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UNITED STATES – SUNSET REVIEW OF ANTI-DUMPING DUTIES ON CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM JAPAN

Request for the Establishment of a Panel by Japan

The following communication, dated 4 April 2002, from the Permanent Mission of Japan to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 9 July 1993, the United States Department of Commerce ("DOC") concluded its antidumping investigation on imports of Certain Corrosion-Resistant Carbon Steel Flat Products ("Corrosion-Resistant Steel") from Japan and found that Japanese products were being sold in the United States at less than their fair value (i.e., dumped).[1] The United States International Trade Commission ("ITC") on 9 August 1993, then, determined that imports of Corrosion-Resistant Steel from Japan were causing material injury to the United States domestic industry.[2] Following the ITC injury determination, on 19 August 1993, DOC published its final antidumping duty order on Corrosion-Resistant Steel from Japan establishing an initial dumping margin of 36.41 per cent *ad valorem*[3] for all exporters of the subject product.

On 1 September 1999, the DOC automatically initiated a "sunset" review of the definitive antidumping duties on the Corrosion-Resistant Steel from Japan.[4] The DOC preliminary results, issued on 27 March 2000, found that revocation of the order would result in continued dumping at the original rate of 36.41 per cent.[5] The DOC's final determination, published on 2 August 2000, affirmed its preliminary determination.[6] Finally, on 2 November 2000, the ITC determined that revocation of the antidumping order would result in continued injury to the United States' domestic industry.[7]

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[1] See Final Determinations of Sales at Less Than Fair Valve: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 58 Fed. Reg. 37154 (9 July 1993).

[2] *See Certain Flat-Rolled Carbon Steel Products from Japan*, USITC Pub. No. 2664, Inv. No. 731-TA-617, at 4 (Final) (August 1993).

[3] See Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 58 Fed. Reg. 44163 (19 Aug. 1993).

[4] See Initiation of Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products, 64 Fed. Reg. 47767 (1 Sep. 1999).

[5] See Corrosion-Resistant Carbon Steel Flat Products From Japan; Preliminary Results of Sunset Review of Antidumping Duty Order, 65 Fed. Reg. 16169 (27 March 2000).

[6] See Corrosion-Resistant Carbon Steel Flat Products From Japan; Final Results of Full Sunset Review of Antidumping Duty Order, 65 Fed. Reg. 47380 (2 August 2000).

[7] *See Certain Carbon Steel Products From Japan*, USITC Pub. No. 3364, Inv. No. 731-TA-617 (Review) (2 Nov. 2000).

Following these events, on 30 January 2002, Japan requested consultations with the United States pursuant to Article 4 of the DSU, Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.2 of the Agreement on Implementation of Article VI of GATT 1994 (the "AD Agreement"), regarding the final determinations of both the DOC and the ITC and the relevant provisions and procedures of the United States.[8] The consultations, which were held in Geneva on 14 March 2002, enabled the parties to gain a better understanding of each other's position, but unfortunately did not give rise to a mutually satisfactory solution.

The Government of Japan considers both (i) the United States' decision not to terminate the imposition of the antidumping duties on the imports of Corrosion-Resistant Steel from Japan, and (ii) the provisions, procedures and practices pertaining to the United States Tariff Act of 1930 ("the Act") on which the decision was based, to be inconsistent with the United States' obligations under Articles VI and X of the GATT 1994, Articles 2, 3, 5, 6, 11, 12 and 18 of the AD Agreement, and Article XVI:4 of the Marrakesh Agreement establishing the World Trade Organization (the "WTO Agreement"). The Government of Japan would like a panel, which will be established in accordance with Article 4.7 and Article 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), to address the following specific claims:

