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UNITED STATES – ANTI-DUMPING MEASURES ON STAINLESS STEEL PLATE IN COILS AND STAINLESS STEEL SHEET AND STRIP FROM KOREA

Report of the Panel

The report of the Panel on United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 22 December 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. INTRODUCTION

1.1 On 30 July 1999, Korea requested consultations with the United States regarding the preliminary and final determinations of the United States Department of Commerce ("DOC") on imports of stainless steel plate in coils ("Plate") from Korea, dated 4 November 1998 and 31 March 1999, respectively, and the preliminary and final determinations of the DOC on imports of stainless steel sheet and strip in coils ("Sheet") from Korea, dated 4 January 1999 as amended 26 January 1999 and 8 June 1999, respectively. Korea made its request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Dispute Settlement Understanding" or "DSU"), Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and Article 17.3 of the Agreement on Implementation of Article VI of GATT 1994 (the "Anti-Dumping Agreement" or "AD Agreement").[1] The United States and Korea held consultations on 17 September 1999, but failed to reach a mutually satisfactory solution.

1.2 On 14 October 1999, Korea requested the establishment of a panel with the standard terms of reference set out in Article 7 of the DSU. Korea made its request pursuant to Article 6 of the DSU, Article XXIII:2 of GATT 1994 and Article 17.5 of the AD Agreement.[2] In that request, Korea identified the United States measures at issue as the anti-dumping duty order on imports of Plate from Korea, dated 21 May 1999, including actions by the DOC preceding this measure, such as the preliminary and final determinations of the DOC dated 4 November 1998 and 31 March 1999, respectively, and the anti-dumping duty order on imports of Sheet from Korea, dated 27 July 1999, including actions by the DOC preceding this measure, such as the preliminary and final determinations of the DOC dated 4 January 1999 as amended 26 January 1999 and 8 June 1999, respectively.

1.3 At its meeting on 19 November 1999, the Dispute Settlement Body ("DSB") established a panel pursuant to the above request.[3] At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The terms of reference were:

> "To examine, in light of the relevant provisions of the covered agreements cited by Korea in document WT/DS179/2, the matter referred to the DSB by Korea in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 The European Communities and Japan reserved their rights as third parties to the dispute.

1.5 On 24 March 2000, the Panel was constituted as follows:

Chairman:	Mr. José Antonio S. Buencamino
Members:	Mr. G. Bruce Cullen
	Ms. Enie Neri de Ross

1.6 The Panel met with the parties on 13-14 June 2000 and 12-13 July 2000. It met with the third parties on 14 June 2000.

1.7 The Panel submitted its interim report to the parties on 9 November 2000. The Panel submitted its final report to the parties on 14 December 2000.

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[1] WT/DS179/1.
[2] WT/DS179/2.
[3] WT/DS179/3.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping duties by the DOC on imports of Plate and Sheet from Korea. The DOC imposed definitive duties on Plate and Sheet through separate proceedings.

A. PLATE

2.2 On 31 March 1998, a number of U.S. steel companies and U.S. steel workers' associations filed an anti-dumping application with the DOC alleging that imports of Plate from Korea and five other countries were being exported to the United States at less than their fair value and that such imports were materially injuring an industry in the United States. The DOC received supplemental information from the petitioners in April 1998. On 27 April 1998, the DOC published a notice announcing the initiation of an anti-dumping investigation on imports of Plate from Korea and the five other countries concerned.[4] The period of investigation selected by the DOC for the purpose of determining whether dumping had occurred went from 1 January 1997 through 31 December 1997.[5]

2.3 On May 27 1998, the DOC issued investigation questionnaires to two Korean companies, including Pohang Iron and Steel Company ("POSCO").[6] POSCO replied to Section A of the investigation questionnaire on 1 July 1998 and to Sections B through D of that same questionnaire on 20 July 1998. Additionally, in July, August, September and October 1998, POSCO submitted replies to supplemental questionnaires. In turn, the petitioners filed comments with respect to POSCO's submissions in July, August and September 1998.[7] On 4 November 1998, the DOC published a preliminary affirmative dumping determination, and instructed the U.S. Customs Service to require a cash deposit or the posting of a bond on imports of Plate from Korea, equal to the calculated dumping margins (2.77% for both POSCO and all the other Korean exporters).[8]

2.4 In November-December 1998, the DOC verified the sales data and the cost data submitted by POSCO. POSCO submitted revised sales data on 30 November 1998. Additionally, both POSCO and the petitioners filed case briefs on 26 January 1999, commenting on the preliminary determination, and rebuttal briefs, commenting on the case briefs, on 2 February 1999.[9] On 31 March 1999, the DOC published a final affirmative dumping determination, and instructed the U.S. Customs Service to continue requiring a cash deposit or the posting of a bond on imports of Plate from Korea, equal to the calculated dumping margins (16.26% for both POSCO and all the other Korean exporters). [10]

2.5 On 4 May 1999, the United States International Trade Commission informed the DOC of its final affirmative injury determination concerning imports of Plate from the six investigated countries,

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[4] *Initiation of Antidumping Duty Investigations: Stainless Steel Plate in Coils from Belgium, Canada, Italy, Republic of South Africa, South Korea, and Taiwan*, Federal Register Vol. 63, No. 80, at pages 20580-20585. Korea Exhibit 3.

[5] *Notice of Preliminary Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea* (*"Preliminary Determination on Plate"*), Federal Register Vol. 63, No. 213, at page 59536. Korea Exhibit 4.

[6] In what follows, we only make reference to POSCO's participation in the investigation since Korea is not challenging the actions taken by the DOC with respect to the other Korean company.

[7] *Preliminary Determination on Plate*, at page 59536. Korea Exhibit 4.

[8] *Preliminary Determination on Plate*, at page 59539. Korea Exhibit 4.

[9] *Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils from the Republic of Korea ("Final Determination on Plate")*, Federal Register Vol. 64, No. 61, at page 15444. Korea Exhibit 11.

[10] *Final Determination on Plate*, at page 15456. Korea Exhibit 11

including Korea.[11] Following this notification, on 21 May 1999 the DOC published an anti-dumping duty order with respect to imports of Plate from these countries, setting a cash deposit rate for imports of Plate from Korea equal to the dumping margins arrived at by the DOC in its final determination (16.26% for both POSCO and all the other Korean exporters).[12]

B. SHEET

2.6 On 10 June 1998, a number of U.S. steel companies and U.S. steel workers' associations filed an anti-dumping application with the DOC alleging that imports of Sheet from Korea and seven other countries were being exported to the United States at less than their fair value and that such imports were materially injuring an industry in the United States. The DOC received supplemental information from the petitioners in June 1998. On 13 July 1998, the DOC published a notice announcing the initiation of an anti-dumping investigation on imports of Sheet from Korea and the seven other countries concerned.[13] The period of investigation selected by the DOC for the purpose of determining whether dumping had occurred went from 1 April 1997 through 31 March 1998.[14]

2.7 On 3 August 1998, the DOC issued investigation questionnaires to five Korean companies: POSCO, Inchon Iron and Steel Co., Ltd ("Inchon"), Taihan Electric Wire Co., Ltd. ("Taihan"), Sammi Steel Co., Ltd., and Dai Yang Metal Co., Ltd.[15] On 21 September 1998, the DOC selected three mandatory respondents for the investigation, including POSCO. POSCO replied to Section A of the investigation questionnaire on 8 September 1998 and Sections B through D of that same questionnaire on 23 September 1998. Additionally, POSCO submitted replies to supplemental questionnaires in November 1998. In turn, the petitioners filed comments with respect to POSCO's submissions in October 1998.[16] On 4 January 1999, the DOC published a preliminary affirmative dumping determination, and instructed the U.S. Customs Service to require a cash deposit or the posting of a bond on imports of Sheet from Korea, equal to the calculated dumping margins (12.35% for POSCO, 0% for Inchon, 58.79% for Taihan, and 12.35% for all the other Korean exporters).[17]

2.8 On 28 December 1998, POSCO filed a brief before the DOC alleging that the Department had made "significant ministerial errors" in the calculation of POSCO's dumping margin for the purpose of the preliminary determination (signed on 17 December 1998 and made available to parties thereafter). On 26 January 1999, after reviewing these allegations, the DOC published an amendment to its preliminary determination, which revised the cash deposit rate for POSCO to 3.92%.[18]

2.9 In December 1998 and February-March 1999, the DOC verified the cost data and the sales data submitted by POSCO. POSCO submitted revised sales data on 8 March 1999. Additionally,

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[11] *Antidumping Duty Orders: Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa and Taiwan ("Anti-Dumping Duty Order on Plate")*, Federal Register Vol. 64, No. 98, at page 27756. Korea Exhibit 13.

[12] *Anti-Dumping Duty Order on Plate*, at page 27757. Korea Exhibit 13.

[13] *Initiation of Antidumping Duty Investigations: Stainless Steel Sheet and Strip in Coils from France, Germany, Italy, Japan, Mexico, South Korea, Taiwan, and the United Kingdom*, Federal Register Vol. 63, No. 133, at pages 37521-37528. Korea Exhibit 15.

[14] *Notice of Preliminary Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils from South Korea* (*"Preliminary Determination on Sheet"*), Federal Register Vol. 64, No. 1, at page 139. Korea Exhibit 16.

[15] In what follows, we only make reference to POSCO's participation in the investigation since Korea is not challenging the actions taken by the DOC with respect to the other Korean companies.

[16] *Preliminary Determination on Sheet*, at page 137, Korea Exhibit 16.

[17] *Preliminary Determination on Sheet*, at page 147, Korea Exhibit 16.

[18] *Notice of Amended Preliminary Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils from Korea*, Federal Register, Vol. 64, No. 16, at page. 3930. Korea Exhibit 18.

both POSCO and the petitioners filed case briefs on 15 April 1999, commenting on the preliminary determination, and rebuttal briefs, commenting on the case briefs, on 21 April 1999. A public hearing was held on 26 April 1999.[19] On 8 June 1999, the DOC published a final affirmative dumping determination, and instructed the U.S. Customs Service to continue requiring a cash deposit or the posting of a bond on imports of Sheet from Korea, equal to the calculated dumping margins (12.12% for POSCO, 0% for Inchon, 58.79% for Taihan, and 12.12% for all the other Korean exporters). [20]

2.10 On 19 July 1999, the United States International Trade Commission informed the DOC of its final affirmative injury determination concerning imports of Sheet from three of the eight investigated countries, including Korea.[21] Following this notification, on 27 July 1999 the DOC published an anti-dumping duty order with respect to imports of Sheet from these three countries, setting a cash deposit rate for imports of Sheet from Korea equal to the dumping margins arrived at by the DOC in its final determination (12.12% for POSCO, 0% for Inchon, 58.79% for Taihan, and 12.12% for all the other Korean exporters).[22]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. KOREA

3.1 Korea respectfully requests the Panel to find that the U.S. anti-dumping measures at issue, including actions preceding those measures, are inconsistent with the following provisions of the AD Agreement and GATT 1994:

- Article VI:1 of *GATT 1994* and Article 2.4 of the *AD Agreement*, which permit adjustments to be made only for differences that are demonstrated to affect price comparability;

- Article 2.4 of the *AD Agreement*, which also requires the investigating authorities to make a fair comparison of the export price and the normal value;

- Article 2.4.1 of the *AD Agreement*, which permits alterations to the standard price comparison methodology to account for currency movements only when the exporting country's currency is appreciating against the importing country's currency;

- Article 2.4.1 of the *AD Agreement*, which also permits currency conversions only when such conversions are required;

- Article 2.4.2 of the *AD Agreement*, which requires that the calculation of dumping margins be based on a comparison of a single average normal value to a single average of prices of all comparable export transactions;

- Articles 6.1, 6.2, and 6.9 of the *AD Agreement*, which require the investigating authorities to give exporters notice of all essential facts in order to provide them with a full and ample opportunity to defend their interests;

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[19] *Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils from the Republic of Korea ("Final Determination on Sheet")*, Federal Register Vol. 64, No. 109, at page 30665. Korea Exhibit 24.

[20] *Final Determination on Sheet*, at page 30688. Korea Exhibit 24.

[21] *Notice of Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils from the United Kingdom, Taiwan and South Korea ("Anti-Dumping Duty Order on Sheet")*, Federal Register Vol. 64, No. 143, at page 40556. Korea Exhibit 26.

[22] *Anti-Dumping Duty Order on Sheet*, at pages 40556-40557. Korea Exhibit 26.

- Article 12.2 of the *AD Agreement*, which requires the investigating authorities to provide a full explanation of the reasons for their determinations;

- Article X:3(a) of *GATT 1994*, which requires each WTO Member to administer its laws, regulations, decisions, and rulings in a uniform, impartial, and reasonable manner; and

- Article VI of *GATT 1994* and Article 1 of the *AD Agreement*, which only permit anti-dumping measures to be imposed in the circumstances provided for in Article VI and pursuant to investigations conducted in accordance with the *AD Agreement*.

3.2 Therefore, Korea requests that the Panel find that: (i) the United States has nullified or impaired a benefit accruing to Korea, directly or indirectly, under the *WTO Agreements*; and (ii) the United States is impeding the achievement of the objectives of the *WTO Agreements*.

3.3 Korea further requests that the Panel recommend that the United States bring its anti-dumping measures against Plate and Sheet from Korea into conformity with the WTO *AD Agreement* and *GATT 1994*. Specifically, Korea requests that the Panel suggest that the United States revoke the anti-dumping duty orders concerning Plate and Sheet from Korea.

B. UNITED STATES

3.4 The United States respectfully requests the Panel to find that the actions of the United States in conducting the investigations at issue were in conformity with the requirements of the *AD Agreement* and *GATT 1994*.

3.5 The United States further requests that, should the Panel agree with Korea on the merits of the case, the Panel nonetheless should reject Korea's request to revoke the anti-dumping duty orders concerning Plate and Sheet from Korea, and make a general recommendation and suggestions for implementation, consistent with the DSU and established GATT/WTO practice.

IV. ARGUMENTS OF THE PARTIES AND THIRD PARTIES

4.1 With the agreement of the parties, the Panel has decided that, in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel report. Accordingly, the parties' first and second written submissions and oral statements, along with their written responses to questions, are attached at **Annex 1** (Korea) and **Annex 2** (the United States). The written submissions and oral statements of the third parties are attached at **Annex 3**.

V. INTERIM REVIEW

5.1 The **United States** did not make any comments on the interim report. **Korea** did however offer a number of comments on the interim report, as discussed below. Neither party requested an interim review meeting.

5.2 **Korea** considers that the Panel misread the discussion of 'local sales' in the Final Determination in Plate. The interim report assumes that the DOC made a factual determination that the 'local sales' were denominated in won rather than in dollars. The Final Determination however does not address the issue of denomination at all. Moreover, the interim report appears to read the Plate Final Determination as if the DOC made a factual determination that 'local sales' were paid in won using the exchange rate prevailing on the date of invoice. Once again, no such determination was made. Although the DOC did say that the customer pays in won, it did not say how many won were

paid or what exchange rate was used to calculate the amount of won paid. This confusion may result from a misunderstanding about the significance of a charge to the sales ledger. There is no connection between the exchange rate that applies to the sales ledger charge and the exchange rate that applies to the payment. Korea considers that this incorrect understanding of the factual determinations made by the DOC led the Panel to a line of reasoning that is not relevant to the issues presented. Therefore, Korea requests that paragraphs 6.19 - 6.31 be revised to reflect the absence of a factual determination that the exchange rate was fixed as of the time of invoice. Korea considers that, in the absence of such a factual determination, there is no basis for upholding the DOC's double conversion methodology in the Plate case.

5.3 The Panel recognizes that the Final Determination in Plate does not contain an unambiguous determination that the amount of won paid was based upon the dollar/won exchange prevailing at the time of invoice.[23] It is however clear from the Determination as a whole that the DOC believed that the won amounts initially reported to the DOC – amounts which were equivalent to the dollar amount invoiced converted to won at the exchange rate prevailing on the date of invoice – were the amounts actually paid. Thus, the DOC summarized the arguments of the parties as reflecting a choice between calculating normal value "based upon the US dollar price at which the local sales were invoiced" or using "the won prices the customers actually pay". In examining this question, the DOC compared POSCO's internal exchange rate *on the date of invoice* not only with the DOC's "market" exchange rate on the date of invoice but also with DOC's market exchange rate *on the date of payment*, and concluded that they were dissimilar. The DOC noted that this contrasted with the situation in *Roses from Colombia*, where "the Department verified that the payment in pesos reflected the market exchange rate *at the date of payment*" (emphasis added).[24] Thus, both the issue posed and the manner in which it was addressed indicate the DOC's belief that the won amount paid was calculated based upon the exchange rate prevailing as of the date of invoice. Given POSCO's questionnaire responses – which initially reported a won invoiced amount and never suggested that the won amount paid differed from the amount invoiced – the DOC's belief was in our view eminently reasonable. Thus, we have not – except in para. 6.9 – made the changes requested by Korea.

5.4 **Korea** argues that, in Paragraph 6.29, the interim report notes an 'admitted error' by the DOC in the Plate case, namely, the comparison of POSCO's 'internal exchange rate' to the wrong U.S. exchange rate. Nevertheless, the interim report considers that this 'admitted error' does not give rise to an inconsistency with the *AD Agreement*. In so doing, the interim report overlooks the fact that this 'admitted error' vitiates one of the three reasons given in the Final Determination for the double conversion, in fact, the reason identified by the United States as the 'primary basis' for the double conversion. Moreover, the interim report appears to accept, *sub silentio*, the notion of 'harmless error', an approach inconsistent with that taken by another recent panel.[25]

5.5 We disagree with Korea. In our view, the factual error committed by the DOC does not undermine the validity of the DOC's resolution of this issue. Nor do we see any inconsistency between our ruling here and that in *Guatemala – Cement II*. The issue in that dispute was whether certain *violations* of the *AD Agreement* – failure to provide timely notice of initiation, to provide an

[23] The DOC statement that "it is more appropriate to use the won price in which the customer actually pays" is not entirely clear. Similarly, the import of the statement that "the customer pays in won not US dollars, and the sales value of the merchandise is charged to the sales ledger in won, based on the aforementioned exchange rate [i.e., the exchange rate on the date of invoice]", depends upon whether the final clause regarding exchange rates relates only to the sales ledger or also to the amounts paid.

[24] *See* para 6.22, *infra*.

[25] *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, para. 8.22, adopted 17 November 2000.

appropriate public notice and to timely provide the text of the application – were harmless. Here, the question is rather whether certain *factual errors* vitiate a determination, thus giving rise to a violation.

5.6 **Korea** contends that the interim report is incorrect in treating as a question of fact the issue whether the DOC adjusted for the unpaid sales as part of 'constructing the export price' or as an adjustment to the export price (paras. 6.62 to 6.70). There is no dispute between the parties as to what the DOC did: The DOC calculated a 'bad debt expense' for the unpaid sales and made an adjustment to all of POSCO's export sales to account for that expense. The only question is how to characterize this adjustment. That characterization is a question of law. In order to preserve the current balance in the WTO system between acceptance of factual determinations and review of legal conclusions, Korea submits that a panel should not unduly defer to the investigating authority's own characterization of its actions. Rather, a panel should determine as a factual question what actually happened and then should determine as a legal question, based on an objective, functional analysis, which provisions of the *AD Agreement* are most applicable to the factual situation. Korea therefore requests that we treat this as a legal question, with conforming changes to the ensuing analysis.

5.7 We do not agree with Korea. Our task as a Panel is to review the determinations of the DOC and to establish, as a matter of fact, the bases on which it acted. As the determinations and underlying analysis memoranda indicated that the actions in question were taken as part of the construction of the export price, the consistency of those actions with the *AD Agreement* must be assessed against the provisions relating to such construction.

5.8 **Korea** argues that the interim report in para. 6.123 addresses issues not properly before the Panel for decision. Moreover, Korea does not consider that the reasoning in Paragraph 6.123 is sufficient to justify an inference that multiple averaging is permitted by the *AD Agreement* in the circumstances suggested in that Paragraph and, particularly, in Footnote 123. Accordingly, Korea suggests that the Panel delete all of paragraph 6.123, except for the first sentence. Alternatively, Korea suggests that the Panel keep the first two sentences of Paragraph 6.123 and replace the rest of the paragraph with the following: 'We express no opinion as to whether the Anti-Dumping Agreement permits the use of multiple averaging in that factual circumstance.'

5.9 We decline to make the change requested by Korea. Paragraph 6.123 is an essential part of our findings and is necessary in order to make clear why the DOC's actions were inconsistent with the *AD Agreement* and to provide guidance in respect of implementation.

5.10 **Korea** argues that the interim report generally follows the common practice of panels of declining to decide issues that are considered 'unnecessary' to resolution of the dispute, typically because a measure has been found inconsistent with one provision of a WTO Agreement and the panel considers it unnecessary to analyse the measure's consistency with a second provision. However, the interim report inexplicably departs from this practice in two respects. After finding that the United States' use of multiple averaging in the Plate and Sheet investigations was inconsistent with the requirement of Article 2.4.2, the interim report continues to analyse the consistency of multiple averaging with Article 2.4.1 (in Paragraphs 6.128 - 6.131) and with the 'fair comparison' requirement of Article 2.4 (in Paragraphs 6.134 - 6.136). In the interests of 'judicial economy,' and judicial consistency, Korea requests that these paragraphs be replaced in their entirety by paragraphs declining to address these 'unnecessary' issues.

5.11 We decline to make the changes suggested by Korea. We recognize that we might well have exercised judicial economy in respect of these claims. Having addressed them in the interim report, however, we do not see what interest would now be served by excising our conclusions from the final report. To the contrary, their inclusion could prove of some utility depending the course of any possible appeal.

5.12 In response to comments by **Korea**, we have also made certain minor changes to paragraphs 6.3, 6.22, 6.24, 6.27, 6.51, 6.66, 6.68, 6.111 and 6.120. Additional typographical and other minor changes were made to paragraphs 1.7, 6.33, 6.68, 6.69, 6.79, 6.84, 6.97, 6.105, 6.106, 6.119, 6.125 and 7.8.

VI. FINDINGS

A. GENERAL REMARKS

6.1. In reviewing the United States' final measures imposing the anti-dumping duties at issue in this dispute, we keep in mind the applicable principles concerning the burden of proof and the standard of review in disputes under the *AD Agreement*.

6.2. In WTO dispute settlement proceedings, the burden of proof with respect to a particular claim or defense rests with the party that asserts such claim or defence.[26] In the context of the present dispute, this means that Korea is obliged to present a *prima facie* case of violation of the relevant Articles of the *AD Agreement*. In this regard, the Appellate Body has stated that ". . . a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[27] Thus, where Korea presents a *prima facie* case in respect of a claim, it is for the United States to provide an "effective refutation" of Korea's evidence and arguments, by submitting its own evidence and arguments in support of the assertion that it has complied with its obligations under the *AD Agreement*. Assuming evidence and arguments are presented on both sides, it is then our task to weigh and assess that evidence and those arguments in order to determine whether Korea has established that the United States acted inconsistently with its obligations under the *AD Agreement*.

6.3. Article 17.6 of the *AD Agreement* sets out a special standard of review for disputes arising under that Agreement. With regard to factual issues, Article 17.6(i) provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"

Assuming that we conclude that the establishment of the facts with regard to a particular claim in this case was proper, we then may consider whether, based on the evidence before the DOC at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the DOC reached on the matter in question.[28]

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[26] *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India ("United States – Shirts and Blouses")*, Appellate Body Report, WT/DS33/AB/R, adopted 23 May 1997, p. 14.

[27] *European Communities – Measures Concerning Meat and Meat Products* (*"EC – Hormones"*), Appellate Body Report, WT/DS26/AB/R–WT/DS48/AB/R, adopted 13 February 1998, para. 104.

[28] We note that this is the same standard as that applied by the Panel in *Mexico – Anti-Dumping Investigation of High Fructose Corn* Syrup, Report of the Panel, WT/DS132/R, adopted 24 February 2000, which, in considering whether the Mexican investigating authorities had acted consistently with Article 5.3 in determining that there was sufficient evidence to justify initiation, stated (para. 7.95): "Our approach in this dispute will … be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation."

6.4. With respect to questions of the interpretation of the *AD Agreement*, Article 17.6(ii) provides:

> "(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

Thus, in considering those aspects of the United States' determinations which stand or fall depending on the interpretation of the *AD Agreement* itself rather than or in addition to the analysis of facts, we first interpret the provisions the *AD Agreement*. As the Appellate Body has repeatedly stated, panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the *Vienna Convention on the Law of Treaties* (*Vienna Convention*). Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. We then evaluate whether the United States' interpretation is one that is "permissible" in light of the customary rules of interpretation of international law.

B. ALLEGED "DOUBLE CONVERSION" OF CERTAIN HOME MARKET SALES PRICES

1. Factual background

6.5. The claims addressed in this section of our report relate to the treatment by the DOC of certain sales by POSCO in the Korean market in both the *Plate* and *Sheet* investigations. These sales, which we will refer to as "local sales", are ordered and invoiced in US dollars, but are paid in Korean won. Some shipping invoices and all tax invoices relating to these sales also reflect a won price, using a calculation based upon the Korean Exchange Bank's exchange rate as of the date of invoice. The won price is recorded in POSCO's accounting records. As local sales are made pursuant to letters of credit, payment is made some months after invoice date; the parties disagree as to what the record in the two investigations shows with respect to the basis for the won amounts actually paid.

6.6. POSCO reported local sales in won in its initial questionnaire responses (the questionnaire response in the *Sheet* investigation also reported dollar amounts "for ease of verification"). In subsequent supplemental questionnaire responses, however, POSCO modified its home market sales listings to report local sales in dollars. In legal briefs submitted to the DOC in both investigations, POSCO argued that the DOC should calculate normal value on the basis of the US dollar price at which local sales were invoiced.[29] The petitioners disagreed. In its final determinations in the *Plate* and *Sheet* investigations, the DOC used as the basis for its calculation of the normal value the won prices recorded in POSCO's accounting records. The DOC converted these won prices to US dollars at the exchange rate prevailing on the date of certain US sales.

2. Claims under Article 2.4.1 of the *AD Agreement*

(a) Arguments of the parties

6.7. Korea considers that the DOC performed a "double conversion" of local sales by converting the dollar amounts appearing in the invoices into won at one exchange rate and converting them back into dollars at a different exchange rate. In Korea's view, Article 2.4.1 of the *AD Agreement* permits

[29] Korea Exhibit 7, pp. 3-6; Korea Exhibit 20, pp. 3-6.

currency conversions only when such conversions are "required", i.e., when there is no other reasonable alternative. Korea considers that the "double conversion" by the DOC was unnecessary, as it could simply have used the original dollar prices in the invoices. Accordingly, the DOC's "double conversion" of local sales departed from the requirement of Article 2.4.1 that currency conversions be performed only when required. [30]

6.8. The **United States** argues that the phrase "[w]hen the comparison under paragraph 4 requires a conversion of currencies" in Article 2.4.1 establishes the condition under which the rules that follow will apply, but it cannot be read to require that currency conversions be avoided in any particular circumstances, particularly where the transaction occurs in a foreign currency. In any event, the United States considers that it made no "double conversion" of local sales in these investigations. Rather, the DOC made a proper factual determination that the local sales were won transactions as reported by POSCO in its questionnaire responses. The DOC simply converted those won amounts into dollars consistent with the methodology established in Article 2.4.1.

(b) Evaluation by the Panel

(i) Does Article 2.4.1 prohibit unnecessary currency conversions?

6.9. Korea alleges that the DOC performed an unnecessary "double conversion" of certain home market sales prices, in violation of Article 2.4.1, which in Korea's view permits the conversion of currencies only when such conversions are "required". As a threshold matter, therefore, we must consider whether Article 2.4.1 permits the conversion of currencies only when required or, expressed another way, whether Article 2.4.1 prohibits unnecessary currency conversions.

6.10. Our starting point in respect of this issue is of course the text of the relevant provisions of the *AD Agreement*. Article 2.4.1 provides that:

> "*When the comparison under paragraph 4 requires a conversion of currencies*, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation. (emphasis added).
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> _____
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> [8][Footnote omitted]

[30] Korea also claimed, in footnote 142 to its first submission, that the United States breached Article 2.4.1, which provides in its relevant part that currency conversions "should be made using the rate of exchange on the date of sale", by using the exchange rate on the date of sale for export (US) sales, rather than the exchange rate on the date of sale of the local sales themselves, when converting the won prices of local sales to dollars. (First Submission of Korea, para. 4.68, footnote 142, Annex 1-1). In response to a question from the Panel regarding this argument, however, Korea indicated that it was not necessary for the Panel to address the meaning of the word "should" in Article 2.4.1, because Korea was not arguing that the DOC was required to use a particular exchange rate, but rather that the DOC performed currency conversions that were not required. (Responses of Korea to Questions posed by the Panel and the United States at the first meeting of the Panel, Annex 1-4, Question 12 on currency conversion). Given this statement, and Korea's failure to pursue this issue elsewhere in its submissions, we conclude that Korea abandoned this putative claim. In any event, we note that Korea's request for establishment of a panel focuses exclusively on the issue of an unnecessary double conversion. (*See* WT/DS179/2). Thus, we doubt that any such claim would be within our terms of reference.

6.11. Article 2.4.1 sets forth rules with respect to the conversion of currencies to be applied "[w]hen the comparison under paragraph 4 requires a conversion of currencies . . . ." While Article 2.4.1 does not spell out the precise circumstances under which currency conversions are to be avoided, we consider that it does establish a general – and in our view, self-evident - principle that currency conversions are permitted only where they are required in order to effect a comparison between the export price and the normal value. We note that a contrary interpretation would call into doubt the utility of the introductory clause of Article 2.4.1. If the drafters had not intended to establish a rule that currency conversions be performed only when required, they could easily have drafted Article 2.4.1 to provide that "Currency conversions should be made using the rate of exchange on the date of sale …." Further, such an interpretation could result in the unusual situation where currency conversions that were required in order to perform a comparison under Article 2.4 would be subject to the rules set forth in Article 2.4.1, but unnecessary currency conversions could be performed without regard to the rules of Article 2.4.1.

6.12. We need not here arrive at any general understanding as to when currency conversions are or are not required within the meaning of Article 2.4.1, nor do we express any view regarding Korea's "reasonable alternative" test. Rather, we consider it sufficient to conclude, for the purposes of this dispute, that currency conversion is not "required", and would thus not be permissible under Article 2.4.1, in instances where the prices being compared are already in the same currency.

6.13. We do not understand the United States to contest that it would be inconsistent with Article 2.4.1 to perform a currency conversion in a case where the prices to be compared were already in the same currency. While the United States initially disputed that Article 2.4.1 prohibits unnecessary currency conversions, it subsequently appears to have acknowledged that Article 2.4.1 would not permit currency conversions in a case where the sales to be compared were already in the same currency. Thus, the United States explained at the second meeting of the Panel that:

> "A review of the submissions confirms that *there is no real disagreement over the meaning of the relevant provisions of Article 2.4.1*. Korea and the United States agree that if the sales used to establish normal value are in a different currency than the export price sales, conversion at the rate in effect on the date of sale was appropriate, *and if the sales are in the same currency, no conversion is necessary or appropriate*." (emphasis added)[31]

(ii) Did the United States properly determine that the local sales were made in won?

6.14. As discussed above, Korea claims that the DOC unnecessarily converted certain dollar-denominated sales in the Korean market into won at one exchange rate and converted them back into dollars in order to compare them to dollar-denominated export sales at a different exchange rate. It follows from our discussion in the previous section of this Report that such an unnecessary "double conversion" would be inconsistent with Article 2.4.1 of the *AD Agreement*. The question remains whether the DOC in fact made such an impermissible "double conversion".

6.15. The United States considers that the sales in question were properly found to have been made in won, such that a conversion to dollars was necessary in order to compare those prices to dollar-denominated export prices. In other words, the United States denies that it performed a "double conversion" in respect of local sales. This issue is a critical one to our inquiry, as the existence of a "double conversion" is a necessary predicate to Korea's claim. To the extent that Korea is correct, the United States acted in a manner inconsistent with Article 2.4.1; to the extent that the United States is

[31] Oral Statement of the United States at the Second Meeting of the Panel, para. 48, Annex 2-6.

correct, then the factual predicate underlying Korea's claim is without basis and Korea's claim must fail.

(i) standard of review

6.16. In examining this issue, we must first consider the issue of the proper standard of review to be applied in reviewing the DOC's determination. The **United States** considers that whether the sales in question were in dollars or won is a question of fact. Accordingly, the Panel should assess pursuant to Article 17.6(i) whether the DOC's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. **Korea** by contrast argues that the determination in question was not a factual determination, because there were no facts in dispute.

