

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

WT/DS244

**ORAL STATEMENT
OF THE
UNITED STATES OF AMERICA**

November 5, 2002

Mr. Chairman, members of the Panel:

1. On behalf of the United States delegation, I would like to thank the Panel for this opportunity to present the U.S. views with respect to certain issues raised by Japan in its first written submission. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the comments that we made there. We will be pleased to receive any questions you may have at the conclusion of our statement.

Introduction

2. Mr. Chairman, this proceeding presents essentially six basic questions. First, did the United States act inconsistently with Article 11.3 by self-initiating a sunset review without regard to the evidentiary provisions of Article 5.6? 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.

3. I will return to these issues in a moment, but first let me address generally Japan’s claims with respect to Commerce’s determination that expiry of the antidumping duty on corrosion-

resistant carbon steel flat products from Japan would likely lead to continuation or recurrence of dumping. The issue here is 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.

Commerce Properly Determined That Expiry Of the Duty Would be Likely to Lead To Continuation or Recurrence of Dumping

4. Article 11.3 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.

5. Mr. Chairman, what does it mean to determine likelihood of continuation or recurrence of dumping and injury? First, let us consider the words establishing the circumstances under which maintaining a duty may be considered necessary.

6. The word "continuation" expresses a temporal relationship between past and future.¹ 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.

¹ See *United States - Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, Report of the Panel, adopted 19 March 1999, para. 6.27 (discussion of the word "continued").

7. 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.

8. Support for this proposition is found in the text of Article 11.3 itself. As discussed in our First Written Submission, note 22 to the AD Agreement provides that a finding in the most recent assessment proceeding that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty. This confirms that the current level of dumping is not decisive as to whether dumping is likely to continue or recur.

9. Now, with respect to Commerce's final sunset determination in the sunset review involving Japanese corrosion-resistant steel, 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.

10. Japan argues that there are a number of substantive and procedural flaws in Commerce's sunset determination. In our First Written Submission, we addressed and rebutted Japan's claims in greater detail. Today, I will only briefly touch upon Japan's main procedural claim. The issue concerns whether the Japanese producer, NSC, was afforded "ample opportunity" to participate in the underlying sunset review.

11. At the outset, I would note that 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 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.

12. With respect to Commerce's procedural actions in the sunset review, Japan argues that Commerce did not provide an "ample opportunity" to present in writing all evidence which the parties considered relevant to the proceeding. As a factual matter, this assertion is simply incorrect.

13. Commerce's published *Sunset Regulations* contain the standard sunset questionnaire and provide an opportunity for parties to submit any argument and information they consider relevant to Commerce's sunset determination. Commerce's regulations also set a 30-day deadline for the submission of such information and provide for extensions of that 30-day deadline. NSC was on notice of these information requirements and options, as well as the applicable deadlines, at least *15 months* prior to the initiation date for the sunset review.

14. Japan has not demonstrated how Commerce's actions in this regard are inconsistent with any of the evidentiary and procedural requirements of Article 6. Fifteen months is "ample opportunity" to gather and present any evidence NSC considered pertinent to Commerce's sunset determination. I would also note that 15 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.

It Is Impossible To Act Inconsistently With Obligations That Do Not Exist

15. Mr. Chairman, I will turn now to the six legal issues raised by Japan in this case. On each issue, 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.²

16. With respect to the first issue, Japan argues that the Panel should read the requirements of Article 5.6 – the provision of the AD Agreement that deals with evidentiary requirements for self-initiation of an *investigation* – into Article 11.3. With respect to the second issue, Japan argues that the Panel should read the requirements of Article 5.8 – the provision of the AD Agreement that deals with the *de minimis* standard for an *investigation* – into Article 11.3. There is no support in the Agreement for either of Japan's theories in this regard.

17. According to Japan, the Article 5 requirements 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 the treaty is

² *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* (“*India Patent Protection*”), WT/DS50/AB/R, Report of the Appellate Body, adopted 16 January 1998, para. 45.

the ordinary meaning of the words of the treaty.

18. In the AD Agreement, the drafters cross-referenced particular provisions to make them applicable in the context of Article 11 reviews. For example, Article 11.4 expressly makes the evidentiary and procedural requirements of Article 6 applicable to Article 11 reviews. Even Japan's argument proves the point – Article 12.3 makes the public notice and explanation requirements of Article 12 applicable in Article 11 reviews on a *mutatis mutandis* basis. This means that the public notice and explanation provisions are applicable to reviews, but with “necessary changes” or “changes as appropriate.” No such references, however, are present here with respect to these two issues.

19. The simple fact is that the drafters did not make these investigation requirements of Article 5 applicable in Article 11 reviews. No amount of creative lawyering can override the plain text of the AD Agreement or create an obligation that does not exist.

