

*United States - Sunset Review of Antidumping Duties on
Corrosion-Resistant Carbon Steel Flat Products from Japan*

WT/DS244

Oral Statement of the United States at the
Second Meeting of the Panel

January 9, 2003

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 comment on certain issues raised in this proceeding concerning the U.S. sunset review of corrosion-resistant steel from Japan. We do not intend to offer a lengthy statement today, in particular because many of the issues in this dispute have been resolved by the Appellate Body in *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*.¹ You have our written submissions and our answers to your questions, and we will not repeat all of the comments that we made in our prior submissions. Instead, we will focus briefly on the central issues in this dispute. We will be pleased, of course, to answer any additional questions you may wish to pose.
2. Mr. Chairman, 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."

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

3. 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.

4. 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.

5. 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*.

6. In the recent case of *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, 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 the AD Agreement are essentially identical to those of the SCM Agreement and the Appellate Body's reasoning is equally persuasive in this proceeding.

7. 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 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*

² *Id.*, para. 65.

³ *Id.*, para. 104.

⁴ *Id.*, para. 105 (emphasis in original).

⁵ *Id.*, para. 72.

Agreement is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.”⁶

8. Each of these findings is based on provisions of the SCM Agreement that have precise analogues in the AD Agreement. Consequently, the above-described elements of the Appellate Body’s reasoning, are fully applicable in the instant dispute.

9. 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.

10. As the United States has detailed in its 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, as just stated, found that the *de minimis* standard in Article 11.9 of the SCM Agreement did not apply to Article 21.3 sunset

⁶ *Id.*, para. 73.

reviews. 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.

11. First, Article 11.3 on its face does not contain a negligibility standard, nor is there a reference to the negligibility concept anywhere in Article 11 of the AD Agreement. Moreover, Article 11 neither implicitly nor explicitly incorporates the negligibility provisions of Articles 3.3 and 5.8 and neither Article 3.3 nor Article 5.8 contains any cross-reference to Article 11.3. Quite simply, if the negotiators had wished to apply Article 5.8 negligibility requirements to Article 11 reviews, they would have done so expressly as they did in cross-referencing other provisions in the Agreement.

12. The Appellate Body also found no indication in Article 21.4 of the SCM Agreement that the drafters intended the obligations of Article 11 of the SCM Agreement to apply to Article 21.3 countervailing duty sunset reviews. Analogously, there is nothing in Article 11.4 of the AD Agreement that would indicate that the drafters intended the obligations of Article 5 of the AD Agreement to apply to Article 11.3 antidumping duty sunset reviews.

13. 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 Like Article 15 of the SCM Agreement, Article 3 of the AD Agreement contains a definition of injury and provides guidance as to how an injury analysis is to be conducted. However, in defining the concept of injury, footnote 9 does not make reference to any specific level of dumped imports. Similarly, none of the other provisions of the AD Agreement limits injury to import levels equal to or above a certain percent. Moreover, the AD Agreement as a whole provides no support for the view that a negligibility assessment is part of an interpretation of injury or that negligible imports are equivalent to no injury.

14. 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 Similarly in this matter, the conclusion that a negligibility assessment is not required in sunset reviews would not lead to irrational results. As the United States fully explained earlier, the focus of a sunset review under Article 11 and an original investigation under Article 3 differs. The differences in the nature and the practicalities of the inquiry in an original investigation and in a sunset review demonstrate that the requirements for the two types of inquiries cannot be identical. The imposition of negligibility requirements would not serve the distinct purpose of a sunset review, which starts from the

⁷ *Id.*, para. 79.

⁸ *Id.*, paras. 84-89.

premise that the volume of subject imports may have decreased and injury eliminated as the result of the antidumping order.

15. 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.

16. This concludes our presentation today. We would be pleased to entertain questions from the Panel. Thank you.