6.17. As noted in Section VI.A, above, Article 17.6 sets forth the standard of review to be applied by a panel when examining a matter under the *AD Agreement*. It is evident from the text of Article 17.6 that the standard of review to be applied by panels depends upon the nature of the question before it. The relevant standard to be applied when considering questions of law, i.e., the interpretation of the *AD Agreement*, is set forth in Article 17.6(ii). The standard to be applied in reviewing determinations of an investigating authority in respect to questions of fact is set forth in Article 17.6(i). Thus, the question before us is whether that determination is one of fact and thus subject to the standard of review set forth in Article 17.6(i).

6.18. Korea's view appears to be that Article 17.6(i) applies only in respect of the establishment of certain objectively-ascertainable underlying facts, e.g., did the invoices express the sales values in terms of dollars or won, in what currency payment was made, etc. We consider that this interpretation does not however coincide with the language of Article 17.6(i). That Article speaks not only to the establishment of the facts, but also to their evaluation. Therefore, the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in an unbiased and objective manner. This concerns the according of a certain weight to the facts in their relation to each other; it is not a legal evaluation.

6.19. In this case, it is generally true that the underlying facts on the basis of which the DOC considered whether the sales in question were made in dollars or won are not disputed (although we will see that there is substantial disagreement between the parties about one key underlying factual issue). We consider, however, that the DOC's determination that the sales in question were made in won was a factual determination in as much as it represents a determination made on the basis of the evaluation of certain facts and does not involve the interpretation of provisions of the *AD Agreement*.

6.20. In light of the above, we consider that the task before us is to examine whether an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Plate* and *Sheet* investigations could properly have determined that the local sales in question were made in won rather than in dollars. Given the nature of the arguments before us, we recall that pursuant to Article 17.5(ii) of the *AD Agreement* we are to examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Finally, we note that this dispute relates to two separate investigations, and that the facts before the DOC differ. Thus we will review the determinations of the DOC in these two investigations separately.

(ii) The *Plate* Investigation

6.21. In order to evaluate whether an unbiased and objective investigating authority could properly have determined that the local sales in the *Plate* investigation were made in won rather than dollars, we must first consider in detail the determination of the DOC and the evidence that was before the DOC at the time it made its determination.

6.22. The arguments of the parties and conclusions of the DOC on the issue of local sales are addressed in detail in the final determination in the *Plate* investigation. We will quote from this determination at length:

> "*Comment 10*. Local letter of credit sales. . . . . [R]espondent maintains that its calculation of normal value should be based on the US dollar price at which the local sales were invoiced. Respondent states that local customers pay POSCO in Korean won based on the US dollar invoiced price. Moreover, respondent notes that it reported the US dollar price for local sales consistent with the Department's requirement and practice. Respondent explains that in *Fresh Cut Roses from Colombia*, the respondent also invoiced home market sales in US dollars but like POSCO, received payment from the customer in the home market currency, pesos in that case. . . . . POSCO states that in this case, the Department accepted the US prices for the calculation of the normal value . . . . Respondent contends that not using the US dollar value in its calculation of normal value in this investigation could have a potentially significant distortive effect on the margin.
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> [Petitioners] object to POSCO's request to use nominal dollar prices for home market customers. Instead, they recommend that the Department use the won prices that the customers actually pay. They argue that it would be bad policy to use nominal prices in the margin analysis. Further, they continue that even if the Department were to find that in some instances use of the nominal price is warranted, the facts in this case do not support such a methodology. Petitioners allege that the *Fresh Cut Roses from Colombia* case cited by POSCO differs from this case in several important respects. Specifically, in *Fresh Cut Roses from Colombia*: (a) the effect of inflation in Colombia was being taken into account in the Department's cost of production analysis and costs were being converted to dollars; (b) the Department stated that it had verified that the payment in pesos had reflected the prevailing dollar/peso exchange rate at the time of payment; and (c) all home market sales were invoiced in dollars and paid in pesos . . . . In contrast, they note that the Department did not verify whether the exchange rates used were proper. Finally, they note that in this case, home market sales were also quoted in won. Therefore, because the Department has not accounted for inflation and did not verify the dollar won exchange rates used, petitioners argue that POSCO's dollar prices are meaningless because POSCO's customers pay in won.
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> *Department's Position*. . . . [W]e disagree with Respondent that the Department should use the US dollar invoiced price for the purposes of calculating normal value. Based upon the facts of the record, as discussed below, we find that it is more appropriate to use the won price in which the customer pays.
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> For HM sale number 1, POSCO provided an internal document which showed the exchange rates used by POSCO to convert US dollar prices into Korean won prices for the month of November 1997. . . . . The record indicates that although customers are invoiced in US dollars (for HM Channel 2 sales the shipping invoice also shows the won price), the customer pays in won not US dollars, and the sales value of the merchandise is charged to the sales ledger in won, based on the aforementioned exchange rate. . . . Moreover, a comparison of the internal exchange rate used by POSCO to the market exchange rate used by the Department shows that the two exchange rates are quite dissimilar (See *Analysis Memorandum*). We note that this is in contrast to *Fresh Cut Roses from Colombia* in which the Department verified that the payment in pesos reflected the market exchange rate at the date of

> payment . . . . Therefore, for the final determination, we have used the won price for home market sales.[32]

6.23. On the basis of this discussion, we can perceive the core issue faced by the DOC and the manner in which it resolved it. It will be recalled that POSCO initially reported local sales to be won sales but subsequently reported them in dollars. In considering how to treat these sales, the DOC had before it evidence that local sales were ordered and invoiced in dollars (and, on some invoices, also in won) but paid in won. The question it faced was whether it should consider the sale to be a sale in dollars in the amount shown on the invoice (such that no currency conversion would be required) or a sale in won based upon the amount charged to the sales ledger. The DOC concluded that use of the won amount was appropriate because the customers paid in won, the merchandise was charged to the sales ledger in won, and the exchange rate used by POSCO to calculate the won equivalent of the dollar amount was dissimilar to the "market" exchange rate used by the DOC.

6.24. The heart of Korea's argument that these sales should have been treated as dollar rather than won sales is clearly stated in its first submission:

> "As discussed in the Statement of Facts, POSCO had a significant quantity of "local sales" of both SSPC and SSSS during the investigation periods. These "local sales" were negotiated and invoiced in US dollars, but the payments were made in Korean won. Significantly, to ensure that payment accurately reflected the actual dollar value of the sales, the amount of the Korean won payment for these "local sales" was not fixed at the time of the sales negotiation or at the time of invoice. Instead, the payment in Korean won was determined by applying the market exchange rate (as announced by the official Korean Exchange Bank) for the date of [payment][33] to the US dollar amount shown on the invoice. Thus, the economic reality is that the final payment for these sales is determined by the US dollar amount shown on the invoice, and not by the Korean won amount recorded in POSCO's accounting records at the time of invoice. In economic terms these "local sales" are equivalent to sales that are invoiced and paid in US dollars.[footnote omitted][34]

This argument – that the transactions in economic terms were dollar transactions because the amount of Korean won actually paid was established by converting the dollar amount invoiced by the exchange rate at the time of payment, rather that at the time of invoice – is repeated frequently by Korea in its submissions.[35]

6.25. We consider that the reasoning advanced by Korea is compelling. The issue in the *Plate* investigation whether the local sales in question were dollar or won sales arose because the invoices were expressed in dollars[36] but the payments were made in won. Thus, if the amount of won actually paid was based on the dollar amount identified in the invoice at the market rate of exchange on the date of *payment* (which, because the local sales in question were letter of credit sales, came some months after the date of invoice), then the controlling amount would be the dollar amount appearing in the invoice. This was in fact a key element in the reasoning of the DOC in *Fresh Cut Roses from*

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[32] *Final Determination on Plate*, at pages 15455-15456, Korea Exhibit 11.

[33] The original Korean submission referred to "date of sale". Korea however informed the Panel that his was a typographical error and that the reference should be to the "date of payment". Responses of Korea to Questions Posed by the Panel and by the United States. (Question 6 on currency conversion, Annex 1-4).

[34] First submission of Korea, para. 4.64, Annex 1-1.

[35] *See* First submission of Korea, paras. 3.51-3.53, Annex 1-1; Oral statement of Korea at the First meeting of the Panel, paras. 60-61, Annex 1-2; Second submission of Korea, paras. 128, 139-140, Annex 1-5; Oral statement at the second meeting of the Panel, paras. 81-84, Annex 1-6.

[36] And sometimes also in won. *See* paragraph 6.5, *supra*.

Colombia[37], an anti-dumping investigation cited by both the petitioners and respondents in the *Plate* investigation and discussed by the DOC in its final determination, as quoted above. In that case, the DOC "established that respondent invoiced its home market customers in US dollars and received the equivalent value in pesos *at the date of payment*".(emphasis added) The DOC "found it appropriate that respondent's home market sales were reported in dollar value since the dollar value was the currency in which the sales transactions were made. Furthermore, since home market sales were transacted in dollars and the payments made, although in pesos, were based on constant dollar value, there is no distortion."[38]

6.26. Korea's argument, however, is dependent upon a particular factual predicate: that the amount of won actually paid in respect of local sales was determined by applying the market rate of exchange at the time of *payment* to the dollar amount stated in the invoice. Korea asserts, and the United States does not appear now to dispute, that the amounts paid were established based upon the application as of the date of payment of exchange rates established by the Korean Exchange Bank. The DOC was not however aware at the time of its final determination in the *Plate* investigation that this was the case. Rather, it is evident to us that the DOC considered at the time of its final determination that the actual won amount paid was the amount charged to the sales ledger, which in turn was derived by converting the dollar amount invoiced to won at the Korean Exchange Bank exchange rate prevailing *at the time of invoice*, and that there was no evidence in the record suggesting to the contrary.

6.27. In response to a question from the Panel, Korea acknowledges that "it is unaware of any evidence in the record of the Plate case that indicates that POSCO specifically informed the DOC that the amount paid in won differed from the converted won amounts shown in the invoice."[39] It contends however that, once POSCO had informed the DOC that local sales were denominated in dollars, the burden was on the DOC to ask for the necessary information. We consider this argument to be unpersuasive. This is not a case where the DOC did not know the actual won amounts paid and did not bother to ask. Rather, POSCO in its initial questionnaire reported local sales in won, and the amount reported was the invoiced amount rather than the – in most cases probably substantially higher – amount actually paid.[40] Even after POSCO reported dollar prices for the local sales and argued that those dollar prices should be used in place of the won prices, it never corrected the initial misimpression that the won amount reported was the amount actually paid.[41] Finally, the DOC did

[37] 60 Fed. Reg. 6980, 7006 (6 February 1995). Korea Exhibit 52.

[38] *Ibid.*

[39] Responses of Korea to Questions Posed by the Panel at the Second Meeting of the Panel, (Question on currency conversion, Annex 1-6).

[40] *Ibid*. POSCO informed the DOC in its initial questionnaire response that it had "reported the actual invoiced price per metric ton in Korean Won. In the home market, POSCO made local letter of credit sales ("local sales")[footnote omitted] and domestic sales. All sales were paid in Korean Won and have been recorded in Korean Won on the database." US Exhibit 21.

[41] When submitting revised data in response to a supplemental questionnaire in August 1998, POSCO noted that it had in addition made some "minor corrections", and had, *inter alia*, "added the US dollar sales price for local sales, as reflected on the invoices, for reference purposes". US Exhibit 38. Subsequently, in a supplemental questionnaire response on 16 October 1998, POSCO submitted a revised home market database to the DOC. It explained that "[t]he home market sales listing has also been modified to report local sales and related charges in the currency in which the sales and associated charges were incurred, *i.e.*, US dollars, consistent with the Department's long-standing practice. [footnote omitted]. In POSCO's prior submissions, both the won and US dollar prices were reported for local sales." US Exhibit 43. In its case brief, POSCO pursued its argument that the price of local sales was negotiated and invoiced in US dollars. POSCO pointed to an exhibit collected by the DOC during verification as evidence that the order sheets for local sales reflected only dollar prices. POSCO further argued that "[l]ocal customers pay POSCO in Korean Won based on the US dollar invoiced price." (POSCO's arguments in this brief are summarized in the portion of the Final Determination quoted above). At no point in this brief, however, did POSCO indicate to the DOC that the won amount it had reported to the DOC initially, which appeared in the tax invoices, and which was based upon the

not become aware at verification that the won amounts paid might be different from the won amounts charged to the sales ledger because customers paid on a rolling basis such that verification of payments on an individual basis was not possible.[42]

6.28. We now turn to a review of the DOC's determination on this issue in light of the facts as understood by the DOC on the basis of the record before it. As the DOC explained in its determination, it had verified certain local sales. For these sales, while the customers were invoiced in dollars (and sometimes also in won), *payment was made in won*, and the value of the merchandise was charged to the sales ledger in won, *based upon the exchange rate prevailing on the date of invoice*.[43] The *Plate* final analysis memorandum that underlies the final determination indicates that the date of *payment* for these sales however was some months later.[44] In other words, the record before the DOC indicated that the won amount the customer would pay on a given date was fixed some months earlier based upon the won/dollar exchange rate prevailing on the earlier date, irrespective of subsequent changes in the dollar/won exchange rate. The DOC's determination then notes that the exchange rate used by POSCO on the earlier date did not correspond to the market exchange rate used by the DOC. Again, the *Plate* final analysis memorandum indicates that the DOC was comparing POSCO's exchange rate on the date of invoice both to the DOC's exchange rate on that date and to its exchange rate on the date of payment.[45] The determination notes that "this is in contrast to *Fresh Cut Roses from Colombia* in which the Department verified that the payment in pesos reflected the market exchange rate *at the date of payment*" (emphasis added).[46] In short, the DOC concluded that local sales were made in won because the amount to be paid was fixed in won on the date of invoice irrespective of subsequent movements in the won/dollar exchange rate between the date of invoice and the date of payment.

6.29. In challenging the DOC's determination, Korea emphasizes an admitted error by the DOC regarding benchmark exchange rates. Specifically, although the DOC stated that it was comparing POSCO's internal exchange rates to US Federal Reserve exchange rates, it mistakenly compared POSCO's internal exchange rates – which were in fact the Korean Exchange Bank's official rates – to certain adjusted exchange rates prepared by the DOC on the basis of three-month rolling averages. This error however does not detract from the essential fact – as perceived by the DOC at the time it made its determination based upon the record before it – that the won price was determined as of the date of invoice and remained fixed irrespective of any subsequent changes in the won/dollar exchange rate between the date of invoice and the date of payment.

6.30. Korea also has emphasized that the order sheets for local sales, which were verified by the DOC, reflect a dollar amount but no won amount. Korea contends that this supports its view that

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application of the exchange rate prevailing on the date of *invoice*, differed from the won amount actually paid. Korea Exhibit 7, pp. 3-6. Nor does the petitioner's case brief indicate any awareness of this fact. To the contrary, the petitioner repeatedly asks the DOC to use "the won prices that POSCO's customers actually pay". Korea Exhibit 10, p. 1.

[42] Responses of Korea and of the United States to Questions Posed by the Panel at the Second Meeting of the Panel. (Question 2 on currency conversion, Annexes 1-7 and 2-7).

[43] It should be noted that, at the request of POSCO and over the opposition of the petitioners, the DOC found that the date of sale was the date of *invoice* and not the date of *order*. The DOC so found because there were changes in price for a significant proportion of shipments between the date of order and the date of invoice. *Final Determination on Plate*, p.15449, Korea Exhibit 11.

[44] Memorandum to File re: Analysis for the final determination in the investigation of stainless steel plate in coils from Korea – Pohang Iron and Steel Company, 19 March 1999 ("*Plate Final Analysis Memorandum*"), Korea Exhibit 12. This Memorandum was placed in the public file and is referenced in the *Final Determination on Plate*. The precise dates specified in the Memorandum are confidential information.

[45] *Ibid*.

[46] *Final Determination on Plate*, p. 15456, Korea Exhibit 11.

local sales were negotiated as well as invoiced in dollars. While the fact that order sheets showed sales in dollars and not in won might be a relevant consideration in other circumstances, the fact remains that – based on the record as placed before the DOC – a won amount was fixed at the date of invoice and this won amount was controlling as to the amount to be paid several months later. We recall in any event that in this investigation the DOC determined that the date of invoice rather than the date of order confirmation was the "date of sale" because it was at the time of invoice that POSCO established the material terms of sale. In support of this view, POSCO had argued that "all POSCO's sales were subject to change between order and shipment". [47] Thus, the fact that the orders for local sales were expressed in dollars is in our view less than conclusive as to whether the sales were won or dollar sales.

6.31. For the foregoing reasons, we conclude that an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Plate* investigation could properly have determined that the local sales in question were made in won.

(iii) The *Sheet* Investigation

6.32. We now consider whether an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Sheet* investigation could properly have determined that the local sales were made in won rather than dollars.

6.33. The arguments of the parties and the conclusions of the DOC are set forth in some detail in the DOC's final determination:

> "Respondent argues that the Department should calculate normal value for "local" sales made in the home market based on the US dollar price at which those sales were invoiced. Local sales are sales of subject merchandise to home market customers who will further process the merchandise into non-subject products for export. Respondent maintains that although POSCO is paid in Korean won, the amount of payment is based on the US dollar invoiced price. Respondent contends that because POSCO's local sales are denominated and invoiced in US dollars, the invoiced prices do not require conversion to won for US comparison purposes, and that the conversion of the US dollar price to won and then back to dollars is not only unnecessary, but would significantly distort the margin. Respondent cites to . . . *Roses from Columbia* [sic] . . ., noting that the Department agreed and accepted the US prices for sales invoiced in US dollars, notwithstanding that the respondent received payment from the customer in the home market currency. Respondent argues that in the final determination in *SSPC from Korea*, the Department's concern was that POSCO's customers paid for sales in won, the sales amounts were recorded in won in POSCO's accounting records, and that the exchange rates utilized by POSCO to determine the won equivalents were different from those exchange rates used by the Department. Respondent contends that the fact that payment is made in won is irrelevant, since both the contract and the invoice reflect a US dollar price, and that sales are converted to won for the purposes of consistency with POSCO's accounting records, which are maintained in won.
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> Petitioners claim that the use of the dollar value for local sales in the home market would be inappropriate, given that POSCO receives payment in won. Petitioners distinguish this case from *Roses from Columbia* [sic] by noting that in that case, the Department was factoring in the effects of inflation in the cost-of-production

[47] *Final Determination on Plate*, Korea Exhibit 11.

> analysis, costs were converted into dollars; the payments in local currencies had reflected the prevailing exchange rate, and all home market sales had been invoiced in dollars and paid in pesos. Petitioners further contend that in *Roses from Columbia* [sic], the decision to use US dollar-based prices was presumably made for convenience and consistency, as costs were also dollar-denominated. Petitioners further note that the disparity between the exchange rates reflected in the price conversion and the rates used by the Department is too great to reconcile, and is in contrast to the situation in *Roses from Columbia* [sic]. Petitioners argue that the use of a constant index such as the dollar is used by the Department in the face of currency depreciation or significant deflation, and should not be applied selectively to reduce a dumping margin.
>
> *Department's position.* We agree with petitioners. First, we believe that respondent's reliance on *Roses from Columbia* [sic] is misplaced. In that case, all prices and costs, both in the home market and in the U.S., were dollar denominated, and the exchange rates reflected in the dollar to peso conversion coincided with the exchange rates used by the Department. Given these facts, the use of dollar-denominated prices provided consistency throughout the Department's analysis in that case. Neither of these facts are present in the instant case. *At verification, we found that local sales are the only sales made in the home market that are expressly linked to a dollar value, but that the sale is ultimately a won-denominated sale*. Additionally, the vast majority of the costs incurred for home market and US sales are denominated and paid by POSCO in won. . . . Finally, as we note above, there is a disparity between exchange rates reflected in POSCO's accounting records and those used by the Department . . . . Although the sales are linked to a dollar value, there is no question that the respondent pays in won, and therefore, the use of the dollar-denominated gross unit price for local letter of credit sales in the home market is unwarranted. In addition, in recent cases involving POSCO (*e.g., SSPC from Korea and Carbon Steel from Korea – 3rd Review*), the Department has used the won-denominated price for local letter of credit sales in the home market because we found that, as in the instant case, the local sales were paid in won and recorded in POSCO's accounting records in won, and the exchange rates used by POSCO were dissimilar from those used by the Department. . . (emphasis added).[48]

6.34. On its face, the issue before the DOC in the *Sheet* investigation was similar to that in the *Plate* investigation. As in the *Plate* investigation, the issue before the DOC in *Sheet* was whether it should use the dollar-invoiced price for local sales or whether it should use the won price which was charged to the sales ledger and reflected in the tax and certain shipping invoices.

6.35. There was however in our view a significant factual difference between the two investigations. As previously discussed, the record in the *Plate* investigation suggested that the won prices initially reported by POSCO represented the won amounts actually paid. In the *Sheet* investigation, on the other hand, the DOC verified, and recorded in its Verification Report, that the won amounts reported by POSCO were *not* in fact the amounts actually paid:

> "Observation [xxxx](HM#1)
>
> This observation represented a local sale from POSCO to [xxxxxx], which involved a recognized loss on foreign currency exchange. We tied the individual sale from POSCO's order sheet to a cumulative shipping list/invoice and tax invoice. As local

[48] *Final Determination in Sheet*, p. 30678, Korea Exhibit 24.

> sales are dollar-denominated, and paid in won equivalents, POSCO records the sale in its won equivalent, reflected in the tax invoice to the customer. On payment, the exchange rate is determined based on the rates given to POSCO by Korean Exchange Bank for Inward Remittance. For this sale, POSCO recognized an exchange rate loss of [xxxx]. This difference between the recorded sales amount and payment amount is reflected in the "Foreign Exchange Currency Loss of Transaction for Local Sales" account. We examined all journal entries, ledgers, bank documents, and publicly available information (re: Korea Exchange Bank, Foreign Exchange Rates), and found no discrepancies."[49]

On the basis of this Verification Report, it seems clear to us that the DOC in the *Sheet* investigation was fully aware that the won amounts reported by POSCO in respect of local sales were in fact different from the won amounts actually paid.

6.36. The United States argues that "the only suggestion that [the invoiced and paid] amounts differed came late in the proceeding amid conflicting information". It contends that POSCO only reported the invoice price and neither informed the United States nor claimed that the amount paid differed from the amount invoiced.[50] We note however that, unlike in the *Plate* investigation, POSCO in the *Sheet* investigation reported dollar amounts ("for ease of verification") in addition to won amounts in its initial questionnaire response.[51] This triggered a supplemental questionnaire from the DOC in response to which POSCO provided information suggesting that the won price paid was not the same as that invoiced.[52] More importantly, the sales verification report quoted above was dated 6 April 1999 and related to a verification performed in February. It thus predated the final determination in the *Sheet* investigation by several months. Moreover, the Verification Report quoted above does not suggest a hint of doubt about the manner in which local sales were handled. A page extracted from POSCO's accounts and attached to the Verification Report listed dozens of exchange rate losses related to local sales.[53] At this point, therefore, the record clearly showed that the amount of won actually paid in the case of local sales differed from the amount initially reported by POSCO and appearing on POSCO's tax invoices.[54]

6.37. In light of the foregoing, it is difficult to understand the basis for the DOC's statement, in its final determination, that, "[a]t verification, we found that local sales are the only sales made in the home market that are expressly linked to a dollar value, but that the sale is ultimately a won-denominated sale." Leaving aside that we can locate no such "finding" in the Verification Report, we are convinced that an unbiased and objective investigating authority could not so find on the basis of the facts before it in the *Sheet* case. As we have seen, it was clear from the record in the *Sheet* investigation that the won price which the DOC considered to be the price in which local sales were denominated was in no sense controlling. Rather, the won amount ultimately paid would be determined by converting the dollar amount appearing on the invoice into won at the rate of exchange prevailing on the date of payment. Thus, the dollar amount appearing on the invoices was controlling,

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[49] *Sheet* Sales Verification Report, 6 April 1999, p. 14, Korea Exhibit 19.

[50] Responses of the United States to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 2 on currency conversion, Annex 2-7).

[51] US Exhibit 41, pp. B-21, B-22.

[52] POSCO stated that "[p]ayment is received on a letter of credit basis in dollars as well. Payment is booked in won with the difference in the exchange rate on the date sale and the date of payment recorded as a transaction gain or loss." US Exhibit 42. It is unclear why POSCO indicated that payment was received in dollars. However, the DOC determined, and POSCO did not subsequently dispute, that payment was in fact made in won.

[53] *Ibid*.

[54] We note that the local sales issue was briefed by the parties and decided by the DOC well after this date.

while the won equivalent appearing on the tax and certain shipping invoices and noted in POSCO's accounts[55] played no role in determining the amount the purchaser ultimately would pay. As explained above, we agree with Korea that there is no logical basis under these circumstances to consider that the sales in question were denominated in won.

6.38. In its determination, and before this Panel, the United States has emphasized that there were differences between the exchange rates used by POSCO and the market exchange rates relied upon by the DOC. We agree that the DOC might have been entitled to disregard the dollar prices stated in the invoices if the won amounts actually paid had been based on fictitious or inaccurate exchange rates, as this would have indicated that the economic value of the transactions was not in fact determined in dollars at all.[56] In this case, however, the DOC verified, and the United States does not now dispute, that the "internal exchange rates" used by POSCO were in fact the official exchange rates published by the Korea Exchange Bank.[57] Further, we consider that the differences between the Korea Exchange Bank rates and the Federal Reserve rates cited in the *Sheet* investigation[58] are not the result of fictitious or inaccurate exchange rates, but merely reflect the existence of a 14-hour time difference between New York and Seoul.[59]

6.39. For the foregoing reasons, we conclude that an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Sheet* investigation could not properly have determined that the local sales in question were made in won.

(iii) Did the United States perform unnecessary currency conversions in violation of Article 2.4.1 of the AD Agreement?

6.40. As discussed above, we have concluded that the DOC did not err in considering that the local sales in question in the *Plate* case were denominated in won rather than in dollars. Therefore the factual predicate underlying Korea's claim under Article 2.4.1 – that the DOC performed an unnecessary "double conversion" in respect of those sales – is without foundation. To the contrary, having properly treated the sales in question as having been made in won, the DOC made only a single conversion, from won to dollars. Accordingly, we conclude that, in the *Plate* investigation, the United States did not act inconsistently with Article 2.4.1.

6.41. With respect to the *Sheet* investigation, we have concluded that the DOC's factual determination that the local sales in question were won-denominated sales was in error. In our view, the DOC improperly treated sales that were denominated in dollars as won sales. We have further concluded that it would be inconsistent with Article 2.4.1 to undertake currency conversions in

[55] The fact that local sales were entered into POSCO's accounts in won is in and of itself of little significance. As Korea points out, *all* sales – including dollar-denominated US sales – are entered into Korea's books in won, and it keeps all its accounts in that currency.

[56] As the petitioners argued before the DOC, "a respondent could quote understated dollar prices [in the home market]and then use an artificially high exchange rate to collect the 'real' amount being charged in the local currency". (Korea Exhibit 23, p. 5). Even in this case, however, an investigating authority presumably would use the actual won amounts *paid* where that amount differed from the nominal won amount appearing on certain invoices.

[57] *Sheet Final Analysis Memorandum*, Korea Exhibit 25; Responses of the United States to Questions Posed by the Panel the Second Meeting of the Panel, question 7 on currency conversion, Annex 2-7.

[58] S*heet Final Analysis Memorandum*, Korea Exhibit 25, p.3. The differences relied upon by the DOC were of less than one percentage point.

[59] As Korea points out, the Federal Reserve rates are based on rates prevailing in New York City at 12:00 p.m. Given the 14-hour time difference, the Federal Reserve rates for a given day are not established until nine hours after close-of-business (17:00) in Seoul. Thus, some difference between the exchange rates is inevitable.

instances where the prices being compared were in the same currency. It being undisputed that in this case the export prices in question were also in dollars, we conclude that, in the *Sheet* investigation, the United States acted inconsistently with Article 2.4.1.

3. Claims under Article 2.4 of the *AD Agreement* ("fair comparison")

(a) Arguments of the parties

6.42. **Korea** asserts that the "double conversion" of local sales from dollars to won and back to dollars was inconsistent with a "fair comparison" requirement in the chapeau of Article 2.4. In Korea's view, the conversion of these sales from dollars to won at the exchange rate prevailing as of the date of the home market sale, and their re-conversion from won to dollars at a different exchange rate prevailing as of the date of a corresponding US sale, unfairly penalised POSCO for changes in the exchange rate between these two dates that were beyond its control. Korea further contends that as a result of this double conversion at different rates, the United States compared the export price to an inflated normal value.

6.43. The **United States** contends that it made a proper factual determination that the local sales were made in won, and that it made a single conversion of those won sales to dollars.

(b) Evaluation by the Panel

6.44. Although Korea expresses its fair comparison claim in slightly different ways at different points in its submissions, it is clear that this claim, like Korea's claim under Article 2.4.1, relies upon the existence of a "double conversion" – i.e., the conversion of dollar-denominated prices into won at one exchange rate and the conversion back into dollars at a different exchange rate. We have concluded that, in the *Plate* investigation, no such "double conversion" occurred, because the DOC properly determined that the sales in question were denominated in won. Accordingly, we find that the United States did not act inconsistently with any "fair comparison" requirement under Article 2.4 in the *Plate* investigation.

6.45. In respect of the *Sheet* investigation, we note that this Panel "need only address those claims which must be addressed in order to resolve the matter in issue in this dispute".[60] Having concluded that the United States acted inconsistently with its specific obligations with respect to currency conversion under Article 2.4.1 in the *Sheet* investigation by performing unnecessary currency conversions in respect of local sales, we do not consider it necessary to examine Korea's claim that those double conversions breached a more general "fair comparison" requirement under Article 2.4 of the *AD Agreement*.

4. Claims under Article X:3(a) of GATT 1994 and Article 12 of the *AD Agreement*

(a) Arguments of the parties

6.46. Korea contends that the double conversion methodology employed by the DOC was unreasonable and departs from established practice without adequate explanation, and is thus inconsistent with the uniform and reasonable administration of the anti-dumping laws required by Article X:3(a) of *GATT 1994*. Korea argues that the double conversion of local sales in these investigations was an unprecedented departure from the established policy of the DOC – as reflected in various investigations including *Roses from Colombia* – to accept charges in the currency in which they are made. In particular, the factual distinctions made by the DOC between the investigations at

[60] *United States – Shirts and Blouses, supra*, p. 19.

issue in this dispute and *Roses* do not withstand scrutiny. In addition, the United States acted unreasonably by penalizing exporters for differences between official Korean and US exchange rates that existed because of a time difference between Korea and New York. Korea further argues that, by providing incorrect and irrelevant arguments to justify its departure from the standard methodology, the United States failed to provide the statement of reasons required by Article 12.2 of the *AD Agreement*.[61]

6.47. In the view of the **United States,** Korea in effect argues that Article X provides for panel review of the consistency of any action by a Member with its own domestic law, regulation or practice. However, the task of a panel under the *DSU* is to review the consistency of a Member's actions with a covered agreement. Further, as observed by the Appellate Body in *EC - Bananas*, Article X:3 does not address the consistency of particular administrative rulings, but rather the *administration* of such rulings. In this dispute, Korea's complaint focuses on the anti-dumping rulings in the *Plate* and *Sheet* investigations themselves, and not on the administration of those rulings. In any event, the United States disputes that *Roses from Colombia* reflects US practice. *Roses* was a single case exception to US practice, not the rule. The facts in these investigations differ significantly from those in *Roses*, and no subsequent case has followed the position taken in *Roses*.

(b) Evaluation by the Panel

(i) The Plate investigation

6.48. Article X:3(a) of the GATT 1994 provides as follows:

> "Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

6.49. In considering Korea's claim under Article X:3(a), we first note the contention of the United States that Korea is challenging the DOC's anti-dumping rulings in these investigations while Article X:3(a) permits challenges only to the administration of those rulings. It is of course clear from the text of Article X:3(a) that that provision relates to the *administration* of laws, regulations, decisions and rulings, and not to the laws, regulations, decisions and rulings themselves. Korea's claim however is not that the DOC's anti-dumping determinations were rulings which the United States administered in a manner inconsistent with Article X:3(a), but rather that the United States administered its anti-dumping laws and regulations in a manner inconsistent with that Article.[62] Thus, we must consider whether the alleged departure of the United States from alleged established policy in these investigations represents a breach of the United States' obligation to administer those laws and regulations in a uniform and reasonable manner.