1. Article 11.1 of the AD Agreement sets forth the overriding principle that antidumping duties shall remain in force "only as long as and to the extent necessary" to counteract injurious dumping. Article 11.3 provides that antidumping duties must be terminated after five years, unless the authorities determine that their expiry would be likely to lead to the continuation or recurrence of dumping and injury. In this context, Article 12 calls on the authorities to satisfy themselves that sufficient evidence (as defined by Article 5) exists to justify an initiation of the review before notifying the public of such initiation. Notwithstanding these provisions of the AD Agreement, Section 751(c)(1) and (2) of the Act and the DOC regulation 19 C.F.R. § 351.218(a) and (c)(1) mandate the DOC to automatically self-initiate sunset reviews without sufficient evidence. This initiation standard does not require sufficient positive evidence that the above-mentioned provisions of the AD Agreement require to be shown. In this particular case, as in all others, the DOC automatically initiated the sunset review without presenting a scintilla of evidence of the likelihood of continued or recurrent dumping or injury. Therefore, Section 751(c)(1) and (2) of the Act and the DOC regulation 19 C.F.R. § 351.218(a) and (c)(1), on the face and as applied in this case, are inconsistent with Articles 5.6, 11.1, 11.3, 12.1, and 12.3 of the AD Agreement and Article X:3(a) of the GATT 1994.

2. The US laws, regulations, procedures, practices and determinations regarding the "likelihood of continuation or recurrence of dumping" are inconsistent, on the face, as a general practice and as applied in this case, with the WTO obligations as follows:

   (a) The DOC regulation 19 C.F.R. §351.222(i)(1)(ii) sets forth the "not likely" standard to revoke an antidumping duty order. In addition, Sections II.A.3 and II.A.4 of the DOC *Sunset Policy Bulletin*[9] provide irrefutable conditions where the DOC may find no likelihood of continued or recurrent dumping. In fact, to our knowledge, no single case has ever met the "not likely" conditions set by *Sunset Policy Bulletin* to date. The DOC regulation 19 C.F.R. § 351.222(i)(1)(ii) and Sections II.A.3 and II.A.4 of the DOC's *Sunset Policy Bulletin*, on the face, as a general practice and as applied in

[8] That request was circulated in document WT/DS244/1, GL/508, G/ADP/D39/1.

[9] Policies Regarding the Conduct of Five-year ("Sunset") Review of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed. Reg. 18871 (16 April 1998) (hereinafter "Sunset Policy Bulletin").

this case, are inconsistent with the requirements of Article 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(b) Both the *Statement of Administrative Action* at 890 and the *Sunset Policy Bulletin* at Section II.A.3 set an irrefutable presumption that dumping is likely to continue where the import volume has declined or where dumping margins remain after issuance of the order. The "good cause" requirement in the DOC regulation 19 C.F.R. § 351.218(d) does not mitigate this defect because it impermissibly narrows the administering authorities' ability to examine other evidences. As such, no attempt whatsoever is made to "determine" whether dumping is likely to continue or recur. The United States' procedures and practice in this regard, both as a general practice and as applied in this case, are inconsistent with the obligations of Article 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(c) The dumping margins that the DOC used in its sunset reviews, including its interpretation of the proper *de minimis* standard in conducting its likelihood analysis,[10] are inconsistent with the WTO obligations as follows:

(i) The DOC used the dumping margins calculated in the original investigation in 1993 to determine the likelihood of continuation or recurrence of dumping in this sunset review. These dumping margins were not calculated pursuant to Article 2 of the AD Agreement. The US policy and practice, both as a general practice and as applied in this case, are thus inconsistent with the United States' obligations under Articles 2, 11.3 and 18.3 of the AD Agreement and Article X:3 of the GATT 1994.

(ii) The DOC has a traditional practice of zeroing negative margins when calculating dumping margins. The DOC applied this practice in its calculation of dumping margins in the original investigations and the administrative reviews in this case. The Appellate Body found this practice of zeroing to be inconsistent with Article 2.4 of the AD Agreement in the *EC – Bed-Linen* case (WT/DS141). The United States' general practice and its application of the practice in this case are therefore inconsistent with Article 2.4 (particularly 2.4.2) of the AD Agreement and Article X:3 of the GATT 1994.

(iii) Notwithstanding the 2.0 per cent *de minimis* standard set forth in Article 5.8 of the AD Agreement, the DOC regulation 19 C.F.R. § 351.106(c)(1) and Section II.A.5 of the *Sunset Policy Bulletin* provide for a 0.5 per cent *de minimis* standard for sunset reviews. In this case, had the DOC properly applied the 2.0 per cent *de minimis* standard provided in Article 5.8 of the AD Agreement, the Japanese producers might have been exempt from the continuation of antidumping duties. Japan contends that the US *de minimis* standard, on the face and as applied in this case, is inconsistent with the United States' obligations under Articles 5.8 and 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(d) Both the *Statement of Administrative Action* and *Sunset Policy Bulletin* provide that the DOC "will make its determination of likelihood on an order-wide basis."[11] The US policy and practice, as a general practice and as applied in this case, are

[10] *Id.* at section II.A.5.
[11] *Id.* at section II.A.2.

inconsistent with Articles 6.10 (which provides the obligation to determine dumping margins on an individual company basis) and 11.3 of the AD Agreement and Article X:3 of the GATT 1994.

