United States - Sunset Review Of Antidumping Duties
On Corrosion-Resistant Carbon Steel Flat Products From Japan
(WT/DS244)

Comments of the United States to
Answers from Japan to Questions from the Panel
in Connection with the
Second Substantive Meeting of the Panel
January 28, 2003

1. The United States will not comment on every answer from Japan to the Panel's questions, particularly where the issues raised have been addressed in prior written submissions of the United States. Instead, the United States will comment briefly on specific responses as warranted.

II. MANDATORY AND DISCRETIONARY LEGAL INSTRUMENTS/ "PRACTICE"

2. With respect to Japan's answer to Panel Question 79, the United States refers the Panel to the U.S. answers to this and succeeding questions. There, we point out that neither *US - Carbon Steel* nor *US - Countervailing Measures on Certain EC Products* alters the conclusion of panels such as *Export Restraints* and *India - Steel Plate* that non-binding precedent cannot be considered a "measure," and the conclusion of the Appellate Body that measures which do not mandate a breach of a WTO obligation do not do so. The United States further notes that Japan's arguments regarding "practice" entail a mischaracterization of U.S. law. Finally, the United States notes that, even though a repetition of similar responses to a similar set of circumstances does not render the responses a "measure" that can be challenged as such, this in no way deprives Japan of the opportunity to challenge a response in a particular proceeding. Indeed, in this proceeding, Japan has challenged Commerce's "practice" as applied in the sunset review at issue.

III. EVIDENTIARY STANDARDS FOR INITIATION IN SUNSET REVIEWS

3. With respect to Japan's answer to Panel Question 84, nothing in Article 11.3 or elsewhere in the AD Agreement states or implies, explicitly or implicitly, that the Members intended to limit how they would implement the obligations contained in Article 11.3. Had the Members wished to provide in Article 11.3 for a specific means of implementing the self-initiation provision, the Members would have specifically and explicitly done so in Article 11.3 or elsewhere in the AD Agreement.

4. With respect to Japan's answer to Panel Question 86, Japan has failed to demonstrate how or where it made a claim with respect to the meaning and effect of the phrase "on their own initiative." Japan attempts to characterize its claim that Commerce did not have sufficient evidence as merely "one way in which the statute and regulations are inconsistent with the AD

Agreement." However, whether sufficient evidence is needed to automatically initiate sunset reviews and whether automatic initiation is synonymous with initiation "on its own initiative" are two different issues.

5. Article 7 of the DSU states clearly that the terms of reference for a panel are contained in the request for establishment of that panel. Moreover, Article 6.2 of the DSU provides, in part:

> The request for establishment of a panel . . . shall . . . identify the specific measures at issue and *provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly*[.] (Emphasis added.)

6. With respect to the terms of reference of panels, the Appellate Body has clarified:

> Thus, "the matter referred to the DSB" for the purposes of Article 7 of the DSU . . . must be the "matter" identified in the request for establishment of a panel under Article 6.2 of the DSU[.] The "matter referred to the DSB," therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*).[1]

7. Further, the Appellate Body has stated:

> As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel *very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU*. It is important that a panel request be sufficiently precise for two reasons: *first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint*.[2]

8. In its panel request, Japan is merely complaining that the United States cannot automatically self-initiate sunset reviews without satisfying the alleged obligation under Article 11.3 to have sufficient evidence to initiate such reviews. Japan's panel request does not mention any claim regarding how the automatic self-initiation provision in U.S. law as such violates Article 11.3 because it allegedly *precludes* Commerce, as an executive branch agency, from initiating a sunset review "on their own initiative." As the Appellate Body has cautioned, "[i]t is not enough . . . that 'the legal basis of the complaint' is summarily identified; *the identification*

---

[1] *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, Report of the Appellate Body adopted 25 November 1998, para. 72 (emphasis in original).

[2] Appellate Body Report on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, para. 122 (emphasis in original), citing Appellate Body Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 142.

must 'present the problem clearly.'"[3] Making claims in the context of a written submission does not retroactively cure the failure to summarize the legal basis of the complaint.

9. Japan's answers to the Panel's second set of questions are the first instance in which Japan raises this additional challenge to U.S. law. This new claim of "on their own initiative" is not properly before the Panel and should therefore be rejected as outside the Panel's terms of reference. Furthermore, the United States has been prejudiced by Japan's failure to comply with Article 6.2.[4]

