and impact of unrestrained and unfairly traded imports on a domestic industry that may be indicative of present injury or threat.

41. In a sunset review, the investigating authorities, in deciding whether to remove the order, examine the *likely* volume of imports *in the future* that have been restrained for the last five years by the antidumping duty order and their *likely* impact *in the future* on the domestic industry that has been operating in a market where the remedial order has been in place. Indeed, there may no longer be either any subject imports or material injury once an antidumping order has been in effect for five years, a fact recognized by the standard of "continuation or recurrence of injury." Thus, the inquiry contemplated pursuant to Article 11.3 is counterfactual in nature, and entails application of decidedly different standards with respect to the volume, price and relevant impact factors from that applicable to original investigations. The authority must then decide the likely impact of a prospective change in the status quo, *i.e.,* the revocation of the antidumping duty order and the elimination of its restraining effects on volumes and prices of imports.

42. The absence of language regarding negligibility in Article 11.3 is consistent with the purpose of the sunset review provisions. The purpose of the antidumping duty order is to reduce or eliminate material injury caused by unfair acts in the market or to require adjustment of prices to eliminate dumping and injury. As a result of the order, dumped imports may have decreased or exited the market altogether, or if they maintain their presence in the market, may be priced higher than they were during the original investigation, when they were entering the market unencumbered by any additional duties. Under Japan's argument, because certain imports cannot compete in the marketplace under the constraints of the order, *i.e.* without dumping, and as a result have declined in volume or exited the market altogether, the order should then be revoked. This result, so incongruous with the purpose of the sunset review provision, should be summarily rejected by the Panel.

J. The Actions at Issue Are Consistent With the AD Agreement and Do Not Violate Article X:3(a) of GATT 1994

43. Having failed to demonstrate that the U.S. law and the application of that law are contrary to the AD Agreement, Japan tries to revisit its claims by turning to Article X:3(a) of the GATT 1994. Japan is apparently alleging that this Panel should find that, even if the contested decisions were consistent with the AD Agreement, they might nevertheless violate the Article X:3(a) requirement that certain laws, regulations, judicial decisions and administrative rulings of general application be administered in a uniform, impartial, and reasonable manner (which Japan terms "due process").

44. In considering the application of Article X:3(a) to this case, the Panel should note three things: First, Article X:3(a) is limited to the *administration* of certain laws, regulations, judicial decisions and administrative rulings of general application, *not* to the laws, regulations and administrative rulings themselves. Therefore, to the extent that Japan is complaining about laws, regulations and rulings of general application, as contrasted with their administration, its complaint is not properly founded in Article X:3(a).

45. Second, the purpose of GATT Article X:3(a) is to ensure that the administering authority has administered the law or the regulations in a uniform, impartial, and reasonable manner by ensuring that similarly situated persons are not treated differently. The purpose of GATT Article X:3(a) is not, as Japan claims, to ensure that the administering authority administers different provisions that cover different situations in the same manner.

46. Third, a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. The Panel should distinguish this dispute – in which Japan is complaining about specific decisions made in the context of particular facts under the AD Agreement – from other Article X:3(a) disputes, in which the overall administration of some program was alleged to be arbitrary.

47. Japan has not alleged that the overall procedure of the antidumping law of the United States is applied arbitrarily, or that Members are otherwise deprived of basic due process, such as notice and opportunity for review in antidumping proceedings. Rather, it disagrees with the specific results in this proceeding. As noted above, however, Commerce and the USITC conducted the sunset review at issue in a matter consistent with the AD Agreement.

K. U.S. Law Is In Conformity with Article XVI:4 of the WTO Agreement

48. Congress specifically undertook to make the antidumping provisions of U.S. law consistent with U.S. international obligations. It adopted requirements that fully satisfy the obligations of the AD Agreement. Since U.S. laws are in conformity with the AD Agreement, the United States is therefore not in violation of Article XVI:4 of the WTO Agreement.

L. The Specific Remedy Sought by Japan Is Inconsistent With Established Panel Practice and the DSU

49. Japan has requested this Panel to recommend that, if the Panel finds that there is insufficient evidence to determine that dumping and injury were likely to continue or recur if the order were revoked, the DSB request the United States to terminate its antidumping duty order. In so doing, Japan has requested a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Japan on the merits, the Panel nonetheless should reject the requested remedy, and instead make a recommendation, consistent with the DSU and established GATT/WTO practice, that the United States bring its antidumping measure into conformity with its obligations under the AD Agreement.

IV. CONCLUSION

50. Based on the foregoing, the United States respectfully requests that the Panel reject Japan's claims in their entirety.