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[61] Korea also suggests in its first submission (para. 4.70) that the United States acted inconsistently with Articles 6.1, 6.2 and 6.9 of the *AD Agreement* in its treatment of local sales. It does not however identify any specific basis for these claims. In its second submission, Korea indicates in general terms that the United States' alleged Article 6 violations in this dispute arise where the DOC agreed with respondents on key issues in the preliminary determination but reversed position in the final determination. In respect of the local sales issue, however, this factual situation did not exist, as local sales were erroneously excluded from the preliminary determination altogether. Thus, we do not consider that Korea has made a *prima facie* case of violation of Article 6 in respect of local sales.

[62] There can be no doubt that the US anti-dumping laws and regulations are "laws" and "regulations" of general application "pertaining to . . . rates of duty, taxes or other charges, or to other requirements, restrictions or other prohibitions on imports or exports" within the meaning of Article X:1 of *GATT 1994*.

6.50. We note at the outset of our examination that we have grave doubts as to whether Article X:3(a) can or should be used in the manner advocated by Korea. As the United States correctly points out, the WTO dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements".[63] It was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system,[64] and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*.

6.51. In any event, we do not consider that the DOC in this investigation committed the "unprecedented departure" from "established policy" alleged by Korea such that its behaviour was either non-uniform or unreasonable. In our view, the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ. Nor do we consider that the requirement of reasonable administration of laws and regulations is violated merely because, in the administration of those laws and regulations, different conclusions were reached based upon differences in the relevant facts.

6.52. Applying these considerations to the case at hand, we recall that the core issue in the *Plate* investigation was the factual question whether local sales were denominated in dollars or in won. The resolution of this issue obviously depended heavily on the facts as determined by the DOC. Thus, assuming that *Roses from Colombia* reflected an "established policy" by the United States, we consider that the United States properly distinguished the *Plate* investigation from *Roses* as a factual matter. Our reasons for this conclusion are stated in detail in paragraphs 6.21 - 6.31 of this Report. Finally, while we recognize that the exchange rates used by POSCO as of date of sale differed from those used by the DOC for the date of sale both as a result of a difference in time zones and as a result of errors in the selection of a comparable exchange rate by the DOC, the DOC understood on the basis of the record before it that the amount of *payment* was determined on the basis of the exchange rate on the date of s*ale*. This difference would have existed even if the DOC had used the same Korean Exchange Bank rates as those relied upon by POSCO.

6.53. Finally, we note Korea's view that the United States failed to provide a statement of reasons for its departure from *Roses* as required by Article 12.2 of the *AD Agreement*. We recall in this respect that Article 12.2 requires a Member in its preliminary and final determinations to set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities" and to "refer to the matters of fact and law which have led to arguments being accepted or rejected", including a "full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2." In our view, Korea has not asserted or established that the United States failed to provide the statement of reasons for its actions required by Article 12.2. Rather, Korea challenges the substantive adequacy of that statement of reasons. We have however already addressed this substantive issue at length above.

6.54. For the foregoing reasons, we conclude that the United States did not act inconsistently with Article X:3(a) of *GATT 1994* and Article 12.2 of the *AD Agreement* in respect of its treatment of "local sales".

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[63] *DSU* Article 3.2.

[64] It is for this reason that both Article X:3(b) of *GATT 1994* and Article 13 of the *AD Agreement* require Members to maintain appropriate judicial, arbitral or administrative tribunals or procedures.

(ii) The Sheet investigation

6.55. In respect of the *Sheet* investigation, we note that this Panel "need only address those claims which must be addressed in order to resolve the matter in issue in this dispute".[65] Having concluded that the United States acted inconsistently with its specific obligations with respect to currency conversion under Article 2.4.1 in the *Sheet* investigation by performing unnecessary currency conversions in respect of local sales, we do not consider it necessary to examine Korea's claim that those double conversions breached the requirements of Article X:3(a) of *GATT 1994* and Article 12 of the *AD Agreement*.

C. TREATMENT OF UNPAID SALES

1. Factual background

6.56. The claims addressed in this section of our report relate to the treatment by the DOC of sales to a company that subsequently declared bankruptcy. During the period of investigation in both the *Plate* and *Sheet* investigations, POSCO made a significant number of sales to a US customer which, for purposes of confidentiality, we will refer to as the ABC Company. All such sales were made on credit through Pohang Steel America Corporation ("POSAM"), a POSCO subsidiary located in the United States. The ABC Company subsequently declared bankruptcy, and did not pay for those sales. POSAM issued negative invoices with respect to these sales, and reflected the non-payment in its accounting records by showing a credit to accounts receivable and a debit to sales, thereby reversing the entries that recorded the sales. There was no evidence in the record that POSCO had any knowledge at the time of sale that ABC Company was in a precarious financial situation.[66]

6.57. In the preliminary determination in the *Plate* investigation, the DOC excluded these sales from its margin analysis, because it determined that the sales were "atypical and not part of POSCO's normal business practice".[67] In the final determinations in both investigations, however, the DOC included the sales in question in its margin analysis and treated the unpaid amounts as "direct selling expenses". The DOC allocated these direct selling expenses over all US sales. In respect of sales made directly to unaffiliated purchasers in the United States, the DOC added the allocated amount of these direct selling expenses to the normal value. In respect of US sales made through POSAM, the DOC subtracted the allocated amount of these direct selling expenses from the price charged by POSAM to unaffiliated customers in the United States.

2. Claims under Article 2.4 ("allowances")

(a) Arguments of the parties

6.58. Korea claims that the DOC's treatment of the amounts unpaid by ABC Company as "direct selling expenses" is an adjustment not permitted by Article 2.4 of the *AD Agreement*. In Korea's view, Article 2.4 permits adjustments only to account for differences that affect prices. The cost of unpaid sales is not one of the five factors deemed by Article 2.4 to affect price comparability. In particular, the term "conditions and terms of sale" refers to the agreed-upon bundle of rights and obligations under a sales agreement, and failure to pay amounts due is not a "condition" or "term" of a contract but is rather a *breach* of a contract. Nor do the unpaid amounts represent an "other difference . . . demonstrated to affect price comparability" within the meaning of Article 2.4. Because POSCO

[65] *United States - Shirts and Blouses, supra*, p. 19.

[66] Responses of the United States to Questions Posed by the Panel at the First Meeting of the Panel, question 2 on treatment of unpaid sales, Annex 2-4.

[67] *See Plate* Preliminary Analysis Memorandum, Korea Exhibit 5, p.3.

did not know that a particular customer would fail to pay at the time it set its prices, the subsequent failure to pay did not affect the prices that POSCO set. In any event, the allocation by the DOC of the cost of unpaid sales of ABC Company over *all* US sales to all customers is inconsistent with Article 2.4 because the failure of one company to pay did not affect the price comparability of sales to other customers who did pay for their purchases.

6.59. The **United States** considers that its treatment of the cost of unpaid sales was consistent with Article 2.4. The United States first notes that certain US sales were made through the associated importer POSAM. For these sales it constructed an export price by deducting from the price charged to the first independent buyer in the United States the expenses and profits associated with the transaction between that buyer and the associated importer, including an allocated portion of the bad debt expense. In respect of these sales, therefore, the bad debt expense was not an *adjustment* to export price under the "due allowance" provision of Article 2.4, but rather a deduction made to *construct* an export price under Article 2.3. The United States maintains that, because Korea has made no claim under Article 2.3, the methodology used by the DOC to construct an export price is not before the Panel. In any event, the United States acted consistently with Article 2.3 in deducting an allocated portion of the bad debt expense when constructing the export price because the bad debt expense was a "cost[] . . . incurred between importation and resale".

6.60. In respect of those sales for which it did make adjustments, the United States contends that bad debt represents a "difference in conditions and terms of sale" for which due allowance shall be made pursuant to Article 2.4. In the United States' view, the term "differences in conditions and terms of sale" encompasses differences in costs associated with the terms of the sales contract and other expenses that are directly related to the sale, i.e., but for the sale the expense would not be incurred. The United States considers that whenever a seller sells on credit, it accepts a credit expense, including any bad debt that may result from the sale. As in the case of a warranty, the expense is part of the bargain and but for the sale the expense would not be incurred. As for the amount of the bad debt allowance, the United States considers that the only practicable method for making such allowances is based on the exporter's actual expense during the period of investigation. The United States does not rely on the reference in Article 2.4 to "other differences" demonstrated to affect price comparability as a basis for its adjustment, but neither does it concede that bad debt could not be treated as such an "other difference".

6.61. Korea disputes the United States' view that, in respect of sales made through the associated importer POSAM, the bad debt expense was not an adjustment to export price but was rather a deduction made to construct an export price. In Korea's view, it is clear that the adjustment was not made to construct the export price because the DOC made the same adjustment to all US sales, whether or not they were made through an associated importer. Further, the DOC's determinations refer to the adjustment as one for "direct selling expenses", which under US law signifies that the DOC determined that a "circumstance of sale" adjustment – equivalent in US law to an adjustment under Article 2.4 – was appropriate. In any event, Korea considers that an adjustment for non-payment is not a permissible adjustment for purposes of constructing an export price because it is not a cost incurred "between importation and resale" and because an item may properly be included as an adjustment for purposes of constructing an export price only if it is the type of item that might reasonably be included in an unaffiliated importer's mark-up.

(b) Evaluation by the Panel

(i) Was the DOC's treatment of unpaid sales in respect of POSAM part of the construction of the export price?

6.62. As discussed above, Korea claims that the DOC's treatment of unpaid sales was an adjustment for differences affecting price comparability pursuant to the third sentence of Article 2.4 which was inconsistent with the requirements of that provision. The United States has responded that, *in respect of those sales made through POSAM*, its treatment of unpaid sales did not represent an *adjustment* to export price pursuant to the third sentence of Article 2.4 but was rather one aspect of the *construction* of an export price pursuant to Article 2.3.

6.63. This issue is important for two reasons. First, if the United States' treatment of unpaid sales in respect of POSAM was one aspect of the construction of the export price, we must consider whether claims relating to construction of the export price are within the Panel's terms of reference. Second, it is clear that a Member's actions regarding the construction of an export price are subject to different rules than a Member's actions with respect to the making of allowances for differences affecting price comparability. Thus, we must as a threshold matter determine whether the DOC's treatment of unpaid debt in respect of sales through POSAM was one aspect of the construction of the export price.

6.64. In addressing this issue, we must of course look to what the DOC actually did during these investigations. This is a factual issue that we must resolve on the basis of the DOC's final determinations and on the publicly available final analysis memoranda which are cross-referenced in those determinations.

6.65. Turning first to the *Plate* investigation, the DOC stated the following in its Final Determination:

> "For US sales made through POSAM, we calculated CEP [constructed export price] based on packed prices to unaffiliated customers in the United States . . . . In accordance with section 772(d)(1) of the Act, *we deducted those selling expenses associated with economic activity occurring in the United States, including direct selling expenses* (credit costs, bank charges, and US commissions) and indirect selling expenses. Also, we made an adjustment for CEP profit in accordance with section 772(d)(3) of the Act." (emphasis added).[68]

Although the Final Determination does not specifically mention the unpaid sales, it is clear from the final analysis memorandum that the amount for unpaid sales was included in the "direct selling expenses" which were deducted in order to calculate the constructed export price.[69]

6.66. The Final Determination in the *Sheet* investigation is more explicit. It states that:

> "For US sales made through POSAM, we calculated CEP based on packed prices to unaffiliated customers in the United States . . . . In accordance with section 772(d)(1) of the Act, we deducted those selling expenses associated with economic activity occurring in the United States. *In addition, we deducted a per unit direct selling*

[68] *Final Determination on Plate*, p. 15445, at Korea Exhibit 11.

[69] *Plate Final Analysis Memorandum*, pp. 8-9, Korea Exhibit 12. The memorandum indicates that an "amount associated with unpaid bankrupt sales" was included in the direct selling expenses ("DIREXPU"). A formula under the title "Constructed Export Price ("CEP") Calculation" indicates that the amount for direct selling expenses was deducted from the gross unit price ("GRSUPRU") in order to derive a net price ("NETPRIU").

> *expense to account for bad debt losses incurred by POSAM for sales made to a bankrupt customer*. . . . Also, we made an adjustment for CEP profit in accordance with section 772(d)(3) of the Act.[70]

Once again, the final analysis memorandum confirms that the amount for unpaid sales was deducted from the price charged to the first unaffiliated purchaser as part of the construction of the export price.[71]

6.67. These determinations and underlying memoranda demonstrate that, in the case of sales through POSAM, the DOC deducted an allocated portion of the unpaid sales as part of its construction of the export price. We note in this respect that the provision of US law on the basis of which the DOC made these deductions, section 772(d) of the Act,[72] is entitled "Additional Adjustments to Constructed Export Price", applies exclusively in the CEP context, and, as made clear by implementing regulations, only for adjustments for expenses associated with commercial activities occurring in the United States.[73] By contrast, adjustments for differences between the normal value and the export price *or* constructed export price in respect of, *inter alia*, taxation, physical characteristics, quantities, level of trade and "other differences in the circumstances of sale" are made to the *normal value* pursuant to section 773 of the Act.[74]

6.68. Korea contends that the DOC's reference to "direct selling expenses" was a "signal" that the DOC had decided to make a circumstances of sale adjustment, which Korea equates to an allowance for differences affecting price comparability under the third sentence of Article 2.4. We note however that Section 772(d) of the Act identifies "expenses that result from, and bear a direct relationship to the sale", i.e., direct selling expenses, as one category of expense for which adjustment shall be made in the construction of an export price.[75] Thus, we cannot agree that the DOC's reference to "direct selling expenses" means that the allowances for unpaid sales in respect of sales through POSAM must be deemed to be adjustments for circumstances of sale.

6.69. Our conclusion on this point is a limited one, relating to a specific factual question: was the DOC's deduction of an amount for unpaid sales in respect of sales through POSAM performed as an element in the construction of an export price? Having answered this question in the affirmative, we agree with the United States that the DOC's actions in respect of those sales must be measured against the provisions of the *AD Agreement* relating to the construction of the export price, or not at all.[76]

6.70. The foregoing conclusion does not of course imply a view about whether the DOC's actions were *consistent* with the provisions of the *AD Agreement* regarding construction of an export price. That is an issue to be taken up only after a consideration as to whether such claims are within the Panel's terms of reference. Nor does it mean that the DOC's adjustments for unpaid sales in respect of sales through *unaffiliated* importers should be measured against the provisions relating to construction

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[70] *Final Determination on Sheet*, p. 30668, Korea Exhibit 24 (emphasis added).

[71] *Sheet Final Analysis Memorandum*, p. 9, Korea Exhibit 25.

[72] Korea Exhibit 1, p. 469.

[73] 19 C.F.R. Section 351.402(b), Korea Exhibit 2.

[74] Korea Exhibit 1, p. 470.

[75] *Compare* 19 C.F.R. Section 351.410(c)(defining "direct selling expenses" for purposes of circumstance of sale adjustments to mean "expenses that result from, and bear a direct relationship to, the particular sale in question"). Thus, while the DOC made adjustments in identical *amounts* for unpaid sales when calculating the margin of dumping in respect of export price and constructed export price sales, this does not mean, as argued by Korea, that these adjustments had the same legal basis.

[76] It is clear to us that, if the DOC's actions in constructing an export price were consistent with WTO requirements regarding such construction, then the DOC's actions would be WTO-consistent whether or not those actions could also have been justified as adjustments for differences affecting price comparability.

of the export price. As discussed below, the WTO-consistency of these adjustments must be measured against the provisions of the *AD Agreement* governing adjustments for differences affecting price comparability. It is to the latter issue that we now turn.

(ii) Was the DOC's adjustment for unpaid sales in respect of sales through unaffiliated importers a permissible allowance for a difference affecting price comparability?

6.71. As we have seen, Korea claims that the *AD Agreement* allows adjustments only for "differences which are . . . demonstrated to affect price comparability" within the meaning of Article 2.4, and that because the non-payment by ABC company of certain sales was not such a difference, the adjustments made by the DOC were inconsistent with that Article. Although the United States contends, and we have found, that in its treatment of sales *through affiliated importer POSAM* the DOC was constructing an export price, the United States does not dispute that the WTO-consistency of its adjustments with respect to sales *to unaffiliated buyers* must be assessed by reference to the "due allowance" provision cited by Korea.[77]

6.72. In examining this claim, therefore, we first consider the relevant provisions of the *AD Agreement*. Article 2.4 of the *AD Agreement* provides as follows:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.*[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties." (emphasis added)
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> ———————————
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> [7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

6.73. The third sentence of Article 2.4 identifies five specific categories of "differences which affect price comparability": differences in conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics. The United States does not assert that the cost of unpaid sales represents a difference in taxation, levels of trade, quantities or physical characteristics.

6.74. The **United States** does contend, however, that the allowances it made here were for "differences in conditions and terms of sale". It considers that a permissible interpretation of differences in "conditions and terms of sale" encompasses differences in costs associated with the terms of the sales contract and other expenses that are directly related to the sale, i.e., but for the sale the expense would

[77] First submission of the United States, para. 81, Annex 2-1 ("When comparing that export price [i.e., the price charged by POSCO to independent buyers] to normal value, the United States made an adjustment to normal value to account for differences affecting price comparability that was consistent with Article 2.4.")

not be incurred. In the United States' view, bad debt is an expense directly related to the payment terms of the contract, because whenever a seller sells on credit he accepts a credit expense, which includes any bad debt that may result from the sale. **Korea** responds that "conditions and terms of sale" are the agreed upon bundle of rights and obligations created by the sales agreement, and that no contract contains terms authorizing a customer to go bankrupt and refuse to pay.

6.75. We do not consider that the phrase "differences in conditions and terms of sale", interpreted in accordance with customary rules of interpretation of public international law, can be understood to encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales. In this respect, we note that Article 2.4 refers to the "terms and conditions *of sale*". Although of course both words – "term" and "condition" – have many meanings, both are commonly used in relation to contracts and agreements. Thus, "term" is defined, *inter alia*, to mean "conditions with regard to payment for goods or services",[78] while "condition" is defined, *inter alia*, as "a provision in a will, contract, etc., on which the force or effect of the document depends".[79] Thus, we consider that, read as a whole, the phrase "conditions and terms of sale" refers to the bundle of rights and obligations created by the sales agreement, and "differences in conditions and terms of sale" refers to differences in that bundle of contractual rights and obligations. Thus, to the extent that there are, for example, differences in payment terms in the two markets, a difference in the conditions and terms of sale exists. The failure of a customer to pay is not a condition or term of sale in this sense, however. Rather, non-payment involves a situation where the purchaser has violated the "conditions and terms of sale" by breaching its obligation to pay for the merchandise in question.

6.76. We perceive no textual basis for the United States' effort to characterize all differences in costs associated with the terms of the contract and expenses directly related to the sale as "differences in terms and conditions of sale". The United States contends that "conditions" of sale can be read in this context to mean the "mode or state of being" of sales, such that "differences in conditions and terms of sale" include the "mode or circumstances" under which sales are made.[80] Assuming this interpretation to be a permissible one, it might allow for adjustments for "differences in conditions and terms of sale" in cases where the contractual provisions governing sales in the two markets were identical but the seller was aware from circumstances existing at the time of sale that those provisions would likely entail different costs.[81] Thus to take an example often cited by the United States in this dispute, a seller might extend identical warranties in different markets or to different customers, knowing in advance that the costs related to those warranties in one market would likely be higher than in the other. Similarly, a seller might extend sales on the same credit terms in two different markets or to two different customers in the awareness that the risk of default – and thus the likely costs associated with the extension of credit – would be higher in one case than in the other. However, we fail to see how the fact that a customer who has purchased on credit subsequently went bankrupt and failed to pay for his purchases could be deemed

[78] *New Shorter Oxford English Dictionary*, Oxford University Press, 1993, p. 3253. The United States apparently agrees that "terms" in Article 2.4 refers to contractual terms, as it states that an ordinary meaning of "terms of sale" is "the situations and conditions that define the nature and extent of the sales contract (*e.g.*, quantity, delivery)". First Submission of the United States, para. 83, Annex 2-1.

[79] *Id.*, p. 472.

[80] First Submission of the United States, para. 83, Annex 2-1. Like the dictionary relied on by the United States, the *Shorter Oxford English Dictionary* identifies "State, mode of being" as one broad definition of the word "condition" (the other broad category being "A convention, proviso, etc."). For example, one may speak of the "human condition", or note that a person is "in no condition" to do something. Read in context, however, we doubt that this alternative meaning is applicable in the context of Article 2.4.

[81] We note however that such a situation might more properly be considered to be an "other difference . . . affecting price comparability".

a "circumstance under which sales are made", at least in a case such as this one where the seller had no knowledge of the precarious financial situation of the purchaser.[82]

6.77. We consider that an examination of the context in which the phrase "differences in conditions and terms of sale" is used supports our understanding of the ordinary meaning of this phrase. We recall that Article 2.4 identifies "differences in conditions and terms of sale" as one of several "differences which affect price comparability".[83] Thus, the notion of price comparability informs our interpretation of "differences in conditions and terms of sale". In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing.[84] A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4. This reinforces our view that the phrase "differences in conditions and terms of sale" cannot permissibly be interpreted to encompass an unanticipated failure of a customer to pay for certain sales.

6.78. In the latter phases of the proceeding, and in response to a question from the Panel, the United States contended that its methodology for the treatment of bad debt was simply a practical way to address differing levels of risks between markets in cases where sales are made on credit.[85] As our previous discussion suggests, we agree with the United States that a difference in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made under Article 2.4. Nor do we preclude that actual bad debt experience during the period of investigation might be evidence relevant to establishing the existence of such a difference.[86] The United States did not however treat actual experience with respect to levels of unpaid sales as *evidence* of different levels of risk in the two markets in these investigations. Rather, it stated that it was the DOC's practice to treat bad debt as a direct selling expense when the expense was incurred in respect of the subject merchandise.[87] Thus, even assuming that the US methodology was somehow intended to address differences in *risk* of non-payment, we do not accept the proposition that

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[82] The United States concedes that there was no evidence in the record in either investigation that POSCO had any knowledge at the time of sale that ABC company was in a precarious financial situation. Responses of the United States to Questions posed by the Panel at the First Meeting of the Panel, (Question 2 on treatment of unpaid sales at the first meeting of the Panel, Annex 2-4).

[83] The parties disagree as to whether a "difference in conditions and terms of sale" is by definition a difference affecting price comparability or whether, having established that such a difference exists, it is still necessary to determine that such a difference affects price comparability in order to make an adjustment. *See* responses of Korea and the United States to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 6 on treatment of unpaid sales, Annexes 1-7 and 2-7). This is not however an issue we need resolve in this dispute.

[84] The United States appears to have a similar view. Thus, it states that "[s]elling expenses such as warranty costs and bad debt not only reflect conditions of sale in the market, *they are also an element of price*.[footnote omitted]. Therefore, differences in such selling expenses affect price comparability". First Submission of the United States, para. 84, Annex 2-1.

[85] The United States contended that the risk of non-payment "may differ between the two markets being compared and thus have different effects on prices in the two markets. Because it is the only practical means – and a method as reasonable as any other – of making a due allowance for any such difference, we base the allowance on the company's actual bad debt experience in the two markets during the period of investigation.[footnote omitted] That is, we rely on the actual bad debt expenses the company recognizes with respect to each of the two markets being compared." Responses of the United States to Questions Posed by the Panel at the Second Meeting of the Panel. (Question 8 on bad debt, Annex 2-4).

[86] Although in our view the existence of different levels of non-payment during prior periods would appear to be much more relevant.

[87] *Final Determination on Plate*, p. 15448, at Korea Exhibit 11; *Final Determination on Sheet*, p. 30674, Korea Exhibit 24.

the existence of a higher level of non-payment in one market than in another during the period of investigation may be *deemed* to demonstrate the existence of such differences in risk and thus represent a permissible adjustment for "differences in conditions and terms of sale".[88]

6.79. We note that the United States does not appear to argue that the adjustment made by the DOC in these investigations is justified on the basis that it represented an adjustment for "other differences which are also demonstrated to affect price comparability."[89] Nevertheless, taking into account the ambiguity of the United States' position on this question, and in the interests of achieving a full resolution of this dispute, we conclude that, for the reasons set forth in paragraph 6.77 above, the adjustment in question in this dispute could not be justified as an adjustment for "other differences which are also demonstrated to affect price comparability".

6.80. For the foregoing reasons, we conclude that the DOC's adjustment for unpaid sales through unaffiliated importers was not a permissible due allowance for differences affecting price comparability and was thus inconsistent with the third sentence of Article 2.4 of the *AD Agreement*.[90]

(iii) Is Korea's claim regarding the DOC's adjustment for unpaid sales in respect of sales through POSAM to construct an export price within the Panel's terms of reference?

6.81. In the preceding section, we concluded that the DOC's adjustment for unpaid sales in respect of sales through unaffiliated purchasers was not a permissible due allowance for differences affecting price comparability and was thus inconsistent with the third sentence of Article 2.4 of the *AD Agreement*. We also concluded, however, that the DOC's adjustment for unpaid sales in respect of sales by POSCO through its affiliated US importer POSAM was not an adjustment for differences affecting price comparability but was rather one aspect of the construction of an export price, the WTO-consistency of which must therefore be measured against the provisions governing such construction. Before considering the substantive issue, however, we must first consider whether claims regarding the construction of the export price are within this Panel's terms of reference.

6.82. The **United States** contends that, because Korea has made no claim under Article 2.3 of the *AD Agreement*, the DOC's decision to construct an export price and the methodology it employed to do so are not issues before this Panel.[91] The United States considers that, while the fourth sentence of Article 2.4 provides guidance on how to construct the export price, it uses non-mandatory language.

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[88] The United States contends that, "during the period of investigation, POSCO actually recognized greater bad debt expenses, as a proportion of sales, in the US market than in the Korean market. This evidence would indicate that POSCO should be charging higher prices in the US market than in the Korean market." In the absence of any evidence in the record that the level of non-payment in the US market was foreseeable or that the historical risk of non-payment was higher in the US than the Korean market, the conclusion that POSCO *should* have been charging higher prices in the US than in the Korean market seems unwarranted.

[89] In response to a question from the Panel, the United States stated that "Because bad debt falls within the meaning of 'conditions and terms of sale', we have not relied on the reference in Article 2.4 to 'any other differences' demonstrated to affect price comparability. That does not constitute a concession that bad debt could not fall within 'other differences'". Responses of the United States to Questions Posed by the Panel at the First Meeting of the Panel, (Question 5 regarding unpaid debt, Annex 2-4).

[90] In light of our conclusion on this issue, we need not address Korea's additional argument that the allocation by the DOC of the cost of unpaid sales of ABC Company over *all* US sales to all customers is inconsistent with Article 2.4 because the failure of one company to pay did not affect the price comparability of sales to other customers who did pay for their purchases.

[91] Second Submission of the United States, para. 22, Annex 2-5.

Thus, a claim that the construction of an export price is in violation of the *AD Agreement* must be based on Article 2.3.[92]

6.83. **Korea**, citing the Appellate Body report in *Argentina - Footwear*,[93] responds that the fact that Article 2.4 specifically refers to Article 2.3 should be sufficient to bring Article 2.3 within the Panel's terms of reference. In any event, Korea asserts that it has not claimed that Article 2.3 establishes a separate basis for a finding that the United States acted inconsistently with the *AD Agreement*. Rather, Korea has addressed Article 2.3 merely to refute a defense offered by the United States. Finally, Korea considers that the rules governing the methodology used to construct an export price are found in the fourth sentence of Article 2.4, not in Article 2.3.[94]

6.84. In considering this issue, we note first that Korea's request for establishment of a panel, which represents the basis for our terms of reference, contains no mention whatsoever of Article 2.3 of the *AD Agreement*, nor of Article 2 generally. Rather, it refers exclusively to Articles 2.1 and 2.4.[95] It is well established that a panel may not, consistent with Article 6.2 of the *DSU*, consider a claim of violation of a treaty provision which has not been identified in the request for establishment underlying the panel's terms of reference.[96] Nor do we consider that a claim of violation of Article 2.3 would be within this Panel's terms of reference merely because Article 2.4 makes a reference to Article 2.3.[97]

6.85. We recall however Korea's statement that it has not claimed that Article 2.3 establishes a separate basis for a finding that the United States acted inconsistently with the *AD Agreement*. Thus, the question before us is not whether a claim *under Article 2.3* is within our terms of reference. Nor does the United States anywhere in its submissions suggest that a claim *under Article 2.4* regarding treatment of bad debt in respect of construction of the export price is not within the Panel's terms of reference. Rather, the issue as framed by the parties relates to the nature of the obligations, if any, imposed by Article 2.4 in respect of the construction of an export price. This is an issue relating to the *substance* of Korea's claim, not to its *admissibility*.

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[92] Responses of the United States to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 2 on unpaid sales, Annex 2-7).

[93] *Argentina – Safeguard Measures on Imports of Footwear*, Appellate Body Report, WT/DS121/AB/R, adopted 1 January 2000, para. 74.

[94] Responses of Korea to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 2 on unpaid sales, Annex 1-7).

[95] WT/DS179/2.

[96] Article 6.2 of the *DSU* provides that the request for the establishment of a panel "shall provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Appellate Body has observed that:

> "Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for the purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all."

Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, para. 124.

[97] The issue identified by Korea in *Argentina - Footwear* related to Article 4.2(c) of the *Agreement on Safeguards*, which requires a Member to publish certain information "in accordance with Article 3" of that Agreement. The Appellate Body concluded that, in considering a claim under Article 4.2(c), the Panel was permitted, and in fact was *obliged* by Article 4.2(c), to take into account the provisions of Article 3 of that Agreement. The Appellate Body did *not* conclude that a *claim* under Article 3 was within the Panel's terms of reference.

(iv) Is the DOC's adjustment for unpaid sales in respect of sales through POSAM to construct an export price consistent with Article 2.4, fourth sentence, of the AD Agreement?

6.86. As is evident from the preceding section, the parties to this dispute disagree as to what obligations, if any, Article 2.4 imposes in respect of the construction of the export price. In considering this question, we must of course turn first to the relevant provisions of the *AD Agreement*.

6.87. Article 2.1 of the *AD Agreement* provides as follows:

> "For the purposes of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

6.88. Article 2.3 of the *AD Agreement* provides as follows:

> "In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, *the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer*, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine." (emphasis added)

6.89. Article 2.4 of the *AD Agreement* provides as follows:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] *In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.* If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties." (emphasis added).

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[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

6.90. In our view, both Article 2.3 and Article 2.4 play an important role in respect of the construction of export prices. When determining whether dumping exists, Article 2.1 usually requires a comparison of the *export price* with the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Article 2.3, however, authorizes a Member to *construct* the export price where, *inter alia*, the actual export price is unreliable because of association

between the exporter and the importer. As discussed in section VI.C.2.(b)(i), it was pursuant to this authorization that the DOC disregarded the export price charged by POSCO to its affiliated importer POSAM in these investigations and instead constructed the export price.

6.91. Further, Article 2.3 specifies that the export price may be constructed *on the basis of* the price at which the imported products are first resold to an independent buyer. It is clear from this language that, while the price charged to the first independent buyer is a starting-point for the construction of an export price, it is not *itself* the constructed export price. Nor does Article 2.3 itself contain any guidance regarding the methodology to be employed in order to construct the export price. Rather, the only rules governing the methodology for construction of an export price are set forth in Article 2.4 of the *AD Agreement*, which provides that, "[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made." Although the United States repeatedly refers to these allowances as "Article 2.3 adjustments",[98] the provision governing these allowances is found in Article 2.4 and it is therefore evident to us that a claim regarding the appropriateness of allowances made to construct an export price may be made pursuant to that Article.[99]

6.92. The United States contends that, because Article 2.4 provides that allowances for costs and profits "should" be made in constructing an export price, that provision is not mandatory, and that this provision of Article 2.4 therefore does not provide a basis for claim of violation.[100] We cannot agree.

6.93. The term "should" in its ordinary meaning generally is non-mandatory, i.e., its use in this sentence indicates that a Member is not *required* to make allowance for costs and profits when constructing an export price.[101] We believe that, because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin – the *AD Agreement* merely permits, but does not require, that such allowances be made.[102]

6.94. Korea does *not* however assert that the DOC failed to make allowance for all costs and profits. Rather, as discussed below, Korea asserts that the DOC made allowances in constructing the export price which can not be justified as allowances "for costs . . . incurred between importation and resale". In our view, that the *AD Agreement* does not require such allowances does not mean that a Member is free to make any allowances it desires, including allowances not specified in this provision. To the contrary, we view this sentence as providing an *authorization* to make certain specific allowances. We therefore consider that allowances not within the scope of that authorization cannot be made.[103] If a

[98] *E.g.*, Oral statement of the United States at the Second Meeting of the Panel, para. 19, Annex 2-6.