V. DETERMINATION OF LIKELIHOOD OF DUMPING/DUMPING MARGINS IN SUNSET REVIEWS

1. Nature of sunset determination

10. In its response to Panel Question 92, Japan now maintains that one of the two claims it made concerning "[Commerce's] application of past dumping margins in its sunset review" is "that the application of past dumping margins, usually from original investigations, also violates the likelihood of injury analysis required by Article 11.3."[5] However, Japan has never made such a claim in the past. The actual nature of Japan's claim with respect to Commerce's reporting of the original dumping margins to the USITC is evident if one examines paragraph 3 of Japan's request for the establishment of a panel. That request reveals that Japan is only challenging how Commerce determined likely margins and Commerce's use of "pre-WTO Agreement margins."[6] Nowhere does Japan mention the impact of likely margins on the USITC likelihood of injury analysis. Although Japan asserts that the issue that it is now attempting to raise is encompassed within numbered paragraph 3 of its panel request, this is not the case. Paragraph 3 contains three claims, each set forth in a subparagraph. Paragraphs 3(b) and (c), on their face, are limited expressly to the same allegations of legal inconsistency set forth in paragraph 2 of Japan's request, and also are premised on inconsistencies with Article 2 of the AD

---

[3] *Korea Dairy*, para. 120 (emphasis added).

[4] We note that the Appellate Body previously has considered whether the responding Member has been prejudiced by a panel request's imprecision when determining the adequacy of that request under DSU Article 6.2. *See, e.g., Korea Dairy*, para. 131. In this case, however, Japan clearly included certain claims in its request, and clearly failed to include a challenge relating to "on their own initiative." It is therefore not necessary to consider the issue of prejudice before drawing the conclusion that this issue is not within the terms of reference. Nevertheless, it is also clear that the United States has been prejudiced by Japan's failure to comply with Article 6.2 of the DSU. Inasmuch as Japan raised these arguments for the first time in its responses to the Panel's second set of questions, the U.S. submissions to the Panel did not include, and could not have included, any responses. Indeed, the U.S. submissions respond only to Japan's claim regarding the alleged evidentiary requirement for self-initiation of sunset reviews under Article 11.3, a claim Japan did set forth in its panel request. The United States already has made its two written submissions and has had its two meetings with the Panel, and thus its key opportunities for making its case have come and gone. As such, the United States is prejudiced by Japan's failure to comply with Article 6.2 of the DSU.

[5] Japan Answers to Questions from Panel (Second Meeting), para. 29.

[6] *See* Request for the Establishment of a Panel by Japan (WT/DS244/4) (5 April 2002), para. 3.

Agreement. The only remaining subparagraph, 3(a), makes absolutely no mention of a violation of any of the provisions of Article 3 of the AD Agreement. Japan cannot now broaden its request to encompass a claim that was not made in its panel request.

11. In its submissions, Japan's emphasis is not on whether the USITC's injury determination was allegedly tainted, but whether Commerce improperly calculated and reported likely dumping margins.[7] Even now in its answer to Question 92, Japan casts this "claim" as concerning *Commerce's* application of past dumping margins in its sunset reviews, *not* the USITC's alleged application of past dumping margins in its sunset reviews. Thus, Japan's new claim is beyond the Panel's term of reference and should not be addressed by the Panel.

12. Even if this claim were properly before the Panel, however, it has no merit. Japan argues that Commerce's dumping margin analysis is part of the USITC's likelihood of injury analysis in Article 11.3 sunset reviews. It insists that all Article 3 obligations are incorporated into Article 11.3 sunset reviews via footnote 9, which defines the term "injury" for use throughout the AD Agreement. According to Japan, Articles 3.4 and 3.5 require the consideration of dumping margins in an injury analysis. Further, Japan asserts that because Commerce's dumping margin analysis is part of the USITC's injury analysis, USITC's injury analysis is tainted. Apart from the fact that Commerce's likely margins and its procedures for determining likely margins do not violate the AD Agreement, Japan is incorrect that the consideration of dumping margins is a required part of the USITC's likely injury analysis.

13. As the United States has previously explained, footnote 9 to Article 3 does not serve as a basis for the wholesale incorporation of Article 3 obligations into Article 11.3 reviews.[8] Second, while Article 3.4 provides for consideration of the "magnitude of the dumping margin," in an original investigation, nothing in the AD Agreement directs an investigating authority to consider the likely dumping margin in a sunset review. Finally, the focus of Articles 3.4 and 3.5 of the AD Agreement is on dumped imports and their effects, not the margin of dumping. As Article 3.5 provides, "[i]t must be demonstrated that the *dumped imports* are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement." (Emphasis added.) Based on the plain text of Article 3.5, it is, thus, the dumped imports that must be shown to be causing injury before an antidumping duty may be imposed. The AD Agreement's focus on the volume and price effects of the dumped imports for the purposes of determining material injury and causal nexus is underlined by Article 3.1 itself, which mandates the determination of injury "shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of dumped imports on the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

14. In sunset reviews, U.S. law provides that the USITC *may* consider the magnitude of the dumping margin in assessing whether injury is likely to continue or recur. The focus remains,

---

[7] *See* Japan First Oral Statement, paras. 47-50; Japan Second Submission, paras. 146-152.

[8] United States First Submission, paras. 78-82; United States Second Submission, paras. 39-42.

nonetheless, on the likely volume and likely price effects of the dumped imports. Nothing in the AD Agreement directs the investigating authority to consider the likely dumping margin, much less the size of the margin, in conducting a sunset review.

