*United States - Antidumping Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Japan*

(WT/DS244)

# CLOSING STATEMENT OF THE UNITED STATES

November 6, 2002

1. Mr. Chairman, members of the panel, thank you for providing us with the opportunity to present the views of the United States. In our closing statement, I would like to take the opportunity briefly to address four general theories that run through the arguments raised by Japan and the third parties in this dispute.

2. The first theory is that Article 11.3 of the AD Agreement creates a presumption of termination of antidumping duties after five years. This theory finds no support in the applicable provisions of the AD Agreement properly interpreted in accordance with customary rules of treaty interpretation.

3. Japan argues that the extension of an antidumping duty order beyond five years is an exception or that Article 11.3 of the AD Agreement creates a presumption that all antidumping duty orders must terminate after five years. Japan is wrong on both counts.

4. There is no *temporal* limitation on the remedial relief from unfairly trade imports afforded by the antidumping duty provisions of the AD Agreement – that is, the Agreement does not prescribe a maximum number of years for application of antidumping measures. Rather, under Article 11.3, there is a *conditional* limitation on the application of antidumping measures. The condition is that *if* the authorities determine that dumping and injury are likely to continue or recur, *then* the authorities may continue to impose antidumping measures. *If* the authorities determine that dumping or injury is not likely to continue or recur, *then* the authorities must terminate the order.

5. 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.

6. 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. As the Appellate Body has previously stated, "describing [or] characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted by ... applying the normal rules of treaty interpretation."[1] 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.

7. Japan's second theory 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. As such it 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, and more generally, this approach to treaty interpretation turns a customary rule of treaty interpretation, found in Article 31(1) of the Vienna Convention on its head. 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 and the approach of the third parties would nullify the Members' expectations as *explicitly* expressed in the AD Agreement.

8. 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

[1] *EC Hormones*, para. 104.

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.

9. Let me turn now to the fourth and final theory, which is that Japan and the third parties' flawed approach to treaty interpretation does not just nullify Members' expectations, it confounds those expectations. To put it plainly, they are seeking to rewrite the "deal" reflected in the AD Agreement.

10. In 1995, the United States amended its antidumping duty statute to include – for the first time – provisions for the conduct of sunset reviews of antidumping duty measures and a provision for application of a *de minimis* standard in antidumping duty investigations. 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.

11. As the WTO Membership embarks upon the new Doha negotiating round, it is more important than ever that WTO dispute settlement proceedings give effect to the negotiators' collectively expressed intent as set forth in the carefully constructed written terms of the WTO Agreement. Members will be less likely to conclude agreements to the extent dispute settlement proceedings are used to rewrite the terms of agreement years after the fact.

12. Finally, Mr. Chairman, there is an additional important point that Japan has attempted to communicate to the Panel which is simply inaccurate. Japan has repeatedly stated in its written submission and before the Panel that Commerce has "only" revoked 72 antidumping duty orders under its sunset regime and that this demonstrates some sort of bias in Commerce's approach. As Japan noted, it is correct these orders were revoked because the U.S. domestic industry did not wish to participate in the sunset review. It is also true, however, that in a nearly identical

number of sunset reviews, foreign interested parties chose not to participate in the Commerce portion of the U.S. sunset regime and instead argued their case before the USITC only. The more relevant statistic here is that, of the 308 antidumping sunset reviews conducted by the United States to date, the United States has revoked 139 antidumping orders, nearly one-half of the AD orders subject to the sunset reviews.

13. Thank you Mr. Chairman and members of the Panel for the opportunity today to address more fully the issues raised in this case.