[99] The United States' perception seems to be based on the assumption that there is a watertight separation between the provision relating to construction of the export price (Article 2.3) and that relating to comparison between export price/constructed export price and normal value (Article 2.4). It is evident from the face of the text, however, that the rules regarding allowances related to construction of the export price are found in the paragraph relating to comparison.

[100] Responses of the United States to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 2 on unpaid sales, Annex 2-7).

[101] *But see United States – Tax Treatment for Foreign Sales Corporations*, Appellate Body Report, WT/DS108/AB/R, adopted 20 March 2000, footnote 124.

[102] It can be assumed that a Member will use this authorization where appropriate without being legally constrained to do so. By contrast, the *AD Agreement* provides that due allowance "shall" be made for differences affecting price comparability. Mandatory language is used here because the failure to make such allowances could generate or inflate dumping margins to the detriment of the interests of other Members.

[103] That the use of the non-mandatory phrase "should" does not support the conclusion advanced by the United States can be confirmed by replacing "should" with another non-mandatory term, "may". That a Member "may" make certain allowances would indicate that the Member was authorized but not required to make those allowances. It does not follow, however, that the Member was free also to make any other

Member were free to make any additional allowances it desired, there would be no effective disciplines on the methodology for construction of an export price and the provision in question would in our view be reduced to inutility.[104] Thus, we conclude that it would be inconsistent with Article 2.4 of the *AD Agreement* to make allowances in the construction of the export price that are not within the scope of the authorization found in that Article.

6.95. Our conclusion that Article 2.4 contains binding obligations regarding the scope of the permissible allowances that can be made in constructing an export price does not mean that we equate allowances for differences which affect price comparability with allowances relating to the construction of the export price. Rather, the third sentence of Article 2.4 requires due allowance to be made for differences affecting price comparability, while the fourth sentence provides that in the cases referred to in paragraph 3 – i.e., when constructing an export price – allowance for certain costs and profits should *also* be made. Finally, the fifth sentence of Article 2.4 makes clear that allowances relating to the construction of the export price could in fact *reduce* price comparability, such that one of several compensating steps should be taken. For all these reasons, it is clear to us that allowances in respect of construction of the export price are separate and distinct from allowances for differences which affect price comparability and are governed by different substantive rules.

6.96. With the foregoing in mind, the question before us can be simply posed: was the deduction from the price charged by POSAM to independent purchasers of an allocated amount of the unpaid sales an allowance for "costs, including duties and taxes, incurred between importation and resale" such that it was authorized by the fourth sentence of Article 2.4?[105]

6.97. It seems reasonably clear, and the parties do not dispute, that non-payment by ABC company represents a "cost" within the meaning of Article 2.4. They do *not* agree, however, as to whether that cost was incurred *between importation and resale*. In this respect, **Korea** argues that non-payment does not occur *between* importation and resale but rather occurs only *after* resale. The **United States** responds that the reference to costs incurred "between importation and resale" cannot be a mere temporal limitation as that would be inconsistent with the object and purpose of Article 2.3, which is to construct a reliable export price to the associated importer. Rather, the United States considers that this provision distinguishes between costs incurred in connection with the import transaction and those incurred in connection with the resale. It is the view of the United States that price is equal to cost plus profit, therefore the deduction from the resale price of all costs and profits associated with the resale leads to the effective price between the exporter and the associated importer for the transaction.

6.98. In considering this question, we note that Article 2.4 uses the word "between". That term is defined to mean, *inter alia*, "[i]n the interval separating two points of time, events, etc.".[106] Thus, the phrase costs "incurred between importation and resale" in its ordinary meaning is most naturally read to refer to costs that were incurred between the date of importation and the date of resale. Under this reading, it might be difficult to conclude that a cost incurred after the date of resale was a cost incurred "between importation and resale".

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allowances not within the scope of the authorization. *Cf . United States – Anti-Dumping Act of 1916*, Appellate Body Report, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, paras. 112-117 (that Article VI:2 of GATT 1994 makes imposition of anti-dumping duties permissive does not mean that a Member may impose measures other than anti-dumping duties to counteract dumping).

[104] As the Appellate Boy stated in *United States – Standards for Reformulated and Conventional Gasoline*, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to inutility." Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, p. 23.

[105] It is clear, and the United States does not dispute, that this deduction was not an allowance for "profits accruing".

[106] *The New Shorter Oxford English Dictionary*, Oxford University Press, 1993, p. 221.

6.99. We are cognizant, however, that dictionary definitions can only take the interpreter so far, and that in interpreting a provision of a treaty we must take into account both context and object and purpose.[107] As discussed above, it is clear that the purpose of allowances to construct an export price is not to insure price comparability *per se*. Rather, an export price is constructed, and the appropriate allowances made, because it appears to the investigating authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or third party. By working backwards from the price at which the imported products are first resold to an independent buyer, it is possible to remove the unreliability. Thus, we agree with the United States that the purpose of these allowances is to construct a reliable export price to use in lieu of the actual export price[108] or, as expressed by the EC as third party, to arrive at the price that would have been paid by the related importer had the sale been made on a commercial basis.[109]

6.100. Read in light of this object and purpose, we recognize that costs related to the resale transaction but not incurred in a temporal sense between the date of importation and resale could as a general matter be considered to be "incurred between importation and resale" and thus deducted in order to construct an export price. Nor do we preclude that an amount to cover the risk of non-payment might be considered to be such a cost. We do not believe, however, that this interpretation of costs "incurred between importation and resale" can be stretched to include costs that not only were not incurred in an accounting sense until after the date of resale but which were entirely unforeseen at that time. In this regard, we observe that, while we agree with the United States that as a general principle a related importer may be expected to establish price based on costs plus profit, a price certainly cannot be expected to reflect an amount for costs that were entirely unforeseen at the time the price was set. To deduct costs which not only were incurred after the date of resale but which were entirely unforeseen at that time would not result in a "reliable" export price in the sense of the price that would have been paid by the related exporter had the sale been made on a commercial basis.

6.101. Applying this principle to the case at hand, it is clear that the costs arising from the failure of ABC company were incurred in a temporal sense after the date of resale. Further, the unpaid sales in these investigations, which represented a substantial share[110] of total sales of subject merchandise in the United States during the periods of investigation, arose as a result of the unforeseen bankruptcy of a single customer.[111] We further note the admission of the United States that "[t]here was no evidence in either case that POSCO had any knowledge at the time of sale that ABC company was in a precarious financial situation".[112] Thus, it is clear that these costs not only were incurred after the date of resale but were entirely unforeseen as of that date. Under these circumstances, we do not consider the amount for unpaid sales deducted by the United States in constructing an export price was a cost "incurred between importation and resale" within the meaning of Article 2.4 of the *AD Agreement*.

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[107] As the Appellate Body has noted, "dictionary meanings leave many interpretive questions open." *Canada – Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, para. 153.

[108] Responses of the United States to Questions Posed by the Panel at the Second Meeting of the Panel, (Question 5 on unpaid sales, para. 27).

[109] Oral Statement of the EC at the First Meeting of the Panel, para. 9, Annex 3-3.

[110] In order to protect information for which Korea requests confidential treatment, we do not here identify the precise share of sales concerned.

[111] The DOC found in both determinations that POSCO was not aware at the time of sale that the customer would declare bankruptcy. *Final Determination on Plate*, p. 15449, at Korea Exhibit 11; *Final Determination on Sheet*, p. 30674, at Korea Exhibit 24.

[112] Responses of the United States to Questions Posed by the Panel at the First Meeting of the Panel, (Question 11 of the Panel on treatment of unpaid sales, Annex 2-4).

3. Claims under Article 2.4 ("fair comparison")

(a) Arguments of the parties

6.102. Korea also claims the DOC's actions in respect of unpaid sales were inconsistent with the "fair comparison" requirement of Article 2.4. In Korea's view, the adjustments made by the DOC in respect of unpaid sales violated this requirement because non-payment is not a "difference affecting price comparability" for which adjustment may be made under Article 2.4. Korea further considers the DOC's treatment of unpaid debt was inconsistent with the "fair comparison" requirement because it is fundamentally unfair to penalize an exporter for an event that it could not have anticipated and that was beyond its control. In addition, Korea considers that the inclusion of the unpaid sales to the ABC Company in the calculation of the export price was inconsistent with the "fair comparison" requirement. In this respect, Korea considers that the unpaid sales in question were atypical, and that, where the inclusion of atypical sales would distort the results, their inclusion is unfair.

6.103. The **United States** considers that whether a comparison is "fair" within the meaning of Article 2.4 can only be judged in light of the explicit methodological requirements of that Article. The adjustment performed by the DOC was a permissible Article 2.4 adjustment for differences in terms and conditions of sale and was therefore fair. As for Korea's view that the DOC was required to exclude unpaid sales as "atypical", the United States considers that it is Article 2.1, not Article 2.4, which addresses the question what sales are to be used to establish export price and normal value. Thus, Article 2.4 does not require the exclusion of "atypical" sales when determining export price.

(b) Evaluation by the Panel

6.104. In the previous section of this Report, we have found that the United States's treatment of bad debt in the *Plate* and *Sheet* investigations was inconsistent with its obligations under the third sentence of Article 2.4 (in respect of its allowances for differences affecting price comparability) and under the fourth sentence of Article 2.4 (in respect of allowances to construct an export price). We note that "a panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".[113] Having concluded that the United States acted inconsistently with its specific obligations under the third and fourth sentences of Article 2.4 in respect of allowances, we do not consider it necessary to examine Korea's claims that the United States' treatment of bad debt breached a more general "fair comparison" requirement under Article 2.4 of the *AD Agreement*.

D. MULTIPLE AVERAGING

1. Factual background

6.105. The claims addressed in this section of our report relate to the division of the POI for the purpose of calculating the overall margin of dumping in the *Plate* and *Sheet* investigations into two averaging periods to take into account a major devaluation of the Korean won in the period November-December 1997. In the preliminary determinations in both investigations, the DOC used a single averaging period covering the whole POI to calculate the margin of dumping. In the final determinations, however, the DOC divided the POI into two sub-periods, corresponding to the pre- and post-devaluation periods. The DOC calculated a weighted average margin of dumping for each sub-period. When combining the margins of dumping calculated for the sub-periods to determine an overall margin of dumping for the entire POI, the DOC treated sub-periods where the average export price was higher than the average normal value as sub-periods of zero dumping.

[113] *United States – Shirts and Blouses, supra*, p. 18.

2. Claim under Article 2.4.2 of the AD Agreement

(a) Arguments of the parties

6.106. **Korea** argues that Article 2.4.2 prohibits the comparison of multiple averages with multiple averages. Korea contends that Article 2.4.2 obligates a Member to either (i) compare a single weighted average normal value with a single weighted average export price, or (ii) compare individual home market transactions to individual export transactions. Korea considers that this conclusion is mandated by the reference in Article 2.4.2 to "*a* weighted average", i.e., one average, not two averages. It is confirmed by the reference to "*all* comparable export transactions" in Article 2.4.2, as there can only be one average if it takes into account all data. In these investigations the DOC acted inconsistently with Article 2.4.2 because it did not compare a single weighted-average normal value with a single weighted average export price, but rather divided the POI into sub-periods and calculated a separate dumping margin for each sub-period.

6.107. The **United States** responds that, while Article 2.4.2 provides that margins of dumping be based upon a comparison of an average of normal value prices with an average of the prices for export transactions, the transactions included in these averages must be "comparable". The reason for this limitation is that the inclusion in the averages to be compared of sales that are not comparable could result in a dumping margin based upon factors not related to dumping. The United States notes that Article 2.4.2 is subject to the provisions of Article 2.4, which requires that normal value and export price be compared "at the same level of trade . . . in respect of sales made at as nearly as possible the same time" and that allowance be made for, *inter alia*, differences in physical characteristics. Thus, a Member may create multiple averages in order to ensure that comparisons are not distorted by averaging of non-comparable transactions, such as transactions involving different models or at different levels of trade.

6.108. The United States considers that the DOC's conclusion that the collapse of the won rendered transactions before and after the devaluation "not comparable" is a permissible interpretation of the term as used in Article 2.4.2. In stating that comparisons should be "in respect of sales made at as nearly as possible the same time", Article 2.4 recognizes that time is a fundamental aspect of comparability. In fact, Article 2.4.2 could permissibly be interpreted as expressing a preference for daily averages, an approach that would be similar to the transaction-by-transaction methodology approved by Article 2.4.2. In the absence of evidence to the contrary, the DOC presumes sales made within a one-year period to be sufficiently close in time to satisfy the "same time" requirement of Article 2.4. Where facts indicate that changes within the year have the potential to affect comparability, however, the DOC will divide the POI into sub-periods. As the dollar values of pre- and post-devaluation home market sales were sharply different, the DOC permissibly determined that sales before and after the devaluation were not comparable and that it was therefore appropriate to divide the POI into sub-periods and calculate a margin of dumping for each such sub-period.

6.109. **Korea** disputes the United States' view that the depreciation of Korea's currency rendered pre- and post-devaluation sales non-comparable such that the use of multiple averaging is appropriate. Korea considers that substantive limitations in the *AD Agreement* on the transactions that can be compared define the transactions that are "comparable". There are however no provisions of the *AD Agreement* that limit the transactions that may be included in comparisons due to movements in exchange rates. Article 2.4.1 addresses exchange rates, but does not establish a limit on which exchange rates may be comparable. Nor does the Article 2.4 requirement that comparisons be made "in respect of sales made at as nearly as possible the same time" justify multiple averaging in the case of exchange rate movements. Korea considers that, in the case of average to average comparisons, this provision requires only that sales in each market should, *on average*, have been made at the same time in order to be considered comparable.

(b) Evaluation by the Panel

(i) Does Article 2.4.2 prohibit multiple averaging?

6.110. Korea's first claim regarding the use by the DOC of multiple averaging is based upon Article 2.4.2 of the *AD Agreement*. Article 2.4.2 provides as follows:

> "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

6.111. In considering this claim, we first make clear that we do not consider that Article 2.4.2 prohibits the use of multiple averaging *per se*, as Korea's first submission could be taken to suggest. To the contrary, Article 2.4.2 provides that the existence of dumping shall normally be established "on the basis of a comparison of a weighted average normal value with a weighted average of all *comparable* export transactions" (emphasis added). The inclusion of the word "comparable" is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions.[114] It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value.

6.112. We recall Korea's view that the reference in the singular to "a weighted average normal value" means that the use of multiple averages is prohibited. In our view, however, the reference in the singular to "a weighted average normal value" means simply that there must be a single weighted average normal value and export price in respect of comparable transactions. It does not mean that a Member is required to compare a single weighted average normal value to a single weighted average export price in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value.

6.113. An examination of the context of the provision in question and of its object and purpose in our view provide further support for the above conclusion. The chapeau of Article 2.4 states that "[a] fair comparison shall be made between the export price and the normal value." Whatever the relationship of the fair comparison language of the chapeau to the specific requirements of Article 2.4 – an issue of dispute between the parties[115] – it is evident to us that the provisions of Article 2.4.2 must be read

[114] We note that insertion of the word "comparable" into Article 2.4.2 represented the only modification to that Article between the date of the Draft Final Act and the text as adopted. *See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991. This suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters.

[115] Korea considers that the chapeau to Article 2.4 creates a fair comparison requirement that is independent of the other requirements of Article 2.4. The United States contends that, while the first sentence of Article 2.4 establishes a requirement to make a "fair comparison", the remainder of Article 2.4 *defines* how such a comparison is made.

against the background of this basic principle. In fact, the provisions of Article 2.4.2 itself are "subject to the provisions governing fair comparison in paragraph 4." An interpretation of Article 2.4.2 that required a Member to compare transactions that were not comparable would run counter to this basic principle.

6.114. Accordingly, we conclude – and by the later phases of this dispute the parties agreed[116] – that Article 2.4.2 does not preclude the use of multiple averages *per se*. Rather, Article 2.4.2 requires a Member to compare a single weighted average normal value to a single weighted average export price in respect of all *comparable* transactions. A Member may however use multiple averages in cases where it has determined that non-comparable transactions are involved.

(ii) Was the use of multiple averaging permissible in these investigations?

6.115. Having established that the use of multiple averages is permissible where transactions are not "comparable", the question remains whether the DOC was justified in determining in these investigations that multiple averaging was appropriate. In considering this question, we must first consider the explanation provided by the DOC in these two investigations for its decision to divide the POI into two sub-periods.

6.116. In the *Plate* final determination, the DOC explained its decision to divide the POI into two periods as follows:

> "[W]e agree with petitioners that separate averaging periods should be used. Under Section 777A(d)(1)(A) of the Act, the Department has wide latitude in calculating the average prices used to determine whether sales at less than fair value exist. More specifically, under 19 CFR 351.414(d)(3), the Department may use averaging periods of less than the POI when normal value, export price, or constructed export price varies significantly over the POI. *In the instant case, NV (in dollars) in the last two months of the POI differs significantly from NV earlier in the POI due primarily to a significant change in the underlying dollar value of the won.* In this case, the change is evidenced by the precipitous drop in the won's value that began in November 1997 and continued through the end of the POI without a quick, significant rebound. In the span of two months, the won's value decreased by more than 40 per cent in relation to the dollar. Consequently, it was appropriate to use two averaging periods to avoid the possibility of a distortion in the dumping calculation. Moreover, we disagree with respondent's claim that the use of averaging periods is dependent upon a change in a respondent's selling practices. In the final determination of certain preserved mushrooms from Indonesia, the Department stated that, 'in addition to changes in selling practices, we believe that we should also consider other factors, such as prolonged large changes in exchange rates, in determining whether it is appropriate to use more than one averaging period." *See Notice of Final Determination of Sales at Less than Fair Value: Preserved Mushrooms from Indonesia,* 63 FR 72268, 72272 (December 31, 1998). Therefore, we have used two averaging periods for the final determination: January through October and November through December, 1997."[117] (emphasis added).

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[116] *See* Oral Statement of Korea at the Second Meeting of the Panel, para. 44, Annex 1-6 ("Article 2.4.2 does not require one average of every single home-market sale and another average of every single export sale. Rather, it requires a single average for all comparable transactions."); Second Submission of the United States, para. 43, Annex 2-5 ("Article 2.4.2 clearly permits creation of multiple averages where transactions are not comparable.")

[117] *Final Determination on Plate*, p. 15452, Korea Exhibit 11.

6.117. The *Sheet* final determination contains an explanation for the DOC's determination that closely parallels that in the *Plate* final determination. The DOC found that:

> "Under section 777A(d)(1)(A) of the Act, the Department has broad authority to use a number of methodologies in calculating the average prices used to determine whether sales at less than fair value exist. More specifically, under 19 CFR 351.414(d)(3), the Department may use averaging periods of less than the POI when normal value, export price, or constructed export price varies significantly over the POI. *In this investigation, in the last five months of the POI, NV (in dollars) differed significantly from NV earlier in the POI*, due primarily to a significant change in the underlying dollar value of the won, evidenced by the precipitous drop in the won's value that began in November 1997 and continued through December 1997. In the span of two months, the won's value decreased by more than 40 per cent in relation to the dollar. Consequently, it is appropriate to use two averaging periods to avoid the possibility of a distortion in the dumping calculation. Moreover, we disagree with respondent's claim that the use of averaging periods is dependent upon change in a respondent's selling practices. In the final determination of certain preserved mushrooms from Indonesia, the Department stated that 'in addition to changes in selling practices, we believe that we should also consider other factors, such as prolonged large changes in exchange rates, in determining whether it is appropriate to use more than one averaging period." *See Notice of Final Determination of Sales at Less than Fair Value: Preserved Mushrooms from Indonesia*, 63 FR 72268, 72272 (December 31, 1998). Therefore, for both POSCO and Inchon, we have used two averaging periods for the final determination: January through October 1997 and November 1997 through March 1998." (emphasis added).[118]

6.118. It is evident from the DOC's determinations in these investigations that the DOC's decision to divide the POI into two sub-periods was based on the authority granted it by regulation to use multiple averaging periods in cases where "normal values, export prices or constructed export prices differ significantly over the course of the period of investigation."[119] It is further clear that the determination to use sub-periods in these investigations was based exclusively upon the DOC's conclusion that the normal value in the latter part of the POIs in these investigations, expressed in dollars, differed significantly from the normal value in the earlier part of the POIs. Accordingly, the question before us is whether the existence of significant differences in normal value over the course of an investigation, *by itself*, is a sufficient basis to conclude that export and home market transactions at different points in the POI are not comparable such that the use of multiple averages is permissible under Article 2.4.2 of the *AD Agreement*.

6.119. The United States does not of course assert that differences in price between export transactions and normal value are in and of themselves differences which would render such transactions non-comparable within the meaning of Article 2.4.2. Obviously, the purpose of Article 2 as a whole is to provide a methodology for determining whether a product is dumped, i.e., whether the export price is less than the normal value. Thus, to decline to compare transactions because they were made at different prices would defeat the entire purpose of the exercise. Rather, the United States asserts that the existence of differences in the timing of sales in the home market and the export market render transactions non-comparable, at least in cases where there are significant differences in the normal value, export price or constructed export price over the course of the investigation.

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[118] *Final Determination on Sheet*, p. 30676, Korea Exhibit 24.
[119] 19 CFR Section 351.414(d)(3).

6.120. In examining this question, we first note that the term "comparable" has been defined to mean "able to be compared (with)".[120] This definition however does not cast great light on the meaning of the term as used in Article 2 of the *AD Agreement*. Thus, we consider it useful to turn to the context in which this term appears. In this respect, we agree with the parties that the meaning of the term "comparable" as used in Article 2.4.2 can best be established by an examination of other provisions of Article 2 of the *AD Agreement* that address the issue of comparability. We further note that the chapeau to Article 2.4 provides that the comparison between the export price and the normal value shall be made "in respect of sales made at as nearly as possible the same time".[121] Thus, we consider it clear that the timing of sales may have implications in respect of the comparability of export and home market transactions.[122]

6.121. This does not mean, however, that where an average to average comparison methodology is used, individual home market and export sales that are not made at the same time necessarily are not comparable and thus cannot be included in the weighted averages. To the contrary, it is in the very nature of an average to average comparison that, for example, transactions made at the beginning of the averaging period in the export market will be made at a different moment in time than sales in the home market made at the end of averaging period. If the drafters had considered that this situation would necessarily give rise to a problem of comparability, surely they would not have explicitly authorized the use of averaging in Article 2.4.2. Thus we consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same time requires *as a general matter* that the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same.

6.122. The United States argues, in effect, that the "same time" requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods.[123] In our view, however, the US argument proves too much. If the requirement to compare sales at "as nearly as possible the same time" means that sales within an averaging period covering a POI are not comparable, then a Member presumably would be *obligated* to break a POI into as many sub-periods as possible. Yet to interpret the word "comparable", when combined with the requirement that sales be compared "at as nearly as possible the same time", to obligate Members to perform numerous average to average comparisons based on the shortest possible time periods would in effect read the Article 2.4.2 authorization to perform average to average comparisons out of the *AD Agreement*, leaving Members with only the second option, the comparison of normal values and export prices on a transaction-by-transaction basis.[124]

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[120] *The New Shorter Oxford English Dictionary*, Oxford University Press, p. 457.

[121] We recall that Korea and the United States have identified other provisions of Article 2 that they agree justify the use of multiple averaging based, for example, on differences in level of trade and differences in physical characteristics. The United States also argues that it is appropriate to use multiple averaging in the case of hyperinflationary economies. These other forms of multiple averaging are not at issue in this dispute.

[122] As an additional contextual argument, Korea argues that devaluation cannot be considered to affect comparability because there is no provision in the *AD Agreement* specifying that sales made at one exchange rate cannot be compared with sales at another exchange rate. Rather, the only provision of the *AD Agreement* that addresses exchange rates is Article 2.4.1, which the United States concedes does not establish a limit on what sales may be considered comparable. We do not however place any weight on Korea's argument in this respect. In our view – and absent the unusual situation of multiple exchange rates – there will at any given moment in time be only one exchange rate. Thus, any problem of comparability does not relate to exchange rates *per se*, but rather to differences in timing of sales. Thus it is on this issue that we focus.

[123] The United States goes so far as to suggest that the *AD Agreement* could be interpreted as expressing a preference for *daily* averages. *Second Submission of the United States*, para. 47, Annex 2-5.

[124] The United States' argument seems to be posited on its view that the best comparison for measuring dumping is a transaction-to-transaction comparison, and that average-to-average comparisons are a second-best approach allowed because of practical problems with the transaction-to-transaction methodology. *See* US

6.123. We do not preclude that there may be factual circumstances where the use of multiple averaging periods could be appropriate in order to insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets. We note that, where changes in normal value, export price or constructed export price during the course of the POI are combined with differences in the relative weights by volume within the POI of sales in the home market as compared to the export market, the use of weighted averages for the entire POI could indicate the existence of a margin of dumping that did not reflect the situation at any given moment within the POI.[125] In this situation a Member might in our view be justified in concluding that differences in timing of sales in the home and export markets give rise to a problem of comparability that could be addressed through multiple averaging periods.[126] We recall however that this situation only arises where two elements – a change in prices *and* differences in the relative weights by volume within the POI of sales in the home market as compared to the export market – exist. Thus, while a change in normal value, export price or constructed export price may be a *necessary* condition for the conclusion that the passage of time affects comparability in the case of an average-to-average comparison, the existence of such a change is not in itself a *sufficient* condition to conclude that the export transactions are not comparable to the normal value.[127]

6.124. Turning to the case at hand, we recall that the DOC's determination to use sub-periods in these investigations was based exclusively upon its conclusion that the normal value in the latter phase of the POIs in these investigations, expressed in dollars, differed significantly from the normal value in the earlier phase of the POIs. There is no suggestion in the DOC's determinations or in the final analysis memoranda underlying them that the reason for the DOC's decision to divide up the POI was based upon the existence of a difference in the relative weights by volume of sales within the POI between the home and export markets. In light of the foregoing discussion, we do not consider that this represented a permissible determination of non-comparability.

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answer to question 2 from the Panel posed at the second meeting of the Panel with the parties. We perceive no valid textual basis for such a conclusion, however. To the contrary, the *AD Agreement* sets forth two options for a comparison methodology – average-to-average and transaction-to transaction – and expresses no preference between them.

[125] A particularly dramatic example of this situation would arise where, during a substantial portion of the POI, there were *no* sales in one of the two markets.

[126] The combination of these two factors could even result in a situation where, although at any given moment in time throughout the POI, the exporter was charging an identical price (after all appropriate allowances had been made), a margin of dumping could nevertheless be found to exist. For example, imagine that there were two home market sales (HM-1 and HM-2) and two export sales (EX-1 and EX-2) during the POI. HM-1 and EX-1 occurred on day 1 and were both at a price of $10. HM-2 and EX-2 occurred on day 90 and were both at a price of $15. Thus, neither of the individual export transactions was dumped when compared to the simultaneous home market transactions. If all these sales were in the same volumes, then a weighted average to weighted average would also show no dumping. Assume however that HM-1 and EX-2 involved a volume of ten units, while HM-2 and EX-1 involved a volume of twenty units. In this case, the weighted average normal value would be (10 units x $10/unit) + (20 units x $15/unit) = $400/30 units = $13.33/unit. The weighted average export price would be (20 units x $10/unit) + (10 units x $15/unit) = $350/30 units = $11.27/unit. Thus, the weighted average margin of dumping would be 18 per cent.

[127] As Korea explained, "[a]s long as the sales in both markets are spread in a similar manner throughout the period, the averaging process will result in an average home-market sale and an average export sale made, on average, at the same time. Thus, the averaging process necessarily takes care of the timing requirement of Article 2.4 (unless the sales in the two markets are weighted disproportionately in different parts of the period)." Oral Statement of Korea at the Second Meeting of the Panel, para. 58, Annex 1-6.

6.125. Accordingly, we conclude that the United States' use of multiple averaging periods in these investigations was inconsistent with the requirement of Article 2.4.2 to compare "a weighted average normal value with a weighted average of all comparable export transactions".[128]

3. Claim under Article 2.4.1

(a) Arguments of the parties

6.126. **Korea** observes that the DOC used multiple averaging periods to account for the depreciation of the Korean won during the POI in these two investigations. Korea contends however that Article 2.4.1 is the only provision of the *AD Agreement* that addresses exchange rates or the permissible modification to the dumping calculation methodology to account for exchange rate fluctuations. Article 2.4.1 sets forth special rules that apply to situations when the exporting country's currency has been *appreciating*. However, Article 2.4.1 does not permit any adjustment to the dumping calculations to account for a *depreciation* of the exporting country's currency. Consequently, because the DOC adopted a multiple-averaging methodology in these investigations to account for the depreciation of the Korean won, it was inconsistent with the requirement of Article 2.4.1 that the price comparisons not be modified to account for depreciation in the exporting country's currency.

6.127. The **United States** responds that Article 2.4.1 provides guidance to Members in selecting the exchange rates for use in anti-dumping investigations. The issue raised by Korea, although precipitated by a currency situation, relates to the DOC's construction of averages under Article 2.4.2, rather than its selection of exchange rates under Article 2.4.1. Thus, Article 2.4.1 does not address the currency conversion problem faced by the United States in these investigations and is not relevant to the issue raised by Korea.

(b) Evaluation by the Panel

6.128. Article 2.4.1 of the *AD Agreement* provides as follows:

> "When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.
>
> [8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

[128] During the course of this dispute, the methodology used by the United States to derive a single dumping margin on the basis of the calculations for each sub-period was also placed at issue by Korea. In Korea's view, "splitting the period, calculating separate averages for the sub-periods, 'zeroing out' the negative averages and recombining the separate averages into an overall dumping margin were all part of a single methodology" described in Korea's request for establishment of a panel and thus within our terms of reference. In the view of the United States, the methodology challenged by Korea was limited to the division of the POI into two sub-periods and the calculation of separate weighted average normal values for each sub-period. *See* Responses of Korea and the United States to Questions Posed by the Panel at the Second Meeting of the Panel, question 1 on multiple averaging, Annexes 1-7 and 2-7. Korea further indicated, however, that "[i]f the Panel finds that it was improper for the United States to split the investigation periods . . . then zeroing simply disappears from this case". *Ibid*. Having so found, we need not further address this issue.

6.129. In our view, Article 2.4.1 relates to the selection of exchange rates to be used where currency conversions are required. It establishes a general rule – conversion should be made using the rate of exchange on the date of sale – and an exception to this general rule for sales on forward markets. It also establishes special rules in the case of fluctuations and sustained movements in exchange rates. We note Korea's view that the requirements of the second sentence of Article 2.4.1 prescribe specific results, rather than describing a method for selecting exchange rates. It appears to us, however, that, read in context, these special rules also relate to the selection of exchange rates, and not to the construction of averages. Rather, the permissibility of the use of multiple averaging is an issue addressed by Article 2.4.2.

6.130. Even if Article 2.4.1 were not restricted to the issue of the selection of exchange rates, we find nothing in that Article that would prohibit a Member from addressing, through multiple averaging, a situation arising from a currency depreciation. Korea contends, and the United States does not dispute, that the provision of Article 2.4.1 requiring Members to allow exporters sixty days to adjust their export prices to sustained movements in exchange rates applies only in the case of currency appreciation, and not in the case of currency depreciation. Assuming that the parties are correct in this regard, the requirement that a Member take certain actions in the case of currency appreciation does not in our view mean that Members are prohibited from taking any action to address a situation arising from a currency depreciation.[129]

6.131. For the foregoing reasons, we conclude that the United States' use of multiple averaging periods in these investigations was not inconsistent with Article 2.4.1 of the *AD Agreement*.

4. Claim under Article 2.4 ("fair comparison")

(a) Arguments of the parties

6.132. **Korea** contends that, in these investigations, US petitioners in essence claimed that anti-dumping orders were needed to protect them from an increase in imports after the devaluation of the Korea won. In these circumstances, a fair analysis of whether POSCO engaged in injurious dumping must focus on – or at an absolute minimum, include – pricing data after the devaluation of the won. Yet that pricing data was effectively excluded from the DOC's price comparisons by the multiple averaging methodology. In other words, the DOC's multiple averaging methodology resulted in a finding of dumping based solely on pre-devaluation sales. This methodology was however inconsistent with the injury analysis, which found injury based primarily on post-devaluation imports. The methodology was thus inconsistent with the fair comparison requirement of Article 2.4.