15. With respect to Japan's answer to Panel Question 94(c), Japan's answer is factually incorrect. Japan states that Commerce "simply dismissed the information without explanation." As Commerce explained in the *Final Sunset Determination*[9] and has explained in prior written submissions to the Panel, NSC's submission of the information in the sunset review of corrosion-resistant carbon steel from Japan was not considered because it was untimely.

3. "Ample Opportunity"

16. With respect to Japan's answer to Panel Question 106, Japan asserts that providing a "seven-month deadline is not the issue." The United States responds that, rather, Japan's seven-month delay in this case is the issue. NSC's case brief was not NSC's first opportunity to submit information and argument on import volumes. All parties subject to a sunset review, including NSC, are aware that Commerce considers import volumes to be an essential element in making its likelihood determination in a sunset review because the importance of import volumes is outlined in the antidumping statute and the *Sunset Policy Bulletin*. Had NSC wanted to submit information that NSC considered relevant to Commerce's likelihood determination, NSC had the opportunity to do so. Although the United States considers that the volume of the information at issue is not material to the inquiry, if the amount of information was moderate, as asserted by Japan, then it is still more puzzling why NSC did not submit the information in a timely manner.

17. Japan also cites *Mechanical Transfer Presses* for the proposition that Commerce's solicitation of additional factual information in that sunset review "illustrates that consideration of information received in a party's case brief does not impede [Commerce's] ability to complete the sunset review as scheduled." NSC's approach would effectively turn the administrative process of a sunset review over to the interested parties to the proceeding - essentially permitting parties to submit information whenever they wished and imposing a burden on the administering authorities to demonstrate that the late submissions impeded the process. Nothing in Article 6 or elsewhere in the AD Agreement requires such an outcome. In *Mechanical Transfer Presses*, Commerce solicited additional factual information because it could not determine the import volumes of the Japanese exporters who were participating in the sunset review for the five-year period preceding the sunset review, and the participating Japanese exporters had argued *in their substantive submissions* that the decrease in import volumes was due to factors other than the imposition of the antidumping duty order.[10] Thus, Commerce requested the additional information because the Japanese respondents had raised the issue in their substantive responses

---

[9] *Final Sunset Decision Memorandum* at 11 (Exhibit JPN-8(e)).

[10] *Preliminary Results of Full Sunset Review; Mechanical Transfer Presses from Japan*, 65 Fed. Reg. 753 (Jan. 6, 2000).

and the import information was not readily available to Commerce.[11]

18. With respect to Japan's answer to Panel Question 107, Japan concedes that NSC could have submitted the information in a timely manner, but simply chose not to do so. NSC does not, and cannot, explain why it chose to supply information late. In other words, it was not the "good cause" standard that caused NSC to submit its information late. Whether or not the information would be subject to a "good cause" analysis, Japan could have submitted the information nonetheless. Section 351.218(d)(3)(iv)(B) of Commerce's *Sunset Regulations* provides that a "substantive response from an interested party . . . also may contain any other relevant information or argument that the party would like [Commerce] to consider." In addition, the *Sunset Policy Bulletin* provides guidance about information that Commerce finds relevant to its likelihood determination in a sunset review, including the importance of information concerning import volumes. In submitting the information in question, NSC neither submitted the information in a timely manner nor made any attempt to establish "good cause" when it did.

19. Finally, Japan asserts that the 30 day deadline is "arbitrary" because Commerce accepted information in the sunset review of the antidumping duty order on *Mechanical Transfer Presses*. As explained above, Commerce requested and accepted information in the *Mechanical Transfer Presses* sunset review because of the unique facts of that case. The deadline is a procedural mechanism for administration of the sunset review proceeding. Commerce's *Sunset Regulations* provide parties with ample opportunity to submit whatever information they deem relevant. Indeed, in *Mechanical Transfer Presses*, Commerce considered additional information because the Japanese exporters made an argument concerning the depressed import volumes in their substantive submissions; in this case, *no* argument was made regarding the relevance of the untimely information.

[11] *Mechanical Transfer Presses*, 65 Fed. Reg. at 753 . Commerce initially determined that there was an inadequate response from the Japanese exporters because the export volumes of the participating Japanese exporters did not exceed 50 percent, as required by section 351.218(e)(1)(ii)(A) of Commerce's *Sunset Regulations*. Commerce reconsidered this position because the Japanese exporters explained that one Japanese producer of mechanical transfer presses, which had been participating in administrative reviews, was excluded from the antidumping order by Commerce sometime prior to the sunset review. The magnitude of this company's exports after exclusion and prior to the sunset review was undetermined. Therefore, Commerce decided to conduct a full sunset review and requested that the Japanese exporters submit import volume information to facilitate Commerce's analysis of the Japanese exporter's claims that depressed import volumes were not necessarily due to the imposition of the antidumping duty order.