20. Mr. Chairman, Japan's argument places the legitimate expectations of the Members as a whole, as expressed in the agreed text of the treaty, at risk. As the Appellate Body has stated:

The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these *principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.*³

21. 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

³ *India Patent Protection*, para. 45 (emphasis added).

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.

Commerce's Likelihood Determination Is Consistent with the Article 11.3 Obligation to Determine Whether Dumping is Likely to Continue Or Recur

22. 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.

23. First of all, the provision from Commerce's regulation cited by Japan⁴ is a ministerial provision. Although this section contains the phrase "not likely," it is clear from its context that the phrase "not likely" is a simple shorthand to describe a negative final sunset determination. The use of this phrase does not provide and is not intended to provide a standard by which the results of a sunset review are to be determined. Furthermore, the applicable U.S. law, on its face,⁵ requires that Commerce determine whether there is a likelihood that dumping will continue or recur in sunset reviews.

⁴ 19 CFR 351.222(i)(1)(ii).

⁵ Section 752(c) of the Tariff Act of 1930, as amended, 19 U.S.C. 1671 *et seq.*

24. 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. In short, Japan's assertions concerning the alleged application of a "not likely" standard are not borne out by the facts in this case.

Commerce's Treatment of Antidumping Margins in the Sunset Review Was Consistent With Article 11.3

25. Fourthly, with respect to Commerce's treatment of antidumping margins in the sunset review, Japan challenges Commerce's reliance on pre-WTO margins that are allegedly WTO-inconsistent. Japan's arguments concerning the dumping margins that Commerce reported to the USITC are, however, misguided. 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. Furthermore, Japan's reliance on *EC - Bed Linen*⁶ is misplaced. The *EC - Bed Linen* dispute arose from an *investigation*, not a sunset review. The *EC-Bed Linen* decision did not address the consistency of the EC's margin calculation methodology with respect to Article 11.3 of the AD Agreement.

There is No Obligation to Determine Likelihood on A Company-Specific Basis

26. With respect to the fifth issue, the specificity of a likelihood determination, Japan argues

⁶ *European Communities - Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, Appellate Body Report adopted on 12 March, 2001.

that under Article 11.3, Commerce was required to determine likelihood on a company-specific basis. Again, Japan is wrong.

27. 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.

28. Moreover, 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. Article 6.10, upon which Japan relies, provides for the determination of an individual margin of dumping for producers under investigation. As previously discussed, the analysis of likelihood required under Article 11.3 is a qualitative analysis, not a quantitative analysis. Japan’s arguments on this issue are flawed because they are based on an incorrect assumption that a sunset review involves the calculation of dumping margins.

29. Mr. Chairman, I will now turn to my colleague, Mr. James Lyons, from the USITC, to discuss Japan’s arguments concerning negligibility.

The U.S. International Trade Commission’s (USITC) decision to cumulate imports from various countries in this sunset review is consistent with the AD Agreement

30. Mr. Chairman, with regard to the injury determination made in this sunset review, Japan argues that the AD Agreement requires a strict, quantitative negligibility analysis before the USITC may cumulate imports. 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* 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.

31. By its plain language, Article 11.3 does not contain a negligibility test. Nor does it implicitly or explicitly incorporate negligibility concepts from Article 5.8 and Article 3.3. If the negotiators of the Agreement had wanted to incorporate these concepts of negligibility into Article 11.3, they could and would have done so.

32. On its face, Article 3.3 of the AD Agreement 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.

33. 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.

34. 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.

35. 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. Indeed, there may no longer be 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.” Accordingly, Japan has failed to show that the USITC acted in a manner inconsistent with the AD Agreement when it decided to cumulate imports from various countries in this sunset review.

36. Mr. Chairman, before leaving this subject, we feel compelled to respond to erroneous statements in Japan’s oral statement that we have not seen previously from Japan. We direct the Panel’s attention to paragraphs 74 and 75 of Japan’s oral statement. There, Japan states that the United States does not consider the quantity of subject imports in either deciding whether to

cumulate imports or in determining the likelihood of recurrence or continuation of injury.

Japan's assertion is wrong. The unsubstantiated basis of Japan's statement is clear by the inclusion of such information in the USITC's report. In this regard, we direct the Panel's attention to Tables Corrosion I-4 and I-5 of the USITC Report, published as USITC publication 3364, which is contained in the exhibits submitted by Japan with its first written submission to the Panel.

Conclusion

37. Mr. Chairman, members of the Panel, this concludes our presentation today. For the reasons discussed today and in our first written submission, we ask that you reject each of Japan's claims in this dispute. We would be pleased to entertain questions from the Panel. Thank you very much.