6.133. The **United States** considers that Korea's argument has no bearing on the question of whether the United States properly constructed averages for comparison purposes under Article 2.4.2, or even whether the United States made a fair comparison under Article 2.4. Even if Korea's argument were relevant to the issue of the consistency of the measures with Article 3 of the *AD Agreement*, Korea did not raise a claim under Article 3 in its request for panel review. Consequently, this issue is outside the Panel's terms of reference, and must be disregarded.

[129] The provision relied upon by Korea is the language in Article 2.4.1 stating that, "in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation". Korea is in effect asking us to read this provision to further say that "in an investigation the authorities shall take no actions to address currency depreciations". We can perceive no textual basis to imply such an additional rule into Article 2.4.1.

(b) Evaluation by the Panel

6.134. Korea contends that the averaging methodology used in these investigations was inconsistent with the United States' obligations to perform a "fair comparison" *because* the allegations of injury by petitioners, and the analysis of injury by the US International Trade Commission's, focused on post-devaluation imports. We cannot agree. In our view, the consistency of a determination of dumping with Article 2, including with any "fair comparison" requirement under Article 2.4, cannot depend upon how that determination is used in the context of an analysis of injury pursuant to Article 3. In this respect, we note that the final determination of injury in these investigations, as in all US anti-dumping proceedings, was not even made until well after the date of the final determination of dumping. Surely, a determination of dumping that was consistent with the provisions of Article 2 when it was made could not be rendered inconsistent by reason of the manner in which that determination was used for purposes of a subsequent injury analysis.

6.135. Korea's argument in effect is that the DOC's use of multiple averaging masked the fact that there was no dumping after the devaluation, while the United States' injury determination was based precisely on injury suffered in the post-devaluation period. We note however that such a situation could easily arise whenever an investigating authority uses an average-to-average comparison methodology, and irrespective of whether it uses multiple averaging, because an average-to-average methodology informs only as to whether *on average* during the POI there was dumping, not whether there was dumping at any given moment in time within that POI.[130] Thus, the issue raised by Korea relates not to the consistency of the calculation methodology with Article 2, but rather to whether a Member is somehow required by Article 3.5 to take account of the circumstances underpinning the final margin of dumping when considering whether "dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury".[131] Korea has not however asserted any claim under Article 3.5 in its submissions, nor would such a claim be within our terms of reference.[132]

6.136. For the foregoing reasons, we conclude that the United States' use of multiple averaging periods in these investigations was not inconsistent with the first sentence of the chapeau of Article 2.4 of the *AD Agreement* ("fair comparison").

E. OTHER CLAIMS BY KOREA

1. Claims under Article X of GATT 1994 and Articles 6 and 12 of the AD Agreement

6.137. In addition to its claims under Article 2 of the *AD Agreement*, Korea has advanced a variety of claims pursuant to Article X:3(a) of the *GATT 1994* and Articles 6.1, 6.2, 6.9 and 12.2 of the *AD Agreement*. In section VI.A.4 of this Report, having found that the United States did not act inconsistently with the relevant provisions of Article 2.4 in respect of the alleged "double conversion" of certain home market sales in the *Plate* investigation, we have proceeded to address Korea's claims under the above provisions. In respect of the other aspects the DOC's methodology in the *Plate* and *Sheet* investigations, however, we have found violations of Article 2 of the *AD Agreement*. Under

[130] For that matter, even in cases where a transaction-to-transaction methodology is used, the final margin of dumping for a given exporter will not inform as to whether sales at any given moment during the POI were dumped.

[131] We are not of course expressing any view here as to the proper interpretation of Article 3.5. We note in passing, however, that the use of multiple averaging periods in these investigations would have facilitated, rather than impeded, any such analysis, by making available information regarding the existence of dumping both pre- and post-devaluation.

[132] Article 3 is nowhere mentioned in Korea's request for establishment of a Panel. *See* WT/DS179/3. It is well established that the identification of the relevant treaty provision is a "minimum prerequisite" under Article 6.2 of the *DSU*. *See EC – Bananas*, *supra* at para. 6.84.

these circumstances, we do not consider it necessary to address Korea's additional claims under the above provisions.

2. Claims under Article VI of GATT 1994 and Article 1 of the AD Agreement

6.138. Korea has also asserted that the United States has acted inconsistently with Article VI of the *GATT 1994* and Article 1 of the *AD Agreement*, "which only permit anti-dumping measures to be imposed in the circumstances provided for in Article VI and pursuant to investigations conducted in accordance with the Anti-Dumping Agreement".[133] We note that Korea's claims in respect of these two articles are dependent claims, i.e., Korea argues that *because* certain provisions of the *AD Agreement* have been violated, Article VI of the GATT 1994 and Article 1 of the *AD Agreement* are consequently violated.[134] Because of their dependent nature, we can perceive of no useful purpose that would be served by ruling on these claims. Accordingly, we do not consider it necessary to address them.

VII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

7.1 In light of the findings above, we conclude that, with respect to **"local sales"**:

(a) the United States in the *Plate* investigation did not act inconsistently with its obligations under Article 2.4.1, Article 2.4 chapeau ("fair comparison"), and Article 12.2 of the *AD Agreement* nor with its obligations under Article X:3(a) of GATT 1994;

(b) the United States in the *Sheet* investigation acted inconsistently with Article 2.4.1 of the *AD Agreement* by performing a currency conversion that was not required.

7.2 We further conclude that, with respect to the **treatment of unpaid sales**, the United States:

(a) acted inconsistently with its obligations under Article 2.4 chapeau of the *AD Agreement* in both the *Plate* and *Sheet* investigations by making allowances in respect of sales through unaffiliated importers which were not permissible allowances for differences affecting price comparability;

(b) acted inconsistently with its obligations under Article 2.4 chapeau of the *AD Agreement* in both the *Plate and Sheet* investigations by making allowances in respect of sales through an affiliated importer which were not permissible allowances in the construction of the export price for costs incurred between importation and resale.

7.3 With respect to **multiple averaging**, we conclude that:

(a) the United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was inconsistent with the requirement of Article 2.4.2 to compare "a weighted average normal value with a weighted average of all comparable export transactions";

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[133] First Submission of Korea, para. 5.7, last tiret, Annex 1-1.

[134] The only exception involves Korea's claim of a violation of Article VI:1 in respect of due allowances for differences affecting price comparability. Korea however identified no basis for concluding that Article VI:1 imposes any obligation in this respect beyond that imposed by Article 2.4.1 of the *AD Agreement*.

(b) The United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was not inconsistent with Article 2.4.1 of the *AD Agreement;*

(c) The United States' use of multiple averaging periods in the *Plate* and *Sheet* investigations was not inconsistent with the first sentence of the chapeau of Article 2.4 of the *AD Agreement* ("fair comparison").

7.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent that the United States has acted inconsistently with the provisions of the *AD Agreement*, it has nullified or impaired benefits accruing to Korea under that *Agreement*.

B. RECOMMENDATION AND SUGGESTION

7.5 In accordance with Article 19.1 of the *DSU*, we therefore recommend that the Dispute Settlement Body request that the United States brings its definitive anti-dumping duties on imports of stainless steel plate and sheet from Korea into conformity with the *AD Agreement*.

7.6 **Korea** requests that the Panel suggest, pursuant to Article 19.1 of the *DSU*, that the United States revoke its anti-dumping orders on stainless steel plate and sheet from Korea. In support of its request, Korea identifies prior panel reports under the WTO and Tokyo Round *AD Agreements* in which panels have suggested revocation of an anti-dumping order. Korea considers that Article 1 of the *AD Agreement*, which provides that "[a] anti-dumping measure shall be applied only under he circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement", precludes the possibility that the United States could bring the anti-dumping measures into conformity without revocation.

7.7 The **United States** considers that Korea seeks to convert the Panel's discretionary mechanism for suggesting ways that a Member could implement its recommendation into a device for obtaining a specific remedy that is inconsistent with established GATT/WTO practice and the *DSU*. Further, it is impossible for the Panel to know whether a dumping analysis that conformed to the Panel's decision would result in a zero or *de minimis* margin such that revocation would be necessary in order to bring the measures into conformity. Finally, the United States considers that Korea's broad interpretation of Article 1 of the *AD Agreement* to require revocation of an anti-dumping measure regardless of the nature or magnitude of the violation would render meaningless the provision of Article 19.1of the *DSU* that the Member bring the *measure* into conformity.

7.8 In considering Korea's request, we note first that Article 19.1 of the *DSU* gives this Panel the clear authority to "suggest ways in which the Member concerned could implement the recommendations". Thus, we do not accept the United States' proposition that a suggestion that a Member withdraw an anti-dumping measure would be inconsistent with the *DSU*. Nor do we consider that such a recommendation would be inconsistent – or consistent – with "established practice", as only a handful of WTO panels under the *AD Agreement* have even addressed a request for a suggestion to revoke.[135] Rather, we consider that Article 19.1 of the *DSU* allows but does not require a panel to make

[135] *Compare Guatemala – Anti-Dumping Investigation Regarding Portland on Cement From Mexico*, Report of the Panel, WT/DS60/R, para. 8.6, *reversed on other grounds*, WT/DS60/AB/R and *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, para. 9.6, adopted on 17 November 2000 (Panels suggest revocation in the context of a WTO-inconsistent initiation) to *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit and Above from Korea*, WT/DS99/R, para. 7.4, adopted 19 March 1999 (request for a suggestion to revoke was denied "in

a suggestion where it deems it appropriate to do so.

7.9 That we have the *authority* under Article 19.1 of the *DSU* to suggest revocation of an anti-dumping measure does not mean that we must or should do so in a given case. To the contrary, the *AD Agreement* is comprised of eighteen separate articles and innumerable obligations. Thus, violations of the *AD Agreement* may take many different forms and have different implications for the anti-dumping measure in question. In our view, Korea's contention that Article 1 of the *AD Agreement* dictates that any violation of the *AD Agreement*, irrespective of its nature and severity, requires the revocation of the anti-dumping measure is unsustainable. Although we do not agree that such an interpretation would render Article 19.1 of the *DSU* a nullity in the strict legal sense,[136] we do believe that, had the drafters intended to deviate from the general rule of Article 19.1 and *require* revocation of anti-dumping measures in all cases of a violation, they would have manifested that intention through a special or additional dispute settlement provision in Article 17 of the *AD Agreement*.

7.10 Turning to the case at hand, we recall that Korea's claims related to the determinations of the DOC regarding the margin of dumping. While we have found those determinations inconsistent with the *AD Agreement* in a number of respects, we cannot say that, had the DOC acted consistently with the *AD Agreement*, it would not have found the existence of dumping.[137] Under these circumstances, while there can be little doubt that revocation would be *one* way that the United States could implement our recommendation, we are not prepared to conclude at this time that it is the *only* way to do so. Accordingly, we decline Korea's request to suggest that the United States revoke the anti-dumping duties at issue in this dispute.[138]

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light of the range of possible ways in which we believe the [defendant] could appropriately implement" the recommendation).

[136] Because, *inter alia*, Article 19.1 would of course continue to operate in disputes relating to measures other than anti-dumping measures.

[137] Nor would it be appropriate for the Panel to try to recalculate the margin itself in light of its conclusions.

[138] *Cf. United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, para 596 (Panel under Tokyo Round *AD Code* declined to recommend revocation because "[I]t could not be presumed that a methodology of calculating dumping margins consistent with the Panel's findings on these aspects would necessarily result in a determination that no dumping existed . . . .")

ANNEX 1-1

FIRST SUBMISSION OF KOREA

(5 May 2000)

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NOTE: In this submission, including the exhibits, Korea has placed information which POSCO has previously designated as business proprietary information in brackets ("{ }"). This information has been omitted and the brackets left in the text."{ }"

I. INTRODUCTION

1.1 The Republic of Korea ("Korea") contests the anti-dumping measures imposed by the United States on stainless steel plate in coils ("SSPC") and stainless steel sheet and strip in coils ("SSSS") from Korea, respectively, on 21 May 1999 and 27 July 1999. These anti-dumping measures are inconsistent with the obligations of a Member of the World Trade Organization ("WTO"), including Article VI and X of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Articles 1, 2, 6, and 12 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement").

1.2 In the proceedings that led to the imposition of anti-dumping measures on SSPC and SSSS from Korea, the United States made critical errors on three major issues, which resulted in a massive overstatement of the "dumping margins" found for Pohang Iron & Steel Co., Ltd. ("POSCO"), the Korean producer. As discussed below, the treatment of these issues by the United States violated numerous individual provisions of GATT 1994 and the Anti-Dumping Agreement. As a result, the United States imposed anti-dumping measures far in excess of those permitted by the Anti-Dumping Agreement, when a proper analysis would have resulted in little, if any, dumping margins for POSCO.

1.3 The first of these issues arose from the fact that an unrelated US customer of POSCO went bankrupt and, as a result, failed to pay POSCO for certain purchases. In its preliminary determinations, the United States had excluded POSCO's sales to this customer from its analysis, because it concluded that these sales were "atypical." However, in its final determinations, the United States reversed course: It included these sales in its calculation of the export price, and also deducted the cost of these unpaid sales as an adjustment to the export price—thus reducing the export price of all US sales to all US customers. Not surprisingly, the comparison of these reduced export prices to home-market prices artificially created and inflated the dumping margins. In applying this methodology, the United States acted inconsistently with its WTO obligations in the following respects:

- Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement permit adjustments to be made only for "differences which are … demonstrated to affect price comparability." But the fact that a customer unexpectedly goes bankrupt after a sale is made does not affect the comparability of prices that were set at the time of sale. Consequently, the non-payment by the bankrupt US customer did not, and was not demonstrated to, affect price comparability — neither for the specific US sales for which the customer did not pay, nor for the other US sales to other US customers who did pay. Accordingly, the adjustment made for the bankrupt customer's non-payment was inconsistent with the provisions of GATT 1994 and the Anti-Dumping Agreement.

- Article 2.4 of the Anti-Dumping Agreement also requires the investigating authorities to make a "fair comparison" of export price and normal value. The inclusion of the unpaid sales in the dumping calculations, and the deduction of the cost of the bankrupt customer's unexpected non-payment from the export prices for all US sales to all US customers, was not consistent with this fair comparison requirement, because: (1)it created an unbalanced comparison that distorted the results, and (2)it effectively penalized POSCO for a factor beyond its control, despite established US judicial precedents holding that it is "unreal, unreasonable and unfair" for a finding of dumping to be based on "a factor beyond the control of the exporter."

- Article X:3(a) of GATT 1994 requires each WTO Member to "administer … its laws, regulations, decisions and rulings" in a "uniform, impartial and reasonable manner." The methodology employed by the United States was not consistent with this requirement, because it failed to follow, and failed to provide a rational basis for departing from,

established US practice. The United States has acknowledged that the inclusion in dumping calculations of sales that are "extraordinary for the market in question" can "lead to irrational or unrepresentative results." To avoid such results, the United States routinely excludes atypical sales from its analysis of export price and normal value. Despite conceding that the sales to the bankrupt customer were atypical, however, the United States failed to follow that established practice in these cases. Also, Article 12.2 of the Anti-Dumping Agreement requires the investigating authorities to provide a full explanation of the reasons for their determinations. In these cases, however, the United States failed to provide an adequate explanation of its decisions.

1.4 The second of these issues arose from the manner in which the United States calculated and compared the average export prices and normal values to determine the dumping margin. Under the Anti-Dumping Agreement and the normal methodology employed by the United States, the investigating authority calculates a single average export price and a single average normal value, and then determines the dumping margins by comparing these single averages. In these cases, however, the United States departed from its established practice and the explicit requirements of the Anti-Dumping Agreement, by dividing the period of investigation into sub-periods and then calculating dumping margins based on a comparison of the average export price and normal value for each of these sub-periods (rather than for the entire investigation period). The United States claimed that this departure from the proper methodology was required to account for the devaluation of the Korean won during the investigation period. The effect of this departure, however, was to artificially create dumping margins in a manner contrary to the WTO obligations of the United States:

- Article 2.4.2 of the Anti-Dumping Agreement requires that the calculation of dumping margins be based on a comparison of a single average normal value to a single average of "prices of all comparable export transactions." A "multiple averaging" methodology is not consistent with that requirement.

- Article 2.4.1 of the Anti-Dumping Agreement permits alterations to the standard price comparison methodology to account for currency movements only when the exporting country's currency is appreciating against the importing country's currency in a manner that would create or inflate dumping margins. It does not permit alterations to the standard price comparison methodology to account for currency devaluations that would reduce the dumping margins. Consequently, the adoption of a "multiple averaging" methodology to account for a currency devaluation was not consistent with the requirements of Article 2.4.1.

- As mentioned, Article X:3(a) of GATT 1994 requires each WTO Member to "administer ... its laws, regulations, decisions and rulings" in a "uniform, impartial and reasonable manner." In a decision addressing the same issue in another case (which was issued only months before the decisions in these cases), the United States held that no adjustment to its standard price comparison methodology was appropriate to account for the devaluation. In these cases, however, the United States failed to follow that established methodology—and thus did not act in a uniform and reasonable manner. Also, Article 12.2 of the Anti-Dumping Agreement requires the investigating authorities to provide a full explanation of the reasons for their determinations. In these cases, however, the United States failed to provide an adequate explanation of its departure from the standard single-average methodology.

- Articles 6.1, 6.2, and 6.9 of the Anti-Dumping Agreement require the investigating authorities to give exporters notice of all "essential facts" in order to provide them with a "full" and "ample opportunity" to defend their interests. In these cases, however, the United States did not decide to depart from its established methodology until the final stage of the anti-dumping investigations (after the United States had followed its established policy in the preliminary

determinations). The United States therefore failed to provide POSCO with the required opportunity to fully defend its interests.

- Finally, Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to base anti-dumping measures on a "fair comparison." In the unique circumstances of these cases, the "multiple-averaging" methodology was not consistent with that requirement. In effect, the "multiple averaging" methodology allowed the United States to base the finding of dumping solely on sales before the devaluation of the Korean won, when a proper analysis showed that there was no dumping after the devaluation. Such a result is fundamentally unfair where, as in these cases, petitioners' claims of injury were explicitly based on the alleged impact of increasing imports caused by the "Asian economic crisis" that accompanied the devaluation of the Korean won and, the United States based its affirmative injury determinations— which allowed it to impose anti-dumping measures— on these post-devaluation imports.

1.5 The third of these issues arose from certain "local sales" POSCO made in its home market, for which the prices were set in US dollars. The United States did not base its calculation of normal value for these sales on the actual invoice prices in US dollars— as it had in previous cases involving similar dollar-denominated home-market sales. Instead, it converted the dollar-denominated home-market sales into Korean won using one exchange rate, and then converted them back into US dollars (for comparison to export price) using a different exchange rate. The United States held that this methodology was appropriate, because the exchange rates used to record these transactions in POSCO's internal accounting records— although matching the official exchange rates announced by the Korean Exchange Bank— differed slightly from certain US benchmark rates. The result, however, was the artificial creation and inflation of the dumping margins, in a manner that was contrary to the following WTO obligations of the United States:

1.6 Article 2.4.1 of the Anti-Dumping Agreement, which permits currency conversions only when such conversions are "required." The distortive "double-conversion" of the dollar-denominated home-market sales prices was not "required," however, when the United States could simply have used the dollar-denominated prices without conversion, and thus avoided the distortion.

- Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to base anti-dumping measures on a "fair comparison." In this case, however, the United States employed a distortive comparison that created and inflated the dumping margins because POSCO's internal records used the official exchange rates set by the Korean Exchange Bank, and not US exchange rates that were not even known on the relevant date.

- Finally, Article X:3(a) of GATT 1994 requires each WTO Member to "administer ... its laws, regulations, decisions and rulings" in a "uniform, impartial and reasonable manner." The United States failed to act in the required uniform and reasonable manner when it chose not to follow its established methodology of using dollar-denominated home-market prices without conversion. It also failed to act reasonably when it rejected the official exchange rates set by the Korean Exchange Bank, and held that POSCO should have used US exchange rates that were not even known on the relevant date. Also, Article 12.2 of the Anti-Dumping Agreement requires the investigating authorities to provide a full explanation of the reasons for their determinations. In these cases, however, the United States failed to provide an adequate explanation of the departure from its past practices.

1.7 As a result of its treatment of these three critical issues, the United States imposed anti-dumping measures against SSPC and SSSS from Korea in circumstances not provided for in Article VI of GATT 1994 and pursuant to investigations not conducted in accordance with the Anti-Dumping Agreement. The imposition of these anti-dumping measures thus violated Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

1.8 Korea therefore requests that the Panel find that: (i) the US anti-dumping measures concerning imports of SSPC and SSSS from Korea, including the anti-dumping investigations and other actions preceding these measures, are inconsistent with the provisions of the Anti-Dumping Agreement and GATT 1994; (ii) the United States has nullified or impaired benefits accruing, directly or indirectly, to Korea under the WTO Agreements; and (iii) the United States is impeding the achievement of the objectives of the WTO Agreements. Korea also requests that the Panel recommend that the United States bring its anti-dumping measures against SSPC and SSSS from Korea into conformity with the WTO Anti-Dumping Agreement and GATT 1994. Specifically, Korea further requests that the Panel suggest that the United States revoke the anti-dumping duty orders concerning SSPC and SSSS from Korea.

II. PROCEDURAL BACKGROUND

A. REQUEST FOR CONSULTATIONS

2.1 On 30 July 1999, Korea requested consultations with the United States regarding the anti-dumping measures against SSPC and SSSS from Korea that are being imposed on the basis of dumping investigations conducted in a manner that was unfair and inconsistent with the WTO Agreements (WT/DS179/1). Korea made its request pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "Dispute Settlement Understanding" or "DSU"), Article XXIII:1 of GATT 1994, and Article 17.3 of the Anti-Dumping Agreement.

B. CONSULTATIVE PROCESS

2.2 Pursuant to this request, Korea and the United States consulted in Geneva on 17 September 1999. Unfortunately, the consultations failed to resolve the dispute.

C. REQUEST FOR ESTABLISHMENT OF A PANEL

2.3 On 14 October 1999, Korea requested the establishment of a panel with the standard terms of reference provided by Article 7 of the DSU (WT/DS179/2). Korea made this request pursuant to Article 6 of the DSU, Article XXIII:2 of GATT 1994, and Article 17.5 of the Anti-Dumping Agreement. Korea's panel request sets forth the challenged US measures with specificity, along with the legal basis of the complaint.

D. ESTABLISHMENT OF THE PANEL

2.4 On 19 November 1999, the Dispute Settlement Body (the "DSB") established a panel pursuant to Korea's request. The Panel's terms of reference are:

> To examine, in light of the relevant provisions of the covered agreements cited by Korea in document WT/DS179/2 the matter referred to the DSB by Korea in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

The members of the Panel are Mr. José Antonio S. Buencamino (Chairman), Ms. Enie Neri de Ross, and Mr. G. Bruce Cullen (WT/DS179/3).

III. STATEMENT OF FACTS

3.1 As the measures at issue are anti-dumping measures arising from two separate, but broadly similar, anti-dumping investigations under US anti-dumping law, this Statement of Facts is organized as follows:

3.1.1 Part A provides an introduction to US anti-dumping law and procedure.

3.1.2 Part B describes the procedural history of the US anti-dumping investigations of Korean SSPC and SSSS.

3.1.3 Part C provides the facts most relevant to the WTO deficiencies of the US anti-dumping measures against Korean SSPC and SSSS.

A. INTRODUCTION TO US ANTI-DUMPING LAW AND PROCEDURE

3.2 In the United States, responsibility for administering the anti-dumping laws is divided between the US Department of Commerce (the "DOC") and the US International Trade Commission (the "USITC"). The DOC is responsible for determining whether or not imports are being sold in the United States at "less than fair value" (*i.e.*, whether the imports are being "dumped"). The USITC is responsible for determining whether or not imports are causing or threatening injury to a US industry. For the United States to issue an anti-dumping order and thereby impose final anti-dumping measures, it is necessary for the DOC to make a final affirmative determination of dumping and for the USITC to make a final affirmative determination of injury.[1]

3.3 The DOC makes the determination of dumping by comparing the "export price" (for sales to the United States) to the " normal value" (which is normally based on the prices for home-market sales). Under US law, the export price and normal value are subject to certain adjustments before they are compared.[2] The DOC then calculates an average adjusted normal value and export price for each product comparison. The "dumping margin" for each product then represents the amount by which the average adjusted normal value exceeds the average adjusted export price for that product (*i.e.*, normally the price difference between the home-market price and the export price).

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[1] The US statutory provisions authorizing the DOC and USITC to perform investigations and impose anti-dumping duties are set forth in Section 731 *et seq.* of the Tariff Act of 1930, as amended (the "Tariff Act"). These statutory provisions are codified in Section 1673 *et seq.* of Title 19 of the US Code. The DOC's regulations addressing the procedures and substantive methodologies employed in its anti-dumping investigations and reviews are set forth in Section 351 of Title 19 of the Code of Federal Regulations. A copy of the relevant provisions of the US anti-dumping statute is provided in ROK Ex. 1. A copy of the relevant provisions of the DOC's regulations is provided in ROK Ex. 2.

[2] The manner in which these adjustments are made depends, in part, on whether the US sales being analyzed are classified as "export-price" or "constructed-export-price" sales. As a general matter, an "export-price" analysis is used when the merchandise is sold by the exporter directly to an unaffiliated customer in the United States (or in certain situations in which the merchandise is sold through an affiliated importer). A constructed-export-price analysis is used in certain circumstances where the merchandise is sold through an affiliated importer in the United States. See Tariff Act §§ 772(a) and (b), 19 USC. §§ 1677a(a) and (b).

Under US law, when a "constructed-export-price" analysis is used, the DOC will deduct from the US sales price the amount of any " direct selling expenses" incurred on the US sales. See Tariff Act § 772(d), 19 USC. § 1677a(d). By contrast, when an "export price" analysis is used, the DOC does not deduct these US direct selling expenses from US price. Instead, the DOC makes the adjustment for the US direct selling expenses by *increasing the normal value* — that is, it adds to the home-market price the amount of the direct selling expenses incurred on the comparable US sales. See Tariff Act § 773(a)(6)(C)(iii), 19 USC. § 1677b(a)(6)(C)(iii). See also 19 C.F.R. § 351.410(c).

However, the net effect on the dumping margins of these two methodologies is essentially the same, since an increase in the normal value has the same effect as a decrease in the export price when calculating the "price difference" between the two. Therefore, for purposes of simplicity, this Submission will refer to "decreases in the export price on all US sales" to refer to the combined effect of increases in the normal value for some US sales and decreases in the export price for the other US sales.

3.4 After the DOC initiates an anti-dumping investigation, the USITC makes a preliminary injury determination. If the preliminary determination of the USITC is affirmative, the investigation returns to the DOC. In order to gather the information needed for the anti-dumping investigation, the DOC issues questionnaires requesting information about exporters' costs, export prices, home-market prices, and other issues.

3.5 The DOC reaches its preliminary determination on the basis of the facts presented in the exporters' responses to the questionnaires. The DOC may also address legal issues needed to reach a preliminary determination. The analysis underlying the preliminary determination is explained in the published notice of the DOC preliminary determination, and in an internal DOC "analysis memorandum," which is provided to the parties.[3]

3.6 The DOC next conducts "verification" of the responses to the questionnaires and prepares its "verification reports." After verification, the DOC prepares a report on its verification findings, which is provided to the parties. The parties participating in the investigation then simultaneously submit "case briefs" to the DOC concerning legal issues raised by the preliminary determination. Each later simultaneously submits a "rebuttal brief" commenting on the other's arguments. A hearing may then be held at which the parties explain their arguments, and respond to the arguments of the other parties, before DOC officials.

3.7 The DOC then reaches its final determination. As with the preliminary determination, the analysis underlying the final determination is explained in the published notice of the determination, and in an internal DOC "analysis memorandum." The published notice of the final determination also summarizes comments made by the parties in their briefs and presents the DOC's view of those comments.

3.8 If the DOC's final determination is negative (*i.e.*, if the DOC determines that US sales are not being made at prices below normal value), the investigation ends. On the other hand, if the DOC's final determination is affirmative, the investigation returns to the USITC. The USITC then makes a final determination whether the imports are causing or threatening injury to a US industry. If the USITC makes a negative final determination, the investigation ends. If the USITC makes an affirmative final determination, it so notifies the DOC, which then publishes an anti-dumping order.

3.9 The determinations by the DOC and USITC are published in the US Federal Register. The published determinations by the DOC normally contain a discussion of the issues that have arisen in the investigation, as well as an explanation of the DOC's position on the comments raised by the parties. These published DOC determinations are also supplemented by internal "analysis memoranda" by the DOC's staff.

3.10 The final decisions by the DOC and USITC may be appealed, as a matter of right, to the US Court of International Trade ("USCIT"). The decisions by the USCIT may then be appealed, as a matter of right, to the US Court of Appeals for the Federal Circuit ("CAFC"). The parties may request that the US Supreme Court review decisions by the CAFC; however, the US Supreme Court is not obligated to accept such appeals and, in practice, it has never accepted an appeal of a decision by the CAFC arising from an anti-dumping proceeding.

[3] The DOC's procedures also permit the parties to comment on any "ministerial" errors in the preliminary determination. If the DOC agrees that there were "ministerial errors," it may issue an amended preliminary determination correcting those errors.

B. PROCEDURAL FACTS CONCERNING THE US ANTI-DUMPING INVESTIGATIONS OF KOREAN SSPC AND SSSS

1. The SSPC Investigation: Procedural Facts

3.11 On 20 April 1998, at the behest of US steel companies and workers, the DOC initiated an anti-dumping investigation of imports of SSPC from Korea and five other countries.[4] The "period of investigation" (for purposes of determining whether dumping had occurred) covered the period from 1 January 1997 through 31 December 1997.[5]

3.12 On 27 May 1998, the DOC issued a questionnaire to POSCO.[6] POSCO timely responded to Section A of the questionnaire on 1 July 1998 and to Sections B, C, and D of the questionnaire on 20 July 1998.[7] The DOC issued supplemental questionnaires in July, August, September and October 1998, to which POSCO timely responded.[8]

3.13 On 27 October 1998, the DOC formally issued the preliminary determination in the SSPC investigation. The DOC preliminarily determined that the dumping margin for Korean SSPC was *only 2.77%.*[9] The methodologies used in the preliminary determination were described in the notice of the preliminary determination, and in an analysis memorandum also dated 27 October 1998.[10] The substance of this preliminary determination is discussed, in relevant part, below.

3.14 From 9 to 13 November 1998, the DOC conducted verification of POSCO's responses to the DOC questionnaires as they pertained to POSCO's sales.[11] From 19 to 20 November 1998, the DOC conducted verification pertaining to the US sales of POSCO's US affiliate, Pohang Steel America ("POSAM"). From 7 to 15 December 1998, the DOC conducted verification pertaining to POSCO's costs. The verified evidence is discussed, in relevant part, below.

3.15 On 26 January 1999, the DOC received case briefs from POSCO and the US petitioners.[12] On 2 February 1999, the DOC received rebuttal briefs from POSCO and the US petitioners.[13]

3.16 On 19 March 1999, the DOC issued its final determination regarding SSPC. Because of several changes from the analysis in the SSPC Preliminary Analysis Memorandum, the "dumping margin" for Korean SSPC increased from *2.77%* in the preliminary determination to *16.26%* in the

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[4] See Notice of Initiation, 63 Fed. Reg. 20580, 20585 (27 April 1998) (hereinafter, "SSPC Notice of Initiation"). A copy of the SSPC Notice of Initiation is provided as ROK Ex. 3.

[5] Notice of Preliminary Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea, 63 Fed. Reg. 59535, 59536 (4 Nov. 1998) (hereinafter, "SSPC Preliminary Determination"). A copy of the SSPC Preliminary Determination is provided as ROK Ex. 4.

[6] SSPC Preliminary Determination, ROK Ex. 4, at 59536. The DOC also issued a questionnaire to another Korean steel company. The other company responded that it did not export the merchandise under investigation to the United States during the period of investigation. *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id*. at 59539.

[10] DOC Memorandum to File of 27 October 1998, at 1 (hereinafter, "SSPC Preliminary Analysis Memorandum"). SSPC Preliminary Analysis Memorandum is provided at ROK Ex. 5.

[11] DOC Memorandum to File of 5 January 1999, at 1 (hereinafter, "SSPC Sales Verification Report"). Excerpts of the SSPC Sales Verification Report are provided at ROK Ex. 6.