(e) The DOC requires Japanese respondents to file all relevant evidence in their "substantive response" within 30 days from the date of initiation. The DOC refused to accept and consider any other information submitted by a Japanese respondent in this case.[12] The DOC's refusal to accept and consider such information in this case was inconsistent with Articles 6.1, 6.2 and 6.6 of the AD Agreement and Article X:3 of the GATT 1994.

(f) The DOC's approach to Article 11.3 determinations contradicts its approach to Article 11.2 determinations pursuant to Sections 751(a) and (d) of the Act and the DOC regulation 19 C.F.R. § 351.222(b) and (d). Given that the language with regard to determining the "likelihood of continuation or recurrence of dumping" is the same in Article 11.2 as in Article 11.3, the US difference in approach, on the face, as a general practice and as applied in this case, is inconsistent with Article X:3 of the GATT 1994.

3. The US procedures and determinations regarding the "magnitude of the margin likely to prevail", *i.e.*, determinations of dumping margins to be reported to the ITC for the purpose of its injury analysis, are inconsistent with the WTO obligations as follows:

(a) Both Section 752(c)(3) of the Act and Section II.B.1 of the *Sunset Policy Bulletin* state that the DOC shall normally provide the ITC with dumping margins from the original investigation. The DOC applied this policy in this case without considering any other factors. The US policy and practice, as a general practice and as applied in this case, are therefore inconsistent with the United States' obligations under Article 11.3 of AD Agreement and Article X:3 of the GATT 1994.

(b) The DOC's reporting of the pre-WTO-Agreement dumping margins to the ITC is, as a general practice and as applied in this case, inconsistent with the United States' obligations under Articles 2, 11.3 and 18.3 of AD Agreement and Article X:3 of the GATT 1994 for the same reasons as discussed in Paragraph 2(c)(i) above.

(c) The DOC's application of its WTO-inconsistent practice of zeroing negative dumping margins for the magnitude of dumping margins in the sunset review, as a general practice and as applied in this case, is inconsistent with Article 2.4 (particularly 2.4.2) of the AD Agreement and Article X:3(a) of the GATT 1994 for the same reasons as discussed in Paragraph 2(c)(i) above.

4. The ITC does not consider whether imports were negligible as defined in Article 5.8 of the AD Agreement when determining whether to cumulate imports in a five-year "sunset" review. In addition, the ITC, in this case, never examined whether imports were negligible and therefore whether they should, or should not, be cumulated. In light of footnote 9 of the AD Agreement, the United States has acted inconsistently with Articles 3.3, 5.8, 11.3, 12.2 and 12.3 of the AD Agreement and Article X:3 of the GATT 1994.

[12] Nippon Steel Corporation ("NSC") provided information on that its 50 per cent-owned galvanizing plant in Indiana achieved full production and that NSC has maintained a steady base of customers.

5. As mentioned above, the US erroneously maintains the antidumping duty on the imports of Corrosion-Resistant Steel from Japan. In this regard, the US acts inconsistently with Articles 11.1 and 11.3 of the AD Agreement.

6. As mentioned above, the US has not conducted the sunset review in a uniform, impartial and reasonable manner. In this regard, the US acts inconsistently with Article X:3(a) of the GATT 1994.

7. Finally, by maintaining these inconsistent laws, regulations and administrative procedures with its obligations under the AD Agreement and Article VI of GATT 1994, the United States is in violation of Article XVI:4 of the WTO Agreement as well as Article 18.4 of the AD Agreement.

Accordingly, pursuant to Article XXIII of the GATT 1994, Articles 4.7 and 6 of the DSU, as well as Article 17 of the AD Agreement, the Government of Japan respectfully requests the establishment of a panel. To that end, I would be grateful if this request could be included in the agenda for the next meeting of the Dispute Settlement Body on 17 April 2002.