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 SECOND SUBSTANTIVE MEETING OF THE PANEL

January 16, 2003

1. The claims raised by Japan in its submissions related to self-initiation standards, an alleged *de minimis* requirement, the evidentiary and procedural requirements applicable to sunset reviews, and an alleged strict quantitative negligibility requirement for sunset reviews, fail because they rely on obligations not found in Article 11.3 of the AD Agreement. On this basis, the Panel should reject Japan's claims and refuse to impute into Article 11.3 of the AD Agreement "words that are not there."

2. Consistent with DSU Article 3.2 and accepted WTO jurisprudence, the United States has argued that the Panel should interpret the text of the AD Agreement, and in particular Articles 11.3 and 11.4, in accordance with the ordinary meaning of the terms of the AD Agreement in their context and in light of the Agreement's object and purpose. This should be a straightforward exercise because the terms themselves are straightforward.

3. Simply put, Article 11.3 provides that a definitive antidumping duty must be terminated unless the requisite finding – likelihood of continuation or recurrence of dumping and injury – is made. This likelihood finding is made in the context of a sunset review that, according to the explicit terms of Article 11.3, may be initiated on one of two bases – on an authority's "own initiative" *or* upon a "duly substantiated request" by or on behalf of the domestic industry. There is no textual or contextual qualification of the right to initiate on the authority's "own initiative." There is also no requirement in Article 11.3 or elsewhere in the AD Agreement to consider the magnitude of current dumping in determining the likelihood that, absent the antidumping duty, dumping would be likely to continue or recur or even to quantify the dumping margins likely to prevail in the event of revocation. Further, there is no requirement in Article 11.3 or elsewhere in the AD Agreement to make likelihood of dumping determinations on a company-specific basis. Neither is there a requirement in Article 11.3 or elsewhere in the AD Agreement that the

negligibility standards of Article 5.8 apply to the likelihood of injury determination in sunset reviews. Finally, under the terms of Article 11.4, a sunset review must be conducted in accordance with the evidentiary and procedural requirements of Article 6. Commerce's sunset determination in corrosion-resistant steel from Japan comports with all of the obligations required by the terms of the AD Agreement.

4. In contrast to the United States' text-based analysis, Japan makes various assumptions regarding the "purposes" of various provisions of the AD Agreement and then attempts to derive from these alleged purposes obligations not found in the text. This approach, of course, is the very antithesis of the basic principle of treaty interpretation reflected in Article 31 of the Vienna Convention.

5. In the recent case of *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*,[1] the Appellate Body rejected the interpretive approach advocated by Japan. First, the Appellate Body rejected a claim by the EC that the *de minimis* standard for countervailing duty investigations is also applicable to countervailing duty sunset reviews by virtue of Article 21.3 of the SCM Agreement. Second, the Appellate Body affirmed the panel's rejection of a claim by the EC that the provisions of U.S. law providing for the automatic self-initiation of sunset reviews by Commerce are inconsistent with Article 21.3 of the SCM Agreement. Although *Corrosion-Resistant Steel from Germany* addressed Article 21.3 and other provisions of the SCM Agreement, the relevant provisions of

[1] WT/DS213/AB/R, Report of the Appellate Body, adopted 19 December 2002.

the AD Agreement are essentially identical to those of the SCM Agreement and the Appellate Body's reasoning is equally persuasive in this proceeding.

6. Four examples of that reasoning are very illuminating with respect to the claims Japan makes before this Panel. First, the Appellate Body began its analysis both on the self-initiation issue and the *de minimis* issue with the text of Article 21.3, the substantive sunset review provision, in an effort to determine whether that text includes the same alleged obligations as those claimed by Japan in the instant dispute. In this regard, the Appellate Body recognized that (1) "the fact that a particular treaty provision is 'silent' on a specific issue 'must have some meaning,'"[2] and (2) "when a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may take place."[3] Second, the Appellate Body noted that Article 21.3 of the SCM Agreement contains no explicit cross-reference to evidentiary rules relating to initiation and went on to state that, "[w]e believe the absence of any such cross-reference to be of some consequence given that, as we have seen . . . the drafters of the *SCM Agreement* have made active use of cross-references, *inter alia*, to apply obligations relating to *investigations* to review proceedings."[4] Third, the Appellate Body accorded meaning to the fact that there is an express reference in Article 21.4 of the SCM Agreement to Article 12 (regarding evidence), but not to Article 11 (regarding initiation). The lack of a cross-reference was interpreted by the Appellate Body as an indication that "the drafters intended that the obligations

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[2] *Id.*, para. 65.
[3] *Id.*, para. 104.
[4] *Id.*, para. 105 (emphasis in original).

in Article 12, but not those in Article 11, would apply to reviews carried out under Article 21.3."[5] Finally, the Appellate Body made findings regarding the object and purpose of the SCM Agreement, concluding that, "[t]aken as a whole, the main object and purpose of the *SCM Agreement* is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures."[6]

7. In addition to the general legal issues just discussed, Japan has also made case-specific claims regarding Commerce's sunset determination involving corrosion-resistant carbon steel flat products from Japan. Commerce's determination – that the expiry of the antidumping duty order would be likely to lead to the continuation or recurrence of dumping – is based on *continued dumping* over the life of the order. After providing all interested parties with ample opportunity to submit for the record their views as well as any information they deemed to be relevant, Commerce reasonably concluded that, in the event of revocation, dumping is likely to continue or recur.

8. As the United States has detailed in it submissions, the AD Agreement does not require the USITC to engage in a negligibility assessment in deciding whether to cumulate imports in sunset reviews. Specifically, the United States has emphasized that neither the text of the Agreement nor its object and purpose supports Japan's assertion. Indeed, the Appellate Body in *Corrosion-Resistant Steel From Germany* recently rejected the panel's conclusions that were premised on arguments similar to those made by Japan here and found that the *de miminis* standard in Article 11.9 of the SCM Agreement did not apply to Article 21.3 sunset reviews.

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[5] *Id.,* para. 72.
[6] *Id.*, para. 73.

Applying the same reasoning underlying the Appellate Body's report with respect to Article 11.9 of the SCM Agreement compels the conclusion in this matter that the negligibility standards of Article 5.8 of the AD Agreement pertaining to original investigations do not apply to Article 11.3 sunset reviews.

9. Notwithstanding the Appellate Body's report in *Corrosion-Resistant Steel From Germany*, Japan continues to argue that the negligibility standards of Article 5.8 are incorporated into Article 11.3 reviews via footnote 9 to Article 3. However, the Appellate Body found that the text of Article 15 of the SCM Agreement, including its footnote 45, which is identical to footnote 9, does not support the conclusion that a *de minimis* subsidy is non-injurious.[7] The Appellate Body also rejected the conclusion that an interpretation that the same *de minimis* rate be considered injurious in the original stage but not at the sunset stage would lead to irrational results, and observed that original investigations and sunset reviews are distinct processes with different purposes, which may explain the absence of a requirement to apply a specific *de minimis* standard in a sunset review.[8]

10. Quite simply, in applying the Appellate Body's reasoning from its report in *Corrosion-Resistant Steel From Germany* to this matter, it is evident that the negligibility standard in Article 5.8 is an agreed rule that if imports are found to be negligible in an *original investigation*, authorities are obliged to terminate their investigation, with the result that no antidumping order be imposed. Thus, Japan's contentions should be rejected.

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[7] *Id.*, para. 79.

[8] *Id.*, paras. 84-89.