[12] POSCO's Case Brief of 26 January 1999 (hereinafter, "POSCO's SSPC Case Brief") is provided at ROK Ex. 7. The US Petitioners' Case Brief of 26 January 1999 (hereinafter, "US Petitioners' SSPC Case Brief') is provided at ROK Ex. 8.

[13] POSCO's Rebuttal Brief of 2 February 1999 (hereinafter, "POSCO's SSPC Rebuttal Brief") is provided at ROK Ex. 9. The US Petitioners' Rebuttal Brief of 2 February 1999 (hereinafter, "US Petitioners' SSPC Rebuttal Brief") is provided at ROK Ex. 10.

final determination.[14] The changes in the DOC's analysis were described in the notice of the final determination and in the final "analysis memorandum.[15] The substance of the DOC's final determination and final "analysis memorandum" is discussed, in relevant part, below.

3.17 Also on 19 March 1999, the DOC provided to POSCO and the US petitioners various "disclosure documents" containing data used in connection with the DOC's final analysis.

3.18 On 4 May 1999, the USITC informed the DOC of its final affirmative injury determination.[16] On 21 May 1999, the DOC issued its anti-dumping order with respect to SSPC, setting the cash deposit rate for Korean SSPC at 16.26%.[17]

2. The SSSS Investigation: Procedural Facts

3.19 On 30 June 1998, at the behest of US steel companies and workers, the DOC initiated an anti-dumping investigation of imports of SSSS from Korea and seven other countries.[18] The "period of investigation" (for purposes of determining whether dumping had occurred) covered the period from 1 April 1997 through 31 March 1998.[19]

3.20 On 3 August 1998, the DOC issued a questionnaire to POSCO and several other Korean steel companies.[20] POSCO timely responded to Section A of the questionnaire on 8 September 1998 and to Sections B, C, and D of the questionnaire on 23 September 1998.[21] The DOC issued three supplemental questionnaires to POSCO in October 1998, to which POSCO timely responded in November 1998.[22]

3.21 On 17 December 1998, the DOC issued its preliminary determination regarding SSSS. The DOC preliminarily determined that the dumping margin for POSCO's SSSS was 12.35%.[23] The DOC's analysis was described in the notice of the preliminary determination in the preliminary "analysis memorandum" also dated 17 December 1998.[24] The substance of the DOC's analysis is discussed, in relevant part, below.

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[14] Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea, 64 Fed. Reg. 15444, 15456 (31 Mar. 1999) (hereinafter, "SSPC Final Determination"). The SSPC Final Determination is provided at ROK Ex. 11.

[15] DOC Memorandum to File of 19 March 1999, at 1 (hereinafter, "SSPC Final Analysis Memorandum"). The SSPC Final Analysis Memorandum is provided at ROK Ex. 12.

[16] See Antidumping Duty Orders, 64 Fed. Reg. 27756 (21 May 1999) (hereinafter, "SSPC Anti-Dumping Order"). The SSPC Anti-Dumping Order is provided at ROK Ex. 13.

See also Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa, and Taiwan, 64 Fed. Reg. 25515 (12 May 1999). The USITC's explanation of its final injury determination was set forth separately in its publication Certain Stainless Steel Plate from Belgium, Canada, Italy, Korea, South Africa and Taiwan, USITC Pub. 3188 (May 1999) (hereinafter, "SSPC Final Injury Determination"). The SSPC Final Injury Determination is provided as ROK Ex. 14.

[17] SSPC Anti-Dumping Order, ROK Ex. 13, at 27757.

[18] See Notice of Initiation of Antidumping Duty Investigations, 63 Fed. Reg. 37521, 37528 (13 July 1998) (hereinafter, "SSSS Notice of Initiation"). A copy of the SSSS Notice of Initiation is provided as ROK Ex. 15.

[19] Notice of Preliminary Determination of Sales at Less than Fair Value: Stainless Steel Sheet and Strip in Coils from South Korea, 64 Fed. Reg. 137, 139 (4 Jan. 1999) (hereinafter, "SSSS Preliminary Determination"). A copy of the SSSS Preliminary Determination is provided as ROK Ex. 16.

[20] *Id*. at 137.

[21] *Id*.

[22] *Id*.

[23] *Id*. at 147.

[24] DOC Memorandum to File of 17 December 1998, at 1 (hereinafter, "SSSS Preliminary Analysis Memorandum"). The SSSS Preliminary Analysis Memorandum is provided at ROK Ex. 17.

3.22 On 28 December 1998, POSCO pointed out that the DOC made three "significant ministerial errors" in its preliminary determination regarding SSSS. On 14 January 1999, the DOC concluded that POSCO was correct. Therefore, the DOC amended its preliminary determination. Upon recalculation with the ministerial errors corrected, the DOC preliminarily determined that the dumping margin for POSCO's SSSS was *only 3.92%.*[25]

3.23 From 7 to 15 December 1998, the DOC conducted verification of POSCO's responses to the DOC questionnaires as they pertained to POSCO's costs. From 22 to 26 February 1999, the DOC conducted verification pertaining to POSCO's sales.[26] From 17 to 18 March 1999, the DOC conducted verification of the US sales of POSAM, POSCO's US affiliate. The verified evidence is discussed, in relevant part, below.

3.24 On 15 April 1999, the DOC received case briefs from POSCO and the US petitioners.[27] On 21 April 1999, the DOC received rebuttal briefs from POSCO and the US petitioners.[28]

3.25 On 19 May 1999, the DOC issued its final determination regarding SSSS. Because of changes from the analysis in the SSSS Preliminary Determination, the dumping margin for POSCO's SSSS increased from *3.92%* in the amended preliminary determination to *12.12%* in the final analysis.[29] The DOC's revised analysis was described in the notice of the final determination and in the final "analysis memorandum" also dated 19 May 1999.[30] The substance of the DOC's final analysis is discussed, in relevant part, below.

3.26 Also on 19 May 1999, the DOC provided to POSCO and the US petitioners various "disclosure documents" containing data used in connection with the DOC's final analysis.

3.27 On 19 July 1999, the USITC informed the DOC of its final affirmative injury determination with respect to imports of SSSS from Korea and two other countries.[31]

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[25] Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from South Korea, 64 Fed. Reg. 3928, 3930 (26 Jan. 1999) (hereinafter, "SSSS Amended Preliminary Determination"). The SSSS Amended Preliminary Determination is provided at ROK Ex. 18.

[26] DOC Memorandum to File of 6 April 1999, at 1 (hereinafter, "SSSS Sales Verification Report"). Excerpts of the SSSS Sales Verification Report are provided at ROK Ex. 19.

[27] POSCO's Case Brief of 15 April 1999 (hereinafter, "POSCO's SSSS Case Brief") is provided at ROK Ex. 20. The US Petitioners' Case Brief of 15 April 1999 (hereinafter, "US Petitioners' SSSS Case Brief") is provided at ROK Ex. 21.

[28] POSCO's Rebuttal Brief of 21 April 1999 (hereinafter, "POSCO's SSSS Rebuttal Brief') is provided at ROK Ex. 22. The US Petitioners' Rebuttal Brief of 21 April 1999 (hereinafter, "US Petitioners' SSSS Rebuttal Brief") is provided at ROK Ex. 23.

[29] Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from the Republic of Korea, 64 Fed. Reg. 30664, 30688 (8 June 1999) (hereinafter, "SSSS Final Determination"). The SSSS Final Determination is provided at ROK Ex. 24.

[30] DOC Memorandum to File of 19 May 1999, at 1 (hereinafter, "SSSS Final Analysis Memorandum"). The SSSS Final Analysis Memorandum is provided at ROK Ex. 25.

[31] See Notice of Antidumping Duty Order; 64 Fed. Reg. 40555 (27 July 1999) (hereinafter, "SSSS Anti-Dumping Order"). The SSSS Anti-Dumping Order is provided at ROK Ex. 26.

See also Certain Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, the Republic of Korea, Mexico, Taiwan, and the United Kingdom, 64 Fed. Reg. 40896, 40897 (28 July 1999). The USITC's explanation of its final injury determination was set forth separately in its publication Certain Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, the Republic of Korea, Mexico, Taiwan, and the United Kingdom, USITC Pub. 3208 (July 1999) (hereinafter "SSSS Final Injury Determination"). The relevant portions of the SSSS Final Injury Determination are provided as ROK Ex. 27.

3.28 On 27 July 1999, the DOC issued its anti-dumping order with respect to SSSS. The order set the cash deposit rate for POSCO's SSSS at 12.12%.[32]

C. FACTS CONCERNING THE WTO DEFICIENCIES OF THE US ANTI-DUMPING MEASURES AT ISSUE

3.29 This Part of the Statement of Facts provides the facts most relevant to the WTO deficiencies of the US anti-dumping measures against Korean SSPC and SSSS, namely, facts concerning: (1) the DOC's treatment of POSCO's sales to an unaffiliated US customer that subsequently went bankrupt without paying POSCO; (2) the DOC's methodology for dividing the investigation period into multiple "averaging periods" for purposes of comparing average normal values with average export prices; and (3) the DOC's treatment of POSCO' s "local sales," which are sales made in the Korean domestic market that are priced in US dollars.

1. POSCO's Sales to an Unaffiliated Customer that Later Went Bankrupt

3.30 The ABC Company (as we will refer to it for reasons of confidentiality) had been a valued US customer of POSCO. It is not affiliated with POSCO. It often bought on credit from POSCO. Prior to the period of investigation, it never defaulted on a payment due POSCO. Indeed, prior to the period of investigation, none of POSCO's US customers had ever defaulted on a payment due POSCO.[33]

3.31 During the period of investigation, POSCO made several sales of SSPC and SSSS to the ABC Company. The ABC Company subsequently declared bankruptcy, and to date has not paid POSCO for certain of those sales. This bankruptcy was an unprecedented, unanticipated event beyond POSCO's control. It had nothing to do with POSCO's pricing policies in the United States.

3.32 The record shows that the ABC Company did not pay POSCO for { } sales of SSPC, accounting for { }% of POSCO's US sales by value and { } by quantity.[34] Likewise, the ABC Company did not pay for { } sales of SSSS, accounting for { }% of POSCO's US sales by value and { } by quantity.[35]

3.33 The issue of how to treat the unpaid sales to the ABC Company first arose in the anti-dumping investigations when POSCO submitted its response to the DOC questionnaire in the SSPC investigation, explained the extraordinary circumstances, and asked the DOC to exclude the unpaid sales from its calculation of export price (and thus from the comparison of export price to normal value).[36] The US petitioners objected to POSCO's request, arguing that the unpaid sales were "bad debts" which "should be allocated over [POSCO's] sales to other customers to arrive at a direct selling expense on US sales" and that "direct selling expense must be deducted from gross price in calculating net export prices."[37] POSCO responded that the unpaid sales were not "bad debts" and they should be excluded lest the calculation of the dumping margin be distorted by extraordinary or unusual circumstances.[38]

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[32] SSSS Anti-Dumping Order, ROK Ex. 26, at 40557.
[33] POSCO's SSPC Rebuttal Brief, ROK Ex. 9, at 5.
[34] SSPC Supplemental Questionnaire Response for Sections B and C, ROK Ex. 28, at 15.
[35] SSSS Questionnaire Response for Sections B and C, ROK Ex. 29, at C-1.
[36] SSPC Questionnaire Response for Sections B and C, ROK Ex. 30, at C-1.
[37] Letter of 19 October 1998 from US Petitioners to DOC, at 2-3. This letter is provided at ROK Ex. 31.
[38] Letter of 22 October 1998 from POSCO to DOC, at 3-5. This letter is provided at ROK Ex. 32.

3.34 The issue arose in the same way in the SSSS investigation. POSCO submitted its response to the DOC questionnaire and requested exclusion of these aberrant sales and the US petitioners objected.[39]

3.35 In the preliminary determinations for both SSPC and SSSS, the DOC excluded the unpaid sales to the ABC Company from its calculation of export price.[40] It agreed with POSCO that these sales were "atypical and not part of POSCO's normal business practice.[41] It expressly rejected the petitioners' argument that the cost of these sales was a "direct expense.[42]

3.36 The preliminary determination to exclude the unpaid sales because they were "atypical" was consistent with the past practice of the United States. The United States has acknowledged that the inclusion in dumping calculations of sales that are "extraordinary for the market in question" can "lead to irrational or unrepresentative results.[43] For that reason, the US anti-dumping statute specifically directs the DOC to exclude any home-market sales that are "outside the ordinary course of trade" from its calculation of normal value. Similarly, although the US statute does not contain an explicit provision directing the DOC to exclude such sales from the calculation of the export price, the DOC routinely excludes such sales from its export price analysis. In fact, the US Court of International Trade has affirmed that the DOC "has the discretion to disregard certain US pricing data if 'inclusion of certain sales which are clearly atypical would undermine the fairness of the comparison of foreign and US sales.'[44] In accordance with this principle, the DOC has, in at least one past case, excluded from its analysis US sales for which payment was never received because of the customer's bankruptcy, on the ground that the sales were not representative.[45]

3.37 In the final determinations, however, the United States reversed position. The United States did not exclude the sales for which POSCO did not receive payment because of the customer's bankruptcy. Instead, it included these unpaid sales in its analysis; it declared that the amounts due POSCO by the ABC Company were "bad debts;" it treated the costs of the unpaid sales as "direct selling expenses;" and it adjusted for these alleged expenses in the calculation of the dumping margins.[46] This adjustment was made despite the DOC's admission that, "at the time [the sales] were made, POSCO was not aware that the customer would declare bankruptcy.[47]

3.38 The United States offered the following explanations for its change in policy:

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[39] SSSS Questionnaire Response for Sections B and C, ROK Ex. 29, at C-1 (POSCO's request); Letter of 2 December 1998 from US Petitioners to DOC, at 6-7 (US petitioners' response). This letter is provided at ROK Ex. 33.

[40] SSPC Preliminary Determination, ROK Ex. 4, at 59536-37; SSSS Preliminary Determination ROK Ex. 16, at 140.

[41] SSPC Preliminary Analysis Memorandum, ROK Ex. 5, at 3; SSSS Preliminary Determination, ROK Ex. 16, at 140.

[42] SSSS Preliminary Determination, ROK Ex. 16, at 140.

[43] Statement of Administrative Action for the Uruguay Round Agreements, at 164, reprinted in 1 H.Doc. 103-316 at 656, 834 (1994). The relevant excerpt of the Statement of Administrative Action is provided as ROK Ex. 34.

[44] *Chang Tieh Industry Co., Ltd. v. United States*, 840 F. Supp. 141, 145 (Ct. Int'l Trade 1993) (see ROK Ex. 35), quoting *Ipsco, Inc. v. United States*, 714 F. Supp. 1211, 1217 (Ct. Int'l Trade 1989). See also *Asociacion Colombiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114, 1126 (Ct. Int'l Trade 1989) (when deciding whether to include US sales in its analysis, DOC "must make a determination as to which sales of the included producer are so unrepresentative as to be unfairly distorting.") (see ROK Ex 36).

[45] See Fabric and Expanded Neoprene Laminate from Taiwan: Final Determination of Sales at Less Than Fair Value, 52 Fed. Reg. 37193, 37194 (5 Oct. 1987) (see ROK Ex. 37).

[46] SSPC Final Determination, ROK Ex. 11, at 15447-49; SSSS Final Determination, ROK Ex. 24, at 30671-74.

[47] SSPC Final Determination, ROK Ex. 11, at 15449; SSSS Final Determination, ROK Ex. 24, at 30673-74.

- With respect to SSPC, the United States stated: "Although we disregarded the sales [to the ABC Company] in the preliminary determination, we find that the sales account for such a large percentage of POSCO's US sales that they cannot be dismissed as abnormalities."[48]

- With respect to SSSS, where the sales to the ABC Company were relatively small, the United States explained that: "[R]espondent's arguments regarding the relative significance of these sales [to the ABC Company] compared to POSAM's total sales is [*sic*] inapposite. Although the Department employs a 5 per cent threshold in regard to other issues in investigations … none … apply to this case."[49]

In other words, the United States expressly based its decision regarding SSPC on the "large percentage " of the atypical sales compared to the total sales being investigated. But, when faced with a much smaller percentage of atypical sales in SSSS, the United States held that the percentage of atypical sales was irrelevant. These explanations are obviously inconsistent.

3.39 Having decided to make an adjustment for the unpaid sales to the ABC Company, the DOC adjusted the export price downward by { } for every metric ton of SSPC that POSCO sold in the United States, a distortion equal to 13.7% of the weighted average unit value ({ }).[50] Likewise, regarding SSSS, the adjustment of { } per metric ton distorted the export price downward by 4.6% of the weighted average unit value ({ }).[51]

2. The Division of the Investigation Period into Separate "Averaging Periods" for Purposes of Comparing Average Normal Values with Average Export Prices

3.40 The standard practice in US anti-dumping investigations is for the DOC to calculate a single weighted-average normal value to compare to a single weighted-average export price for the entire period of investigation.[52]

3.41 In the SSPC investigation, the US petitioners asked the DOC to depart from that methodology and "at least 'wall off' November and December 1997 … by limiting pricing/cost comparisons between markets to 'same month' transactions."[53] The petitioners alleged that this departure was necessary to account for the devaluation of the Korean won beginning in October 1997. The US petitioners elaborated on this argument in a letter to the DOC in the SSSS case.[54]

3.42 The same argument had been raised by the US petitioners in another US anti-dumping investigation involving the currency devaluation in Indonesia. In its preliminary determination in that case, the United States expressly found "no basis to depart from our practice of calculating the weighted-average EPs [*i.e.*, export prices] for the entire POI [*i.e.*, period of investigation]" merely because of a currency devaluation without "evidence that there has been a significant change in the respondents' pricing or marketing during the POI."[55]

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[48] SSPC Final Determination, ROK Ex. 11, at 15449.
[49] SSSS Final Determination, ROK Ex. 24, at 30674.
[50] SSPC Final Analysis Memorandum, ROK Ex. 12, at 1, Attachment 1.
[51] SSSS Final Analysis Memorandum, ROK Ex. 25, at 1, Attachment 1.
[52] See, *e.g.*, 19 C.F.R. § 351.414(d)(3) (ROK Ex. 2).
[53] SSPC Letter of 14 October 1998 from US Petitioners to DOC, at 2-3. This letter is provided as ROK Ex. 38.
[54] SSSS Letter of 2 December 1998 from US Petitioners to DOC, ROK Ex. 33, at 2-5.
[55] Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Certain Preserved Mushrooms from Indonesia, 63 Fed. Reg. 41783, 41785 (5 August 1998) (see ROK Ex. 39).

3.43 In accordance with that determination, the DOC's preliminary determinations in the SSPC and SSSS cases again rejected the US petitioners' request for November and December to be "walled off." In SSSS, the DOC distinguished as inapplicable "the one case cited by petitioners in support of averaging multiple periods" and "preliminarily determine[d] that … the use of multiple periods for averaging is *unwarranted*."[56] The DOC's preliminary determination in the SSPC case did note that it was currently studying this issue in the *Preserved Mushrooms* case. Thus, it explained that:

> For the purposes of the final determination, the Department will also analyze the implications, if any, of the decline in the won during 1997 for price averaging and whether multiple averages are warranted. The Department is studying *this issue* in *Mushrooms from Indonesia*.[57]

3.44 On 31 December 1998, the United States issued its final determination in *Preserved Mushrooms from Indonesia*. This final determination once more rejected the petitioners' request for multiple averaging, and maintained the established practice of declining to deviate from its standard methodology because of a currency devaluation.[58]

3.45 Yet, some three months later, in the final determinations for SSPC and SSSS, the United States reversed itself. Although it had previously considered the use of "multiple averaging periods" to be "unwarranted," the United States decided to use multiple averaging in these steel investigations.[59] The United States failed to provide any facts or legal reasons that were not considered in its preliminary decisions and which (in the DOC's view) warranted a different outcome in the final determination. The United States also failed to explain its departure from its then three-month-old precedent in *Preserved Mushrooms*, when the similarities between the devaluations of the won and the Indonesian rupiah clearly demanded the same treatment.

3.46 As a result, the DOC divided the period of investigation into sub-periods: For SSPC, the sub-periods ran (i) from January to October 1997 and (ii) from November to December 1997. For SSSS, the periods ran (i) from April to October 1997 and (ii) from November 1997 to March 1998. The DOC then calculated a separate weighted average export price and a separate weighted average normal value for each sub-period, and calculated a separate dumping margin for each sub-period (based on the amount by which the average normal value exceeded the average export price for that sub-period). In combining the dumping margins for the sub-periods, the DOC treated sub-periods where there were sales at *more* than fair value" (*i.e.*, "negative dumping") as a sub-period of "zero dumping."[60] It then calculated an overall average dumping margin based on the average of the dumping margins found in certain sub-periods and the "zero" dumping margins assigned to the sub-periods in which there had been "negative dumping." As a matter of simple arithmetic, the effect of dividing the period of investigation into separate sub-periods and then treating "negative dumping" for any sub-period as "zero" is necessarily to raise the overall dumping margin.

3.47 The purpose of the "multiple averaging" methodology was plainly to "wall off" the period after the devaluation. In their submissions to the DOC, the US petitioners conceded that { }.[61]

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[56] SSSS Preliminary Determination, ROK Ex. 16, at 145 (emphasis added).

[57] SSPC Preliminary Determination, ROK Ex. 4, at 59359 (emphasis added).

[58] Notice of Final Determination of Sales at Less than Fair Value: Certain Preserved Mushrooms from Indonesia, 63 Fed. Reg. 72268, 72272 (31 Dec. 1998) (see ROK Ex. 40).

[59] SSPC Final Determination, ROK Ex. 11, at 15450-52; SSSS Final Determination, ROK Ex. 24, at 30674-76.

[60] This practice of treating "negative dumping" as "zero dumping" is sometimes called "zeroing."

[61] Petitioners' SSPC Case Brief, ROK Ex. 8, at 28; Petitioners' SSSS Case Brief, ROK Ex. 21, at 14.

3.48 By adopting the "multiple averaging" methodology, however, the DOC was able to effectively exclude the sales during the second sub-period from the calculation of the dumping margins. Consequently, the "walling off" of the later sales from the calculation of the dumping margins meant that the finding of dumping was based exclusively on sales before the devaluation of the Korean won. This finding is fundamentally inconsistent with the underlying basis of the anti-dumping orders: Throughout the proceedings in the investigations at issue, the US petitioners predicated their requests for anti-dumping orders on the claim that such relief was needed to protect the US industry from the adverse consequences of the so-called Asian economic crisis that accompanied the devaluation of the Korean won.[62] The final injury determinations also relied heavily on the imports (and consequent impact on the US industry) after the devaluation.[63] In other words, the increased imports and injury about which petitioners' complained, and on which the anti-dumping orders were predicated, all occurred *after* the devaluation — while, because of the "multiple averaging" methodology, all the sales that led to the finding of dumping occurred *before* the devaluation.

3. POSCO's Dollar-Priced "Local Sales" in the Korean Home Market

(a) POSCO's Accounting Practices for the Different Types of Sales It Makes

3.49 In the normal course of business, POSCO's sales may be classified into three basic categories: (1) domestic sales to Korean companies that are negotiated in Korean won, invoiced in Korean won, and paid in Korean won, (2) export sales to non-Korean companies that are negotiated in a foreign currency, invoiced in the foreign currency, and paid in the foreign currency, and (3) "local sales" to Korean companies that are negotiated in a foreign currency (typically US dollars), invoiced in the same foreign currency, but paid in Korean won.

3.50 For the first category of sales (which are negotiated, invoiced and paid in Korean won), POSCO records the sale in its accounting records at the time of invoice based on the Korean won amount on the invoice, and it records the amount of the payment in its accounting records at the time of payment based on the Korean won amount of the payment (which should be the same as the Korean won amount of the invoice). No difference is recognized between the amount of the sale and

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[62] See USITC Hearing Transcript in Final SSPC Investigation at 91 (Statement of Dr. Magrath) (explaining that the sharp drop in the US industry's profitability in the fourth quarter of 1997 (the "flip-flop") was caused by "the price declines of both the domestic producers and the subject imports, [which] ... were unusually steep and severe in the latter part of '97"); id. at 91-92 (Statement of Mr. Rosenthal) ("*the principal factor*" affecting imports of the subject merchandise was "the beginning of the Asian financial crisis") (emphasis added). See also USITC Hearing Transcript in Final SSSS Investigation at 142 (Statement of Mr. Malashevich) ("the price competition was felt only beginning in late 1997"). For the Panel's reference, a copy of the relevant pages of these transcripts is provided at ROK Ex. 41 and ROK Ex. 42, respectively.

See also Petitioners' Post-Hearing Brief in Final USITC Investigation of SSPC (30 March 1999), Exhibit 1 (Responses to Commission's Questions) at 12 ("Weakening foreign markets, particularly in Asia which culminated in the currency crisis that began in mid-1997 and *deepened in the fourth quarter of 1997*, contributed to a sharp influx in US imports in the second half of 1997, as demand in the United States remained relatively robust. ... [T]he severe weakness for the domestic industry *in the fourth quarter of 1997* coincided with a period of relative strength for subject imports, which rose by 26 percent in terms of volume and by 21 percent in terms of value compared to their respective averages in the first three quarters of the year.") (emphasis added). Petitioners' Post-Hearing Brief in Final USITC Investigation of SSPC (30 Mar. 1999), Exhibit 1 (Responses to Commission's Questions) at 12 (emphasis added). A copy of the relevant pages of this brief is provided in ROK Ex. 43.

[63] SSPC Final Injury Determination, ROK Ex. 14, at 15-16, 20-22; SSSS Final Injury Determination, ROK Ex. 27, at 14-15, 17-20.

the amount of the payment due to changes in exchange rates, because no conversion of currency is required to record the sales or payment.[64]

3.51 For the second category of sales (which are negotiated, invoiced and paid in a foreign currency), POSCO also records the sale in its accounting records *in Korean won* at the time of invoice — using the exchange rate of the official Korean Exchange Bank at the date of invoice to determine the relevant Korean won amount. POSCO subsequently records the payment in its accounting records *in Korean won* at the time of payment — using the exchange rate of the Korean Exchange Bank at the date of payment to determine the relevant Korean won amount. If the exchange rate has changed between the date of invoice and the date of payment, the amount recorded for the sale in Korean won may not match the amount recorded for the payment in Korean won (even though the amount invoiced and paid in the foreign currency is the same). POSCO must therefore record an additional exchange gain or loss to account for the difference between the amount in Korean won recorded at the time of sale and the amount in Korean won recorded at the time of payment.[65]

3.52 For the third category of "local sales" (which are negotiated and invoiced in a foreign currency), the payments are made in Korean won. The amount of the Korean won payment for these "local sales" is not fixed at the time of the sales negotiation or at the time of invoice. Instead, to accurately reflect the dollar value of these sales at the time of payment, the agreed-upon sale amount in the foreign currency is translated into Korean won using the exchange rate of the Korean Exchange Bank *on the date on which the customer pays*. The economic value of the sale is therefore fixed in the foreign currency and not in Korean won.

3.53 The accounting for these local sales is, therefore, necessarily the same as the accounting for the transactions resulting in foreign currency payments: In both cases the economic value is fixed in foreign currency, the accounting records are kept in Korean won, and any change in the exchange rate of the Korean Exchange Bank between the date of invoice and the date of payment has to be recorded in won as an exchange gain or loss.[66]

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[64] POSCO's accounting practices for domestic sales that were invoiced in Korean won were reviewed by the DOC in its verifications in both the SSSS and SSPC cases. See SSPC Sales Verification Report, ROK Ex. 6, at Ex. 6, 19, 20; SSSS Sales Verification Report, ROK Ex. 19, at Ex. 17, 19, 21.

[65] POSCO's accounting practices for export sales in US dollars were reviewed by the DOC in its verifications in both the SSSS and SSPC cases. SSPC Sales Verification Report, ROK Ex. 6, at Ex. 25, 26, 31; SSSS Verification Report, ROK Ex. 19, at Ex. 22.

[66] Specifically, even though the local sale is invoiced in the foreign currency, POSCO records the sale in its accounting records *in Korean won* at the time of invoice — using the exchange rate of the Korean Exchange Bank at the date of invoice to determine the relevant Korean won amount for its accounting entry. POSCO subsequently records the payment in its accounting records *in Korean won* at the time of payment — using the amount of the customer's actual payment in Korean won, which was calculated by applying the exchange rate of the Korean Exchange Bank at the date of payment to the foreign currency amount shown on the invoice. If the exchange rate has changed between the date of invoice and the date of payment, the amount recorded for the sale in Korean won may not match the amount recorded for the payment in Korean won. POSCO must therefore record an additional exchange gain or loss to account for the difference between the amount recorded in Korean won at the time of sale and the amount recorded in Korean won at the time of payment.

In this regard, it should be noted that POSCO's accounting practices for the local sales that were invoiced in US dollars were reviewed by the DOC in its verifications in the SSSS and SSPC cases. For example, in the SSSS case, it was verified that POSCO "recognized an exchange rate loss" on Home Market Sale No. 1, due to changes in the dollar-won exchange rate between invoice and payment. SSSS Sales Verification Report, ROK Ex. 19, at 14. See also SSPC Sales Verification Report, ROK Ex. 6, at 6; SSPC Final Analysis Memorandum, ROK Ex. 12, at 4; SSSS Sales Verification Report, ROK Ex. 19, Ex. 17; SSSS Final Analysis Memorandum, ROK Ex. 25, at 3.

3.54 The economic substance and accounting treatment of these three types of transactions may be illustrated by the following simplified examples. Suppose that POSCO makes three sales that are invoiced on April 1: (1) a domestic sale at a price of 100,000 won that is invoiced and paid in Korean won; (2) an export sale at a price of $100 that is invoiced and paid in US dollars; and (3) a local sale at a price of $100 that is invoiced in dollars but paid in won (as determined by converting the US dollar price using the exchange rate on the date of payment). Suppose, further, that payment for all three sales is made on April 30, that the exchange rate on April 1 (the date of invoice) was 1,000 won per dollar, and that the exchange rate on April 30 (the date of payment) was 1,100 won per dollar. In such circumstances, the transactions would be recorded in POSCO's accounting records as follows:

1. Domestic Sale in Korean Won

Transaction	Actual Amount of Transaction	Applicable Exchange Rate	Amount Recorded for Accounting Purposes	
			Debit	Credit
Invoice (Recorded in Sales Account)	100,000 won	--		100,000 won
Debit to Accounts Receivable Account			100,000 won	
Payment (Recorded in Cash Account)	100,000 won	--	100,000 won	
Credit to Accounts Receivable				100,000 won
Exchange Gain				--

2. Export Sale in US Dollars

Transaction	Actual Amount of Transaction	Applicable Exchange Rate	Amount Recorded for Accounting Purposes	
			Debit	Credit
Invoice (Recorded in Sales Account)	$100	1,000		100,000 won
Debit to Accounts Receivable Account			100,000 won	
Payment (Recorded in Cash Account)	$100	1,100	110,000 won	
Credit to Accounts Receivable				100,000 won
Exchange Gain				10,000 won

3. Local Sale Invoiced in US Dollars but Paid in Korean Won

Transaction			Actual Amount of Transaction	Applicable Exchange Rate	Amount Recorded for Accounting Purposes	
					Debit	Credit
Invoice (Recorded in Sales Account)			$100	1,000		100,000 won
Debit to Accounts Receivable Account					100,000 won	
Conversion of Payment by Customer	Dollar Amount	(A)	$100			
	Exchange Rate	(B)	x 1,100 won/$			
	Won Amount	(AxB)	110,000 won			
Payment (Recorded in Cash Account)			110,000 won	--	110,000 won	
Credit to Accounts Receivable						100,000 won
Exchange Gain						10,000 won

As these examples demonstrate, the foreign currency export sales and local sales result in the same accounting entries, because the economic substance of the transactions is the same. In both types of sales, the value of the customer's payment is determined by converting a foreign currency amount into Korean won using the exchange rate on the date of payment. The only difference is whether this conversion is made by POSCO (as in foreign-currency export sales) or by the customer (as in foreign-currency local sales).

(b) POSCO's Reported Local Sales of SSSS and SSPC

3.55 During the period of investigation, approximately { } of POSCO's sales of SSPC and approximately { } of its sales of SSSS in the home market consisted of "local sales" that were priced in US dollars.[67] As discussed above, POSCO booked these dollar-priced sales in its sales ledgers in Korean won, using the daily exchange rate in effect at the Korean Exchange Bank on the date of sale.[68] The customers made payment in Korean won. The amount of the payment was calculated by multiplying the US dollar invoice amount by the exchange rate in effect at the Korean Exchange Bank on the date of payment.[69] Gains or losses resulting from a change in the exchange rate between sale and payment were reflected in POSCO's books as transaction gains or losses.[70]

[67] Data reported to DOC shows that there were { } metric tons of local sales of SSPC out of { } metric tons of total home-market sales of SSPC during the period of investigation and that there were { } metric tons of local sales of SSSS out of { } metric tons of total home-market sales of SSSS.

[68] A chart showing the daily exchange rates of the Korean Exchange Bank for the period from 1 January 1997 to 31 March 1998 is provided at ROK Ex. 44. The DOC verified that POSCO used the Korean Exchange Bank's rates in its accounting books. See SSSS Sales Verification Report, ROK Ex. 19, at 14.

[69] The DOC verified that the payment amount for these "local sales" was determined by applying the exchange rate on the date of payment to the foreign currency amount on the invoice. The payment record (set forth on page 25 of the verification exhibit) indicates that the "total US$ to be paid" for this transaction was { }. It further indicates that POSCO received a total amount of { } Korean won for this transaction on { } — a date which is described in the verification exhibit as the "date monies are received" and as "date of 'payment' for exchange rate purposes." The Korean Exchange Bank exchange rate on { } was { } won per dollar (according to page 17 of the verification exhibit). Multiplying the { } dollar invoice price by the { } won per dollar exchange rate yields a Korean won amount of { }, which is exactly the amount in Korean won actually received by POSCO. Thus, a review of this verification exhibit demonstrates that the customer's payment in Korean won was determined by multiplying the US dollar invoice amount by the exchange rate of the Korean Exchange

(c) The DOC's Treatment of Local Sales

3.56 The issue of how the "local sales" should be treated first arose when the DOC preliminary determination in SSPC treated POSCO's "local sales" as *export sales* and *excluded* them from the calculation of normal value.[71] Both the US petitioners and POSCO agreed that this decision was in error.[72]

3.57 In its preliminary determination in SSSS and in its final determinations in both SSPC and SSSS, the DOC included these "local sales" in its calculation of normal value.[73] The DOC did not, however, base its calculations on the actual dollar amount at which POSCO invoiced the customer for these sales. Instead, the DOC applied the following methodology:

- The DOC first assigned a won value to these "local sales," by using the amounts in Korean won at which the sales had been recorded in POSCO's sales ledgers at the time of sale. In other words, the DOC effectively converted the actual dollar prices on POSCO' s invoices into Korean won using the exchange rates from the Korean Exchange Bank on the date of the sale

- The DOC then combined these converted amounts in won with the won amounts of POSCO's other home-market sales (*i.e.*, those sales that were invoiced in won) to calculate an average normal value in Korean won.

- The DOC then converted this average normal value in Korean won into a normal value in US dollars by applying a weighted-average exchange rate (based on New York Federal Reserve exchange rates) for the dates of POSCO's *US sales.*[74]

For the "local sales," this methodology meant that the dollar amount of the invoice was translated into Korean won using one exchange rate (*i.e.*, the exchange rate of the Korean Exchange Bank on the date of the local sale), and then translated back into dollars using *a different exchange rate* (*i.e.*, a calculated exchange rate based on a weighted average of the New York Federal Reserve exchange rates on the dates of POSCO's US sales).[75]

3.58 Not surprisingly, this "double conversion" methodology distorted the results of the DOC's calculations, and increased the dumping margins found. The following example, which is based on the actual US and home-market ("HM") sales data submitted by POSCO for one of its SSSS products,

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Bank on the date of payment — which differed from the exchange rate on the date of sale. (A copy of the relevant pages of SSSS Sales Verification Exhibit 17 is provided in ROK Ex. 45.)

[70] SSSS Supplemental Sales Questionnaire Responses, ROK Ex. 46, at 19.

[71] SSPC Preliminary Analysis Memorandum, ROK Ex. 5, at 2.

[72] Letter of 5 November 1998 from US Petitioners to DOC, at 3 (US petitioners alleging " ministerial error"); Letter of 6 November 1998 from POSCO to DOC, at 2 (agreeing with US petitioners that there was an error, but disagreeing as to its characterization as "ministerial"). The US petitioners' letter is provided at ROK Ex. 47. POSCO's response is provided at ROK Ex. 48.

[73] SSPC Final Determination, ROK Ex. 11, at 15455-56; SSSS Preliminary Analysis Memorandum, ROK Ex. 17, at 2.

[74] This average exchange rate was calculated by weighting the New York Federal Reserve exchange rates on the date of each US sale by the quantity sold in each US sale.

[75] After the DOC's preliminary determination in SSSS, POSCO strongly objected to the DOC's methodology in its case briefs in both the SSPC and SSSS cases. SSPC Final Determination, ROK Ex. 11, at 15456; SSSS Final Determination, ROK Ex. 24, at 30678. In the end, however, the DOC persisted in making a "double conversion" of local sales from dollar prices to won prices back to dollar prices.

illustrates how the double-conversion methodology increased its normal value and thus inflated the dumping margins.

Calculation of Weighted Average Exchange Rate for US Sales

US Observation Number	Product Matching Number	Date of US Sale	US Sale Quantity	Exchange Rate	Weighted Exchange Rate
86	0006	3/11/1997	{ }	976.0	
87	0006	3/11/1997	{ }	976.0	
Total			{ }		976.0

Calculation of Weighted Average Normal Value Based on Dollar Prices

Home-Market Observation Number	Product Matching Number	Date of Home-Market Sale	Home-Market Sale Quantity	Home-Market Invoice Price in US Dollars
14	0074	12/12/1997	{ }	{ }
15	0074	19/12/1997	{ }	{ }
Total			{ }	{ }

Calculation of Weighted Average Normal Value Based on Double Conversion

HM Obs. Number	Product Matching Number	Date of HM Sale	HM Sale Quantity (A)	Invoice Price in US Dollars (B)	POSCO Exchange Rate (C)	Invoice Price In Won (D=BxC)	Average US Exchange Rate (E)	Normal Value in US Dollars (F=D/E)
14	0074	12/12/97	{ }	{ }	1,685.2	{ }	976.0	{ }
15	0074	19/12/97	{ }	{ }	1,412.1	{ }	976.0	{ }
Total			{ }	{ }		{ }	976.0	{ }

Thus, for this comparison, the DOC's double-conversion methodology increased the normal value in US dollars from { } to { } — an increase of { }.

(d) The DOC's Rationale for Its Treatment of POSCO's "Local Sales"

3.59 The United States claimed that its "double conversion" of the prices of the "local sales" was necessary, primarily because the exchange rates used by POSCO did not correspond to the exchange rates announced by the US banking authorities.[76] In particular, the DOC claimed that the exchange rates used by POSCO "are quite dissimilar" from the exchange rates published by the Federal Reserve Bank of New York — which are based on the exchange rates at 12:00 noon in New York on the relevant dates.[77]

[76] SSPC Final Determination, ROK Ex. 11, at 15456; SSPC Final Analysis Memorandum, ROK Ex. 12, at 4; SSSS Final Determination, ROK Ex. 24, at 30678; SSSS Final Analysis Memorandum, ROK Ex. 25, at 3.

[77] The DOC's "Policy Bulletin" regarding its exchange rate methodology notes that:

The ... exchange rates are collected by the New York Federal Reserve Bank from a sample of market participants. They are the noon buying rates in New York for cable transfers payable in foreign currencies.

3.60 The factual basis for this decision is severely flawed in several respects:

- In the SSSS case, the United States indicated that the difference between the Korean Exchange Bank rates used by POSCO and the New York Federal Reserve Bank rates was, for all comparisons, *less than one per cent.*[78]

- In the SSPC case, the United States found larger differences only because it compared the exchange rate used by POSCO to the *wrong exchange rate*. While the stated justification for the "double conversion" was the alleged discrepancy between POSCO's "internal rate" (*i.e.*, the rate of the Korean Exchange Bank) and the Federal Reserve rate, the United States failed to use the Federal Reserve rates for that comparison in the SSPC case. Instead, the United States erroneously compared POSCO's "internal rate" to *a modified exchange rate calculated by the DOC* to implement the special exchange rate provisions that apply to investigations in US anti-dumping proceedings.[79]

The United States also failed to explain why the New York Federal Reserve exchange rates should be considered more accurate than the Korean Exchange Bank rates, or why a Korean company should be

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Notice: Change in Policy Regarding Currency Conversions, 61 Fed. Reg. 9434, 9436 n.4 (8 March 1996) (hereinafter, "DOC Notice on Currency Conversion"). A copy of the DOC Notice on Currency Conversion is provided at ROK Ex. 49.

The daily New York Federal Reserve exchange rates, from 1 January 1990 to the present, are available on the Internet at www.bog.frb.fed.us/releases/H10/hist/dat96-ko.txt. For the Panel's reference, the exchange rates for the fifteen months covering the periods of the SSPC and SSSS investigations, from 1 January 1997 to 31 March 1998, are provided as ROK Ex. 50.

[78] According to the final analysis memorandum in the SSSS case,

> [A] comparison of the internal exchange rate used by POSCO to the market exchange rate used by the Department for Home Market Observation { } shows that the two exchange rates are dissimilar: POSCO's won/USD exchange rate for { } is { } won per dollar while the Federal Reserve rate for this date is { } won per dollar. Also, POSCO's won/USD exchange rate on the date of payment ({ }) is { } won per dollar, while the Federal Reserve exchange rate on the date of payment is { } won per dollar.
>
> SSSS Final Analysis Memorandum, ROK Ex. 25, at 3. A simple calculation indicates that the differences between the POSCO rates and Federal Reserve rates identified by this analysis memorandum represent in all cases less than one percent of the Federal Reserve exchange rate.

[79] For example, the final analysis memorandum in the SSPC case stated that the Federal Reserve exchange rate on 23 November 1997 was 947.87 won per dollar. SSPC Final Analysis Memorandum, ROK Ex. 12, at 4. In fact, the Federal Reserve rate on that date was actually 1060.00 won per dollar. See New York Federal Reserve Daily Exchange Rates, ROK Ex. 50. The 947.87 won per dollar rate mentioned in the final analysis memorandum is actually the exchange rate for 23 November 1997 calculated by the DOC using its specialized exchange rate model for appreciating currencies — a model which, by its terms, should not have been applied to the Korean won in the first place, because the won was depreciating in value during the period under consideration. (The adjusted exchange rates calculated by the DOC are available on the Internet at www.ita.doc.gov/import_admin/records/exchange/skorea.txt. The adjusted exchange rates for the fifteen months covering the periods of the SSPC and SSSS investigations, from 1 January 1997 to 31 March 1998, are provided as ROK Ex. 51.).

The final analysis memorandum makes a similar error with respect to the exchange rates on 18 November 1997. See SSPC Final Analysis Memorandum, ROK Ex. 12, at 5.

In this regard, it is interesting to note that the "internal" rate used by POSCO for 23 November 1997 (which is also the rate published by the Korean Exchange Bank) was 1072.10 won per dollar. See SSPC Final Analysis Memorandum, ROK Ex. 12, at 4; see also Korean Exchange Bank Daily Exchange Rates, ROK Ex. 44. In other words, the actual Federal Reserve rate was much closer to POSCO's "internal" rate than it was to the adjusted DOC rate that the United States erroneously relied upon in its analysis (*i.e.*, 1060.00 is much closer to 1072.10 than it is to 947.87).

expected to use New York exchange rates with respect to its accounting in Korea of domestic transactions within Korea. And, the United States failed to address how a Korean exporter could possibly use rates that are not determined until eight or nine hours after the close of business in Korea.[80]

3.61. The "double conversion" of the prices of the "local sales" from dollars to won to dollars (at different exchange rates) was an unprecedented departure from the established policy of "accept[ing] charges in the currency in which the charges are made."[81] In fact, neither the United States nor the petitioners in the investigations cited a single case before the investigations at issue where the United States treated a home-market sale priced in dollars as if it had been priced in the local currency.

3.62 By contrast, there are several cases — most notably *Fresh Cut Roses from Colombia* — in which the United States properly declined to "double convert" home-market sales that were priced in dollars.[82] The United States claimed that the factual situation in *Fresh Cut Roses* differed from the factual situation presented in the SSPC and SSSS cases. However, that claim made no sense.

- Specifically, the United States claimed that the SSPC and SSSS cases could be distinguished from *Fresh Cut Roses* case because "a comparison of the internal exchange rate used by POSCO to the market exchange rate used by the Department shows that the two exchange rates are quite dissimilar."[83] The United States claimed that this difference was "in contrast to *Fresh Cut Roses from Colombia* in which the Department verified that the payment in pesos reflected the market exchange rate at the time of payment."[84] However, as is evident from the facts described above, that claim lacks foundation, because the exchange rate used by POSCO was, in fact, a market exchange rate.

- In the SSSS decision, the United States offered an alternative basis for distinguishing the *Fresh Cut Roses* decision. It claimed that, in the *Fresh Cut Roses* case, "all prices and costs, both in the home market and in the US, were dollar denominated…." while in the case of SSSS "the vast majority of the costs incurred for home market and US sales are denominated and paid by POSCO in won."[85] The factual basis for this distinction is suspect: *Fresh Cut Roses* made no mention of the currency of the exporter's *costs*, so that does not appear to have been a factor of any significance in

[80] As mentioned, the Federal Reserve rates are collected by the New York Federal Reserve Bank based on the noon buying rates in New York for a sample of market participants at 12:00 noon in New York. See DOC Notice on Currency Conversion, ROK Ex. 49, at 9436 n.4. Noon in New York is either 1 a.m. or 2 a.m. the following morning in Korea (depending on whether daylight saving's time is in effect in New York).

[81] Final Determination on Sales at Less Than Fair Value: Fresh Cut Roses from Colombia, 60 Fed. Reg. 6980, 7006 (6 Feb. 1995) ("It is the Department's practice to accept charges in the currency in which the charges are made. In this instance, home market prices were charged in dollars. Therefore, the Department found it appropriate that respondent's home market sales were reported in dollar value since the dollar value was the currency in which the sales transactions were made.") (ROK Ex. 52).

[82] *Id*.; see also Final Determination of Sales at Less Than Fair Value: Silicon Metal from Argentina, 56 Fed. Reg. 37891, 37895-96 (9 Aug. 1991) (ROK Ex. 53).

[83] SSPC Final Determination, ROK Ex. 11, at 15456; accord SSSS Final Determination, ROK Ex. 24, at 30678 ("[T]here is a disparity between the exchange rates reflected in POSCO's accounting records and those used by the Department….").

[84] SSPC Final Determination, ROK Ex. 11, at 15456; SSPC Final Analysis Memorandum, ROK Ex. 12, at 5; SSSS Final Determination, ROK Ex. 24, at 30678; SSSS Final Analysis Memorandum, ROK Ex. 25, at 3-4.

[85] SSSS Final Determination, ROK Ex. 24, at 30678.

the previous decision.[86] More broadly, the United States routinely addresses situations where at least some foreign-currency-denominated costs are associated with dollar-denominated sales without "double converting" the prices of those sales. Indeed, in virtually every US anti-dumping investigation some of the costs incurred in connection with sales to the United States (such as production costs, freight from the factory to the port, and brokerage and handling fees in the exporting country) are denominated in the foreign currency, while the sales prices are denominated in US dollars.

IV. LEGAL ARGUMENT

4.1 Article VI of GATT 1994 governs the use of anti-dumping measures by WTO Members.[87] In the anti-dumping context, Article VI must be read in connection with the Anti-Dumping Agreement — which is formally entitled the Agreement on Implementation of Article VI of GATT 1994. The Anti-Dumping Agreement expressly "govern[s] the application of Article VI of GATT 1994" to all anti-dumping actions.[88] Article VI and the Anti-Dumping Agreement are therefore "part of the same treaty" and an "inseparable package of rights and disciplines."[89] Together, Article VI and the Anti-Dumping Agreement govern when and how anti-dumping duties may be imposed by any Member.

4.2 An understanding of Article VI and the Anti-Dumping Agreement in their proper context must begin with the fact that anti-dumping duties are a derogation from the main thrust of the WTO regime — which is to liberalize and promote trade.[90] Although the GATT has from its inception allowed dumping to be offset if it causes or threatens material injury to a domestic industry, it has always narrowly circumscribed in Article VI both the circumstances in which and the extent to which anti-dumping duties may be imposed. Indeed, widespread concerns among the Contracting Parties (now, Members) about the detrimental effects of over-use and abuse of anti-dumping duties have led to ever tighter restrictions on their use.[91]

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[86] Fresh Cut Roses from Colombia, ROK Ex. 52, at 7005-06.

[87] As recognized by the Panel in *United States — Anti-Dumping Act of 1916 (Complaint by the EC)*, "Article VI does not regulate the practice of dumping itself, but the anti-dumping activities of Members.... [It] concentrates on what Members may do in order to counteract dumping." *United States - Anti-Dumping Act of 1916 (Complaint by the European Communities)* , Report of the Panel, WT/DS136/R, 31 Mar. 2000, not yet adopted, at para. 6.103 ("*1916 Act I*").

[88] Anti-Dumping Agreement, art. 1.

[89] 1916 Act I, at para. 6.97 (following Argentina — Safeguard Measures on Import of Footwear, Report of the Appellate Body, adopted on 12 Jan. 2000, WT/DS/121/AB/R, at para. 81, and India — Quantitative Restrictions on Imports of Agricultural Textile and Industrial Products, Report of the Panel, adopted on 22 Sept. 1999, WT/DS90/R, at paras. 5.18-5.19). See also id. at paras. 6.195 (the Anti-Dumping Agreement " is essential for the interpretation of Article VI"), 6.197 (the provisions of the Anti-Dumping Agreement are "essential elements" of the "context" of Article VI).

[90] See John H. Jackson, World Trade and the Law of GATT, 411 (1969) ("Article VI of GATT treats two subjects: antidumping duties and countervailing duties. In both cases Article VI is something of an anomaly: in essence it is an "exception" to GATT, allowing certain measures that would otherwise be a violation of GATT."); cf. *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, Report of the Panel, DS7/R -3 8S/30, adopted on 11 July 1991, para. 4.4 ("Article VI:3, as an exception to basic principles of the General Agreement, ha[s] to be interpreted narrowly…."); *1916 Act I*, at para. 6.202 & n.443 (quoting Jackson and treating anti-dumping measures as an exception to the MFN and tariff binding obligations).

[91] See, *e.g.*, Negotiating Group on MTN Agreements and Arrangements, Meeting of 6 March 1987, Note by the Secretariat, MTN.GNG/NG8/1, 23 March 1987, at para. 8 ("Several delegations expressed their dissatisfaction with [the Tokyo Round Anti-Dumping Code]. Reference was made to the problem of 'trade harassment' in the area of countervailing and anti-dumping duties and it was suggested that the application of certain provisions of the Codes had in some cases led to increased protectionism.").

4.3 Thus, Article VI "should be interpreted as limiting the use of anti-dumping measures to the situations expressly foreseen in Article VI."[92] Of course, an essential prerequisite for the imposition of anti-dumping duties is that "'dumping' within the meaning of the definition of Article VI:1 has to be found in the first place."[93] This requirement has been made explicit by the first sentence of Article 1 of the Anti-Dumping Agreement, which provides that:

> An anti-dumping measure shall be applied *only* under the circumstances provided for in Article VI of GATT 1994 *and* pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. (emphasis added).

In other words, the WTO Agreements *forbid* the imposition of anti-dumping measures *unless* they are imposed pursuant to investigations that are conducted strictly in accordance with WTO disciplines. The US failure to satisfy the requirements of any Article of the Anti-Dumping Agreement therefore results in a violation of Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

4.4 Under these disciplines, the authority to impose anti-dumping duties is not only preconditioned on the existence of "dumping," it is also limited to the extent of dumping properly found.[94] Thus, the calculation of the extent of "the price difference" between the export price and normal value (*i.e.*, the "dumping margin"),[95] if any, is a critical aspect of an anti-dumping investigation. Consequently, the calculation of the "dumping margin" is subject to numerous substantive and procedural disciplines in Article VI of GATT 1994 and the Anti-Dumping Agreement.

4.5 As discussed below, the actions by the United States in the SSPC and SSSS cases failed to comply with the rules and procedures for calculating dumping margins, and this failure led the United States to impose improperly high anti-dumping duties. Since Article 3.8 of the DSU provides that "[i] n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification and impairment," it is clear that the United States, by this failure, has nullified or impaired benefits accruing to Korea under the WTO Agreements.

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[92] *1916 Act I*, at para. 6.114.

[93] See id. at para. 6.105; see also *European Communities — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Report of the Panel, ADP/137, adopted on 30 October 1995, at para. 585 ("Article 1 [of the Tokyo Round Anti-Dumping Code] provided that anti-dumping duties could not be applied prior to determination of dumping….") (emphasis omitted).

This requirement was first recognized as long ago as 1955. See *Swedish Anti-Dumping Duties*, Report of the Panel, L/328 - 3S/81, adopted on 26 Feb. 1955, at para. 22 ("The Panel agreed that if the Swedish Decree was being applied in such a manner as to impose an anti-dumping levy in the absence of dumping practices, the Italian Government would be deprived of the protection it would reasonably expect from the terms of Article VI of the Agreement and that it could claim an impairment of benefits.").

Cf. *United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* , Report of the Panel, WT/DS99/R, adopted on 19 March 1999, para. 6.43 ("The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping.").

[94] See GATT 1994, art. VI:2 ("In order to offset or prevent dumping, a [Member] may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."); Anti-Dumping Agreement, art. 9.3 ("The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."); see also Anti-Dumping Agreement, art. 11.1 ("An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.").

[95] See GATT 1994, art. VI:2 (defining the "margin of dumping" as "the price difference determined in accordance with the provisions of paragraph 1," *i.e.*, the difference between the export price and normal value).

A. THE UNITED STATES' TREATMENT OF POSCO'S SALES TO AN UNAFFILIATED US CUSTOMER THAT LATER WENT BANKRUPT WAS UNFAIR AND INCONSISTENT WITH GATT 1994 AND THE ANTI-DUMPING AGREEMENT

4.6 As discussed in the Statement of Facts, during the period of investigation, POSCO made several sales of SSPC and SSSS to a US customer (referred to here as the ABC Company) that later declared bankruptcy. In the preliminary determinations for both SSPC and SSSS, the United States excluded these aberrant sales from its calculation of export price (and thus from the comparison of export price to normal value).[96]

4.7 In the final determinations, however, the United States reversed position. It declared that the amounts due POSCO by the ABC Company were "bad debts" and that the cost of this "bad debt" should be treated as a "direct selling expense" and deducted as an adjustment from the prices of POSCO 's US sales. This adjustment increased the price difference between export price and normal value and hence increased the dumping margins found by the United States.[97]

4.8 In essence, the United States penalized POSCO for an event that occurred after POSCO made its sales, that was utterly beyond POSCO 's control, and of which POSCO did not know (and could not have known) at the time it made its sales and fixed its prices. As discussed below, such a methodology is inconsistent with the requirements governing dumping calculations under the WTO Agreements and it is unfair. Specifically, the United States' treatment of the non-payment by a US customer is inconsistent with:

(a) the requirements for allowances for "differences affecting price comparability" in Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement (Part IV.A.1 *infra*);

(b) the requirement for a "fair comparison" between the export price and normal value in Article 2.4 of the Anti-Dumping Agreement (Part IV.A.2 *infra*); and

(c) the requirement for "uniform, impartial, and reasonable" administration of the anti-dumping laws in Article X:3(a) of GATT 1994 and the related procedural requirements of Article 12 of the Anti-Dumping Agreement (Part IV.A.3 *infra*).

4.9 Before examining those specific requirements, however, it is important to consider the consequences of permitting the approach adopted by the United States in the SSPC and SSSS cases. That approach would make it *impossible* for an exporter to avoid the risk of a dumping determination. Regardless of the exporter's pricing policies, there would always be the risk that later events, entirely beyond the exporter's control, would result in findings of dumping. Suppose, for example, that an exporter sells its merchandise in the United States and in its home market at exactly the same prices and under exactly the same terms and conditions. Clearly, there would be no "price differences" within the meaning of Article VI of GATT 1994. Even so, if it happens that one of the exporter's US customers goes bankrupt after the sale is made, under the methodology used in the SSPC and SSSS cases the United States would find that *all* of the exporter's US sales were dumped, and it would therefore impose anti-dumping measures on all of the exporter's US sales. Such a result cannot be consistent with the object and purpose of either Article VI of GATT 1994 or the Anti-Dumping Agreement.

[96] See paras. 3.30 - 3.36 *supra*.
[97] See paras. 3.37 - 3.39 *supra*.

1. The United States Unfairly Adjusted POSCO's Export Price to Account for a Factor that Does Not "Affect Price Comparability," in Violation of Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement

(a) Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement Permit Adjustments to the Prices Being Compared Only for "Differences Which Affect Price Comparability"

4.10 Article VI of GATT 1994, which authorizes WTO Members to impose anti-dumping duties under certain circumstances, provides that the existence of "sales below normal value" (or "dumping") is normally to be determined based on a comparison of the export price to the comparable price in the exporting country (or "home market"). Thus, paragraph 1 of Article VI states that:

> [A] product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the *price* of the product exported from one country to another ... is less than the comparable *price* , in the ordinary course of trade, for the like product when destined for consumption in the exporting country.... *Due allowance shall be made in each case for* differences in conditions and terms of sale, for differences in taxation, and for *other differences affecting price comparability*. (emphasis added).

As this passage indicates, a calculation of a dumping margin must ordinarily focus on a comparison of the *prices*.[98] If the export price is less than the comparable home-market price, then the exporter is dumping. On the other hand, if the export price is greater than or equal to the comparable home-market price, then there is no dumping.

4.11 The comparison of prices is, therefore, the key to a proper determination of dumping under GATT 1994. In recognition of the centrality of the price comparison, GATT 1994 expressly limits the adjustments that can be made to the prices used in the comparison to those adjustments that reflect "differences affecting *price* comparability."

4.12 The basic framework adopted by Article VI:1 of GATT 1994 has been maintained in the Anti-Dumping Agreement. Thus, Article 2.1 of the Anti-Dumping Agreement confirms that the normal focus of an anti-dumping investigation is a comparison of prices in the importing country with prices in the exporter's home market:

> For purposes of this Agreement, a product is considered to be dumped, *i.e.*, introduced into the commerce of another country at less than its normal value, if the export *price* of the product exported from one country to another is less than the comparable *price*, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

Moreover, Article 2.4 of the Anti-Dumping Agreement confirms that, in order to achieve a fair comparison, adjustments may only be made for differences that affect price comparability. Thus, Article 2.4 provides that:

> A fair comparison shall be made between the export price and the normal value…. *Due allowance shall be made* in each case, on its merits, *for differences which affect price comparability*, including differences in conditions and terms of sale, taxation,

[98] The alternative to price comparison provided by Article VI and the Anti-Dumping Agreement, which allows comparison of export price to cost of production when home-market or third-country prices cannot be used, is not at issue in the SSPC and SSSS cases.

> levels of trade, quantities, physical characteristics, *and any other differences which are also demonstrated to affect price comparability* …. (internal footnote omitted, emphasis added).

4.13 Under these provisions, the focus of an anti-dumping investigation must be on the exporter's prices. Adjustments to the exporter's prices are permitted if, and only if, they account for differences in the factors that affect those prices.

4.14 As mentioned, Article VI:1 of GATT 1994 specifically permits adjustments for "differences in conditions and terms of sale" and for "differences in taxation. " Article 2.4 of the Anti-Dumping Agreement follows GATT 1994 in specifically allowing adjustments for "differences in conditions and terms of sale" and for differences in "taxation," and it also specifically allows additional adjustments for differences in "levels of trade, quantities, [and] physical characteristics." After the list of enumerated factors deemed to affect price comparability, GATT Article VI:1 contains a closing phrase that authorizes adjustments for "other differences affecting price comparability." Article 2.4 of the Anti-Dumping Agreement contains a similar closing phrase: it authorizes adjustments only for "other differences *which are also demonstrated* to affect price comparability."

4.15 Significantly, a comparison of the texts of GATT Article VI:1 and Article 2.4 of the Anti-Dumping Agreement shows that the Anti-Dumping Agreement contains a requirement that had not existed in the original GATT: factors that are not expressly enumerated in Article 2.4 must not only "affect price comparability," but they must be "*demonstrated*" to do so. Any interpretation of Article 2.4 that ignored the words "which are also demonstrated" would run afoul of the rule that WTO Agreements must not be construed so as to render any words superfluous.[99]

4.16 Therefore, under Article 2.4 of the Anti-Dumping Agreement, an administering authority may not make an adjustment for "other differences" (*i.e.*, differences other than those enumerated in Article 2.4) unless it is first "*demonstrated*" that these "other differences" affect price comparability.

(b) A Customer's Failure to Pay Is Not a Difference Affecting Price Comparability for Which an Adjustment is Permitted under GATT Article VI:1 and Article 2.4 of the Anti-Dumping Agreement

4.17 As mentioned, the ABC Company failed to pay POSCO after receiving shipments of SSPC and SSSS and, in the anti-dumping investigations, the United States adjusted the export price for POSCO's US sales to account for that non-payment.[100] The ABC Company's non-payment does not fall within any of the categories of differences for which adjustments are specifically permitted by Article VI:1 of GATT 1994 or Article 2.4 of the Anti-Dumping Agreement. The non-payment clearly is not a difference in (i) the conditions and terms of sale, (ii) taxation, (iii) levels of trade, (iv) quantities, or (v) physical characteristics.

4.18 Consequently, an adjustment for this non-payment could be justified only if non-payment is an "other difference[] affecting price comparability." No such justification is tenable, however, in this case.

- First, on procedural grounds, Article 2.4 permits such adjustments only if these "other differences" are "*demonstrated* to affect price comparability." However, there is no indication anywhere in the SSPC or SSSS investigations that such a

[99] See *United States — Standards for Reformulated Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, adopted on 20 May 1996, at 22 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").

[100] See paras. 3.30 - 3.39 *supra*.

demonstration was made with respect to the non-payment by the ABC Company. Therefore, the United States failed to comply with the specific requirements of Article 2.4 of the Anti-Dumping Agreement with respect to adjustments for "other differences affecting price comparability."

- Second, on substantive grounds, non-payment is not a "difference affecting price comparability." The United States has conceded that POSCO did not know that the ABC Company would not pay at the time POSCO set its sales prices.[101] In fact, POSCO had no reason to suspect that any of its US customers would not pay because it had never before experienced a non-payment on its US sales. Because POSCO did not know, and could not have known, that a particular US customer would fail to pay at the time it set its prices, the customer's subsequent failure to pay did not affect the prices that POSCO set. Thus, the customer's non-payment was not a "difference affecting price comparability.[102]

4.19 Therefore, the adjustment made by the United States to the export price to account for the failure of the ABC Company to pay POSCO is inconsistent with Article VI:1 of GATT 1994 or Article 2.4 of the Anti-Dumping Agreement. The resulting anti-dumping measures violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

(c) One Customer's Failure to Pay Is Not a "Difference Affecting Price Comparability" for Which Adjustments May be Made to the Prices of Other Sales to Other Customers Who Did Pay

4.20 As discussed above, it was improper for the United States to make any adjustment to account for the ABC Company's non-payment to POSCO, because non-payment is not a "difference affecting price comparability" for which adjustments are allowed under Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement. But if, by some chance, the Panel were to conclude that Article VI:1 and Article 2.4 permit investigating authorities to make an adjustment to account for a customer's non-payment, the way in which the actual adjustment was made by the United States in the SSPC and SSSS cases would nevertheless have to be found inconsistent with the requirements of Article VI:1 and Article 2.4.

4.21 The United States did not limit its adjustment to the unpaid sales to the ABC Company. Rather, the United States allocated the cost of those unpaid sales over all of POSCO's sales to all of its US customers during the investigation period, and then deducted the allocated amount from the sales price for *each and every* US sale as an adjustment to the export price. In other words, the cost of the non-payment by the ABC Company was deducted from the prices of *all* of POSCO's US sales — *including sales to other customers who had paid for their purchases* . As a result, the export prices

[101] The United States admitted in its final determinations that "at the time [the sales] were made, POSCO was not aware that the customer would declare bankruptcy." SSPC Final Determination, ROK Ex. 11, at 15449; SSSS Final Determination, ROK Ex. 24, at 30673-74.

[102] This conclusion is reinforced by an examination of the adjustments that are specifically enumerated by Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement. All of the "differences" for which adjustments are specifically permitted under those provisions (i.e., for conditions and terms of sale, taxation, levels of trade, quantities and physical characteristics) are "differences" about which the seller would know at the time it entered into its sales agreements and set its prices. In keeping with the *ejusdem generis* doctrine — which provides that "general words following … special words are limited to the genus indicated by the special words" — the phrase that allows adjustments for "other differences affecting price comparability" must also be limited to "differences" about which the seller would know at the time it entered into its sales agreements and fixed its prices. See Ian Brownlie, Principles of Public International Law, 634 (5th ed. 1998).

for all of POSCO's US sales were lowered, and the dumping margins (which equal the difference between the "normal value" and the adjusted export price) were increased for all US sales.[103]

4.22 Assuming *arguendo* that a non-payment by a customer could be considered a "difference affecting price comparability," the adjustment would have to be limited to the particular sales for which the non-payment affected price comparability. The blanket adjustment to all export sales (including sales to customers that paid in full) cannot be consistent with the requirements of Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement for the following reasons.

- To begin with, such a blanket adjustment to the prices of all export sales is inconsistent with the requirement of Article 2.4 that the difference must be "demonstrated" to affect price comparability. An adjustment may not be made to the price of every export sale, but only to those prices whose "comparability" has been "demonstrated" to be affected by the non-payment. There is simply no "demonstration" in either of the final determinations that the failure of the ABC Company to pay POSCO for its purchases had any effect on the prices (or price comparability) of the purchases by *other* US customers who did pay.

- Furthermore, as a substantive matter, the unexpected failure of one US customer to pay for its purchases did not affect the price comparability of POSCO's other US sales to other customers who did pay for their purchases. The DOC's decisions assume that POSCO must have reacted to the ABC Company's non-payment by raising prices for all other US sales during the investigation period, and *only* by raising its prices on those sales. In fact, however, it is at least equally plausible that POSCO did not adjust its prices during the investigation period at all — or reacted by raising prices in Korea or other markets to make up for the non-payment in the United States. Therefore, there is no logical basis for the assumption underlying the DOC's adjustments.

4.23 The ABC Company's failure to pay POSCO for its purchases did not affect — and they were not "demonstrated" to affect — the price comparability of POSCO's sales to other US customers who did pay. Therefore, the DOC's adjustments relating to the ABC Company's non-payment were not permitted under Article VI:1 of GATT 1994 or Article 2.4 of the Anti-Dumping Agreement. The resulting anti-dumping duties therefore violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

2. The United States' Treatment of the Non-payment by One Customer Was Inconsistent with the "Fair Comparison" Requirement of Article 2.4 of the Anti-Dumping Agreement

4.24 As discussed above, the adjustments made by the United States to account for the non-payment by the ABC Company were not consistent with the technical rules of GATT 1994 and the Anti-Dumping Agreement. But the treatment of these sales by the United States suffered from another fundamental flaw: It simply was not fair. In essence, the United States penalized POSCO for an event — the bankruptcy of a customer after POSCO had made its sales to that customer — that was utterly beyond POSCO's control. Such an unfair result cannot be reconciled with the requirements of GATT 1994, as applied by the Anti-Dumping Agreement.

[103] See para. 3.39 *supra*.

(a) Article 2.4 of the Anti-Dumping Agreement Mandates that the Comparison of Export Price to Normal Value, Which Underpins Any Finding of Dumping, Must be "Fair"

4.25 The Anti-Dumping Agreement explicitly requires that the price comparisons used by the administering authorities to determine whether or not dumping has occurred must be "fair." Thus, Article 2.4 of the Agreement explicitly requires that: "A *fair comparison* shall be made between the export price and the normal value."

4.26 The fairness requirement of Article 2.4 imposes important substantive disciplines on the use of anti-dumping measures. The Anti-Dumping Agreement requires the administering authorities to meet the fairness requirement, along with other technical and procedural requirements. "Fairness" is a well-understood concept in international law and in the interpretation of treaties.[104]

4.27 Although it may be difficult to develop a general definition of "fairness" in the abstract, the judicial decisions of the United States help illuminate what "fairness" requires in the context of an anti-dumping investigation. They have recognized that it is "unreal, unreasonable and *unfair*" for a finding of dumping to be based on "a factor beyond the control of the exporter."[105] In other words, it is fundamentally unfair to attribute factors beyond the control of an exporter against the exporter as evidence of dumping.

(b) The Adjustment to Export Price for the Non-payment by One Customer Was Inconsistent with the "Fair Comparison" Requirement of Article 2.4 of the Anti-Dumping Agreement

4.28 As discussed in the Statement of Facts, the United States effectively penalized POSCO for the ABC Company's non-payment. Specifically, the United States reduced the export price for all of

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[104] To give substance to the Anti-Dumping Agreement's fairness requirement, we have attached, as ROK Ex. 54, a memorandum of law prepared by Professor Thomas M. Franck, the Murry and Ida Becker Professor of Law at New York University and the President of the American Society of International Law (the "Franck Memorandum"). Professor Franck is a recognized expert on international law and institutions and the author of a recent treatise entitled *Fairness in International Law and Institutions*. For the reference of the Panel, Professor Franck's *curriculum vitae* is attached as ROK Ex. 55.

The Franck Memorandum reviews numerous contemporary legal instruments that use the word "fair" or similar terms. It concludes that the concept of fairness is " well-established in international law and practice" and that its inclusion in a treaty text signifies that the parties intend for the text to be construed, by the parties themselves and by dispute settlement tribunals, to secure a fair result in all cases.

The Franck Memorandum specifically addresses the responsibility of a WTO panel to decide whether the price comparison in an anti-dumping investigation was "fair," and not merely whether the investigation was technically compliant with other aspects of the Anti-Dumping Agreement, calling this the " most fundamental[]" responsibility of the panel:

> By entering upon a treaty in which such a term as 'fair comparison' is used, WTO Members have formally invited 'fairness discourse' into the evaluation of anti-dumping measures and they should be taken to have intended that the WTO dispute resolution process would develop, case by case, reasonable parameters and rules by which to determine in similar cases the applicable factors or standards by which a 'comparison's fairness' can be measured. Thus, *by requiring that the price comparison in an anti-dumping investigation must be 'fair,' Article 2.4 of the WTO Anti-Dumping Agreement calls for a WTO panel to determine not only whether the anti-dumping measures at issue result from an anti-dumping investigation that satisfied the substantive and procedural requirements spelled out elsewhere in the same Agreement (including elsewhere in Article 2.4), but should also — and most fundamentally — determine whether the comparison of export price to normal value was 'fair.'* (emphasis added)
>
> Franck Memorandum, ROK Ex. 54, at 1-2.

[105] *Melamine Chemicals v. United States*, 732 F.2d 924, 933 (Fed. Cir. 1984) (ROK Ex. 56) (emphasis added).

POSCO's US sales to account for the ABC Company's failure to pay. It then compared the prices charged by POSCO in the home market with this reduced export price, thus creating or inflating the dumping margins.[106]

4.29 This adjustment to account for the non-payment by the ABC Company denied POSCO the benefit of a "fair comparison" between export price and normal value, as required by Article 2.4 of the Anti-Dumping Agreement, in at least two respects.

- First, as demonstrated in Part IV.A.1 above, the non-payment is not a "difference affecting price comparability" for which an adjustment may be made under Article 2.4. By making an inappropriate adjustment to the export price, the United States failed to conduct a fair comparison of the export price to normal value. Instead, it compared the inappropriately reduced export price to normal value, which necessarily overstated the dumping margin. In other words, the United States compared apples to oranges.[107]

- Second, the non-payment by the ABC Company was a factor that was beyond POSCO's control. POSCO was not affiliated with the ABC Company, it had no knowledge at the time it made its sale that the ABC Company would fail to pay, and it could not have prevented the ABC Company from failing to pay.[108] As the US courts have recognized, it is "unreal, unreasonable, and *unfair*" for the DOC to base a finding of dumping on "a factor beyond the control of the exporter" in this manner.[109]

4.30 The adjustment made by the United States to the export price for all of POSCO's US sales based on the non-payment by the ABC Company was, thus, inconsistent with the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement. The resulting anti-dumping measures therefore violated Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

(c) As Past Decisions of the United States Have Recognized, the Inclusion of Atypical US or Home-Market Sales in the Price Comparisons Used to Calculate Dumping Margins Is Unfair

4.31 As discussed above, Article 2.4 of the Anti-Dumping Agreement explicitly requires that the comparisons used by the administering authorities to determine existence of dumping must be "fair." This fairness requirement applies, of course, to the *adjustments* that are made to export prices and normal value. It also applies to the *sales that are included in the comparison* of export price and normal value. When an exporter has atypical sales in one market, and the inclusion of those sales in the dumping calculations would distort the results, then the inclusion of those sales is inconsistent with the "fair comparison" requirement of Article 2.4. In other words, the "fair comparison" required by Article 2.4 cannot rest on a calculation of the export price or normal value that is distorted by the inclusion of atypical sales.

4.32 The United States has acknowledged that the inclusion in dumping calculations of sales that are "extraordinary for the market in question" can "lead to irrational or unrepresentative results."[110] For that reason, the United States routinely excludes such sales from its analysis of both export price

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[106] See para. 3.39 *supra*.

[107] It should not be surprising that a violation of the adjustment requirements of Article 2.4 also states a violation of the "fair comparison" requirement of Article 2.4. Indeed, one may view the adjustment requirements as a subset of the "fair comparison" requirement.

[108] See paras. 3.30 - 3.36 *supra*.

[109] *Melamine Chemicals v. United States*, ROK Ex. 56, at 933 (emphasis added).

[110] Statement of Administrative Action for the Uruguay Round Agreements, ROK Ex. 34, at 164.

and normal value — where "inclusion of … sales which are clearly atypical would undermine the *fairness* of the comparison ... ."[111]

4.33 The US sales for which POSCO's customer did not pay were clearly atypical. In fact, the United States explicitly admitted this point. In the preliminary determinations for both SSPC and SSSS, the United States concluded that these unpaid sales were "atypical and not part of POSCO's normal business practice."[112]

4.34 Therefore, the inclusion of the unpaid sales to the ABC Company in the calculation of export price was inconsistent with the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement. The resulting anti-dumping measures thus violated Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

3. The Failure of the United States to Follow Its Established Practice and Exclude these Atypical US Sales from Its Analysis, and the Failure to Provide a Coherent Rationale for Its Treatment of these Sales, Were Inconsistent with Article X:3(a) of GATT 1994 and Article 12.2 of the Anti-Dumping Agreement

(a) Article X:3(a) of GATT 1994 Establishes "Minimum Standards of Transparency and Procedural Fairness" that Are Amplified by the Specific Procedural Requirements of the Anti-Dumping Agreement

4.35 Article X:3(a) of GATT 1994 requires each WTO Member to "administer … its laws, regulations, decisions and rulings" relating to duties and other restrictions on imports (such as anti-dumping measures) "in a uniform, impartial and reasonable manner." Unlike most GATT provisions, which are concerned with the content of a government's laws, regulations, decisions, and rulings, Article X focuses on the *administration* of those laws, regulations, decisions, and rulings.

4.36 The decisions of the Appellate Body show that Article X:3(a) establishes "certain minimum standards for transparency and procedural fairness" in the administration of trade laws.[113] These

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[111] The US anti-dumping statute specifically directs the DOC to exclude any home-market sales that are "outside the ordinary course of trade" from its calculation of normal value. The US statute does not contain an explicit provision directing the DOC t o exclude such sales from the calculation of the export price. However, the US Court of International Trade has affirmed that the DOC "has the discretion to disregard certain US pricing data if 'inclusion of certain sales which are clearly atypical would undermine the fairness of the comparison of foreign and US sales." *Chang Tieh Industry Co., Ltd. v. United States*, ROK Ex. 35, at 145, quoting *Ipsco, Inc. v. United States*, 714 F. Supp. 1211, 1217 (Ct. Int'l Trade 1989). See also *Asociacion Colombiana de Exportadores v. United States*, ROK Ex. 36, at 1126.

In accordance with this principle, the DOC has, in at least one past case, excluded from its analysis US sales for which payment was never received because of the customer's bankruptcy, on the ground that the sales were not "representative." See Neoprene Laminate from Taiwan, ROK Ex. 37, at 37194.

[112] SSPC Preliminary Analysis Memorandum, ROK Ex. 5, at 3; SSSS Preliminary Determination, ROK Ex. 16, at 140.

[113] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, adopted on 6 Nov. 1998, at para. 183 (holding that the "minimum standards" established by Article X:3(a) were not satisfied by the United States' administration of its restrictions on certain shrimp imports).

Cf. *United States - Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Report of the Appellate Body, WT/DS24/AB/R, adopted on 25 February 1997, at 21 ("Article X:2, *General Agreement*, may be seen to embody a principle of fundamental importance…. The relevant policy principle is widely known as the principle of transparency and has *obviously due process dimensions*.") (emphasis added). We note that, while the Appellate Body was addressing Article X:2, the "due process dimensions" it observed are even greater in the context of Article X:3(a).

minimum standards apply to "*all* trade laws within the scope of Article X:1,"[114] regardless of whether or not other WTO Agreements also apply to the administration of particular trade laws.[115] Because anti-dumping laws clearly fall within the scope of Article X:1, their administration must comport with the "minimum standards" of fairness established by Article X:3(a).[116]

4.37 The requirements of procedural fairness in anti-dumping investigations are further amplified by the explicit requirements of the Anti-Dumping Agreement. Thus, Articles 6.1, 6.2, and 6.9 of the Anti-Dumping Agreement establish a broad requirement that the administering authorities inform the parties of the "essential facts" of the case in a manner that allows them a "full" and "ample opportunity" to defend their interests. In the same vein, Article 12.2 of the Anti-Dumping Agreement requires publication of "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities" in both preliminary and final determinations, including: (1) "a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value," (2) "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures," and (3) "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers …."

(b) The DOC's Treatment of the Atypical US Sales Failed to Meet the "Minimum Standards" of Procedural Fairness Set by Article X:3(a) of GATT 1994 and Article 12.2 of the Anti-Dumping Agreement

4.38 As discussed in the Statement of Facts, in the preliminary determinations for both SSPC and SSSS, the United States concluded that the sales for which POSCO was not paid by the ABC Company were "atypical and not part of POSCO's normal business practice." Accordingly, the United States excluded these sales from its calculation of export price. This was consistent with the prior practice of the United States.[117]

4.39 In the final determinations, however, the United States abruptly reversed its position.[118] Its final price comparisons included the atypical sales on which the customer did not pay, and therefore yielded distorted results that overstated the dumping margins. The explanations offered by the United States for its change in policy are inconsistent and arbitrary on their face:

- Regarding SSPC, the United States explained that: "Although we disregarded the sales [to the ABC Company] in the preliminary determination, we find that the sales account for such a large percentage of POSCO's US sales that they cannot be dismissed as abnormalities."[119]

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[114] Article X:1 of GATT 1994 provides for the prompt and effective publication, *inter alia*, of "[l]aws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to … rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports … or affecting their sale [or] distribution.…"

[115] *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, AB-1997-3, at para. 203-204 (9 Sept. 1997) ("*Bananas III*") (holding that Article X:3(a) applies to the administration of import licensing measures notwithstanding the existence of the WTO Agreement on Import Licensing, although the panel should have considered the more specific agreement first) (emphasis added).

[116] Cf. id. (finding "for all practical purposes, interchangeable" the requirements of GATT Article X:3(a) with the requirements of Article 1.3 of the Import Licensing Agreement that measures be "neutral in application and administered in a *fair and equitable* manner") (emphasis added).

[117] See paras. 3.35 - 3.36 *supra*.

[118] SSPC Final Determination, ROK Ex. 11, at 15447-49; SSSS Final Determination, ROK Ex. 24, at 30671-74.

[119] SSPC Final Determination, ROK Ex. 11, at 15449.

- Regarding SSSS, where the sales to ABC Company were relatively small, the United States explained that: "[R]espondent's arguments regarding the relative significance of these sales [to the ABC Company] compared to POSAM's total sales is [*sic*] inapposite. Although the Department employs a 5 per cent threshold in regard to other issues in investigations … none … apply to this case."[120]

As the first of these passages indicates, the United States expressly based its decision regarding SSPC on the "large percentage" of the atypical sales compared to the total sales being investigated. But, when faced with a much smaller percentage of atypical sales in SSSS, the United States held that the percentage of atypical sales was irrelevant. In other words, the United States took the position that the percentage of atypical sales is only relevant when that percentage would support its decision to include the atypical sales in the dumping analysis. This was clearly arbitrary.

4.40 The inclusion of POSCO's unpaid sales to the ABC Company in the calculation of export price violated Article X:3(a) of GATT 1994 in at least four respects:

- First, as recognized by executive, legislative, and judicial branches of the United States, it is "irrational" and "unreasonable" to include such atypical sales in the calculation of the prices to be compared.[121]

- Second, it was neither "uniform" nor "reasonable" for the United States to fail to follow its precedents on the exclusion of atypical data from dumping calculations.

- Third, as discussed above, the explanations the United States offered to justify its departure from its established practice were internally inconsistent and thus inherently unreasonable.

- Finally, having found that the unpaid sales were "atypical and not p art of POSCO's normal business practice" and that their inclusion would distort the calculation of the dumping margin, it was unreasonable for the United States to reverse that decision when there was no new evidence or argument to justify such a change.

- The inclusion in the dumping calculations of the atypical US sales on which the customer did not pay was, therefore, inconsistent with Article X:3(a) of GATT 1994, which requires each WTO Member to "administer … its laws, regulations, decisions and rulings" relating to duties and other restrictions on imports (such as anti-dumping measures) "in a uniform, impartial and reasonable manner."[122]

4.41 In addition, by offering inherently contradictory statements about the relevance of the percentage of unpaid sales to its final decisions that such sales were not atypical, the United States

[120] SSSS Final Determination, ROK Ex. 24, at 30674.
[121] See para. 3.36 *supra*.
[122] GATT 1994, art. X:3(a). It should be noted that the DOC's failure to provide a reasoned explanation for its departure from its own precedents is also inconsistent with fundamental principles of US administrative law. See Kenneth C. Davis and Richard J. Pierce, Jr., 2 Administrative Law Treatise, at 206 (3rd ed. 1994) (ROK Ex. 57).

failed to provide an adequate statement of reasons for its decisions, in violation of Article 12.2 of the Anti-Dumping Agreement.[123]

4.42 As a result, the anti-dumping measures imposed by the United States violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

B. THE UNITED STATES UNFAIRLY CHANGED ITS METHODOLOGY FOR CALCULATING DUMPING MARGINS, ALLEGEDLY TO ACCOUNT FOR THE DEPRECIATION OF THE KOREAN WON, IN VIOLATION OF ARTICLES 2.4, 2.4.1, AND 2.4.2 OF THE ANTI-DUMPING AGREEMENT

4.43 As discussed in the Statement of Facts, in each of the investigations at issue the United States divided the period of investigation into sub-periods, and then calculated separate average prices and separate dumping margins for each sub-period (based on the amount by which the average normal value exceeded the average export price for that sub-period). For any sub-period where the DOC found "sales at *more* than fair value" (*i.e.*, "negative dumping"), the DOC treated this as a sub-period of "zero dumping." It then calculated an overall average dumping margin based on the average of the "positive" dumping margins found in certain sub-periods and the "zero" dumping margins assigned to the sub-periods in which there had been "negative dumping." As a result, the United States calculated a dumping margin that overstated POSCO's true average dumping margin (if any).[124]

4.44 As discussed further below, such a methodology is inconsistent with the requirements governing dumping calculations under the WTO Agreements and it is unfair.

1. The "Multiple Averaging" Methodology Used by the United States Is Inconsistent with Article 2.4.2 of the Anti-Dumping Agreement

4.45 Article 2.4.2 of the Anti-Dumping Agreement establishes the following standard methodology for dumping calculations:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of *a weighted average* normal value with *a weighted average* of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. (emphasis added).

4.46 Article 2.4.2 thus obligates a WTO Member conducting an anti-dumping investigation to compare either (i) a single "weighted average normal value" with a single weighted average export price for the full period of investigation or (ii) individual home-market transactions to individual export transactions.[125] A simple textual analysis of Article 2.4.2 reveals that it does not allow for the comparison of "multiple averages" with "multiple averages."

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[123] Cf. *Korea — Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, Report of the Panel, ADP/92, adopted on 27 Apr. 1993, paras. 222-224 (finding that the investigating authorities did not provide an "adequate statement of reasons" under Article 8:5 of the Tokyo Round Anti-Dumping Code [the predecessor of Article 12.2 of the Anti-Dumping Agreement] where the statement was "internally contradictory").

[124] See para. 3.39 *supra*.

[125] Article 2.4.2 contains an exception to its rule that either an average must be compared to an average or individual transactions must be compared to individual transactions. The second sentence of that provision provides that:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is

- Article 2.4.2 repeatedly uses the distinctly singular phrase "*a* weighted average" — which is to say, one average, not two averages.

- This requirement is confirmed by the reference in Article 2.4.2 to "a weighted average of prices of *all* comparable export transactions." Clearly, there can only be one average if it takes into account *all* data.

4.47 The United States failed to follow the methodology required by Article 2.4.2 in the final dumping determinations at issue. It did not compare a single weighted-average normal value with a single weighted-average export price for the full period of investigation. Rather, it divided the period of investigation into sub-periods. Then, the United States used "multiple averages," one for each sub-period, to calculate a separate dumping margin for each sub-period. These separate sub-period dumping margins were then combined using a methodology that resulted in a distorted overall dumping margin.[126]

4.48 The use of "multiple averages" by the United States therefore failed to comply with the requirement of Article 2.4.2 that export price must be compared to normal value on the basis of either "a weighted average" to "a weighted average" or individual transactions to individual transactions. The US practice of comparing "multiple averages" to "multiple averages" finds no support in Article 2.4.2. As a result, the anti-dumping measures against SSPC and SSSS from Korea violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

2. The Change in the Price Comparison Methodology Adopted by the United States to Account for the Devaluation of the Korean Won Is Inconsistent with the Requirements of Article 2.4.1 of the Anti-Dumping Agreement, Which Permits Departures from the Normal Comparison Methodology Only for an Appreciation of the Exporting Country's Currency

4.49 The United States claimed that this departure from the requirements of Article 2.4.2 was necessary to account for the devaluation of the Korean won against the US dollar during the period of investigation. As discussed further below, however, under the Anti-Dumping Agreement, departures from the normal price comparisons to account for changes in exchange rates are permitted only when the currency of the exporting country was appreciating in relation to the currency of the importing country — and not when, as in these cases, the currency of the exporting country was depreciating.

4.50 Article 2.4.1 of the Anti-Dumping Agreement sets forth the basic rule for conversion of currencies in the price comparisons used to calculate dumping margins, as follows:

> When the comparison under paragraph 4 requires a conversion of currencies, such conversion shall be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in

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provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

In other words, the second sentence of Article 2.4.2 permits an average to be compared to individual transactions if certain criteria are met.

In this regard, it should be noted that the United States never claimed that the criteria for invoking this exception were met in this case, and it did not use the specific methodology (comparing an average to individual transactions) permitted by the exception.

[126] See paras. 3.45 - 3.48 *supra*.

> exchange rates shall be ignored and in an investigation the authorities shall *allow* exporters at least 60 days to have adjusted their ex port prices to reflect sustained movements in exchange rates during the period of investigation. (internal footnote omitted, emphasis added).

The basic rule established by Article 2.4.1, then, is that currency conversions are to be made using the exchange rate on the date of sale. Article 2.4.1 provides one exception to this rule: It "allows" an exporter time to adjust when its currency is *appreciating* against the currency of the Member conducting an anti-dumping investigation. On the other hand, a similar exception to the basic rule is not provided for situations in which the exporting country's currency is *depreciating.*[127]

4.51 The rationale for this difference in treatment between currency appreciation and currency depreciation is clear: An exporter must be allowed time to adjust its prices to a currency appreciation or it would be unfairly found to be dumping as a result of an event beyond its control. By contrast, no such difficulties arise from a currency devaluation, because currency devaluations do not create or inflate dumping margins.[128]

4.52 All this indicates that the normal price comparison methodology may be modified to account for changes in exchange rates only when the exporting country's currency is appreciating. No such departures are permitted to account for other changes in the exchange rate (such as devaluation of the exporting country's currency).

4.53 By adopting a new price comparison methodology (using multiple averages) to account for the devaluation of the Korean won, the United States departed from the requirement in Article 2.4.1

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[127] As mentioned, the second sentence of Article 2.4.1 provides that "the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation." The United States has expressly recognized that this exception only applies when "there is a sustained movement *increasing the value of the foreign currency relative to the US dollar*." See 19 C.F.R. § 351.415(d) (emphasis added) (ROK Ex. 2); see also Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey, 61 Fed. Reg. 69067, 69071 (31 December 1996) ("[S]ection 773A(b) directs the Department to allow a 60 day adjustment period when a currency has undergone a sustained movement. Such an adjustment period is required only when the foreign currency is appreciating against the US dollar…. No adjustment period is warranted in this review, because the Turkish Lira generally remained constant or depreciated against the dollar during the [period of review].") (ROK Ex. 58).

[128] The difference in the effects of currency appreciation and currency devaluation can be seen from the following example. Suppose that a Korean exporter sells the product in its home-market at 10,000 won per unit at a time when the exchange rate is 1,000 won per dollar. When it sets its export price at $10 (*i.e.*, 10,000 won divided by 1,000 won per dollar) dumping should not be found, because the export price equals the normal value converted into dollars.

Now, suppose that the value of the Korean won appreciates, resulting in a new exchange rate of 800 won per dollar. If the exporter does not adjust its prices, it will be found to have engaged in dumping, because the normal value when expressed in dollars will be $12.50 (*i.e.*, 10,000 won divided by 800 won per dollar), while the export price will remain at $10. To allow the exporter a reasonable period to identify the currency trend, determine that it is a "sustained movement" rather than a "fluctuation," and adjust its prices to avoid a finding of dumping in such circumstances, Article 2.4.1 mandates that the exporter be allowed a period of at least 60 days to respond to the currency appreciation.

On the other hand, if the value of the Korean won had devalued, the exporter would not have faced a dumping problem. Suppose that, instead of the appreciation discussed in the foregoing example, the Korean won had been devalued, resulting in an exchange rate of 1,200 won per dollar. If the exporter did not adjust its prices, no dumping would be found, because the normal value when expressed in dollars will be $8.33 (*i.e.*, 10,000 won divided by 1,200 won per dollar), while the export price would remain at $10. Significantly, the Anti-Dumping Agreement does not permit the investigating authorities to adjust their calculation methodologies to find dumping margins in such circumstances. Instead, it requires the investigating authorities to follow the normal currency conversion rules (thus allowing the exporter the full "benefit" of the currency devaluation).

that the price comparisons not be modified to account for devaluations in the exporting country's currency. As a result, the anti-dumping measures against SSPC and SSSS from Korea violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

3. The Use of the "Multiple Averaging" Methodology Was Inconsistent with the Procedural Requirements of GATT 1994 and the Anti-Dumping Agreement

4.54 As discussed in Part IV.A.3 *supra*, Article X:3(a) of GATT 1994 requires each WTO Member to "administer ... its laws, regulations, decisions and rulings" relating to duties and other restrictions on imports (such as anti-dumping measures) "in a uniform, impartial and reasonable manner." This provision establishes "certain minimum standards for transparency and procedural fairness" in all trade-related actions by WTO Members." The requirements of procedural fairness in anti-dumping investigations are further amplified by the explicit requirements of the Anti-Dumping Agreement, particularly the requirements of Article 6.1, 6.2, 6.9, and 12.2 of the Anti-Dumping Agreement.[129]

4.55 Taken as a whole, these provisions establish a broad requirement that the investigating authorities interpret the relevant laws in a reasonable and consistent manner — and that they provide private parties with an explanation of their proposed interpretation of the relevant laws in a manner that will allow the private parties a "full" and "ample opportunity" to defend their interests. Unfortunately, the actions by the United States in adopting the "multiple averaging" methodology in the SSPC and SSSS investigations did not comply with this requirement.

4.56 As discussed in the Statement of Facts, the United States originally maintained a policy *against* using "multiple averaging" to respond to currency depreciations before abruptly abandoning that position during the course of the SSPC and SSSS investigations.[130]

- In the preliminary determinations for both SSPC and SSSS, the United States declined to use "multiple averaging."[131] In SSSS, the United States distinguished as inapplicable "the one case cited by petitioners in support of averaging multiple periods" and "preliminarily determine[d] that the modification of currency conversion reasonably accounts for the devaluation of the won, and that the use of multiple periods for averaging is *unwarranted*."[132]

- Moreover, in the preliminary determination in *Preserved Mushrooms from Indonesia* (which was proceeding approximately three months before the SSPC investigation and which raised a similar issue of currency devaluation under similar circumstances), the United States expressly found "no basis to depart from our practice of calculating the weighted-average EPs [*i.e.*, export prices] for the entire POI [*i.e.*, period of investigation]" merely because of a currency devaluation without "evidence that there has been a significant change in the respondents' pricing or marketing during the POI."[133]

- The final determination in *Preserved Mushrooms from Indonesia* reached the same conclusion. In that determination, the United States rejected the petitioners' request for "multiple averaging," saying "we have declined to alter our methodology in this case."[134]

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[129] See paras. 4.35 - 4.37 *supra*.
[130] See paras. 3.40 - 3.44 *supra*.
[131] SSPC Preliminary Determination, ROK Ex. 4, at 59539; SSSS Preliminary Determination, ROK Ex. 16, at 145.
[132] SSSS Preliminary Determination, ROK Ex. 16, at 145 (emphasis added).
[133] Certain Preserved Mushrooms from Indonesia (Preliminary), ROK Ex. 39, at 41785.
[134] Certain Preserved Mushrooms from Indonesia (Final), ROK Ex. 40, at 72272.

4.57 The investigations at issue here were the first where the United States departed from its established policy of using a single weighted average for the full period of investigation without any evidence of a change in the respondent's "pricing or marketing" policies. Indeed, in taking this unprecedented action in the SSPC case, the United States failed to even articulate a reason for its departure from its then three-month-old precedent in *Preserved Mushrooms*, when the similarities between the devaluations of the won and the Indonesian rupiah clearly demanded the same treatment. The DOC's failure to explain the departure from the *Preserved Mushrooms* decision was especially glaring in light of the fact that the DOC had previously indicated that the issue in the SSPC case was the same as the issue in *Preserved Mushrooms.*[135]

4.58 Therefore, there is no basis for the United States' departure in the investigations at issue from its well-established standard methodology. To the contrary, the unprecedented resort to "multiple averaging" by the United States in the circumstances of this case violates numerous obligations of the United States under GATT 1994 and the Anti-Dumping Agreement:

- By failing to follow its established methodology, the United States violated Article X:3(a) of GATT 1994, which requires WTO Members to "administer … its laws, regulations, decisions and rulings" in a "uniform, impartial and reasonable manner."

- By failing to provide POSCO with notice of the "essential fact " of a change in US policy from the preliminary determination in a manner that would have allowed POSCO a "full" and "ample opportunity" to defend its interests, the United States acted in violation of Article 6.1, 6.2, and 6.9 of the Anti-Dumping Agreement.[136]

- Finally, by failing to provide an adequate explanation of its departure from the standard methodology (and particularly of its departure from the recent, factually similar decision in *Preserved Mushrooms*), the United States acted in violation of Article 12.2 of the Anti-Dumping Agreement.

As a result of these procedural errors, the imposition of anti-dumping measures against SSPC and SSSS from Korea violated Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

4. The "Multiple Averaging" Methodology Is Inconsistent with the Underlying Basis for the Anti-Dumping Measures against SSPC and SSSS, and Thus Deprived POSCO of the "Fair Comparison" Required by Article 2.4 of the Anti-Dumping Agreement

4.59 In addition to the substantive and procedural errors demonstrated above, the "multiple averaging" methodology also suffered from a larger problem: The fundamental inconsistency between the effect of "multiple averaging" and the underlying basis of the anti-dumping orders on SSPC and SSSS meant that, in the circumstances of these cases, the use of "multiple averaging" was unfair.

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[135] Thus, the DOC's preliminary determination in the SSPC case explained that:

> For the purposes of the final determination, the Department will also analyze the implications, if any, of the decline in the won during 1997 for price averaging and whether multiple averages are warranted. The Department is studying *this issue* in *Mushrooms from Indonesia*.

SSPC Preliminary Determination, ROK Ex. 4, at 59539 (emphasis added).

[136] This violation was particularly significant with regard to SSPC, because (i) it was the very first investigation to use "multiple averaging" to account for a currency devaluation, and (ii) that decision was made at the very end of the Commerce Department investigation.

4.60 As discussed in Part IV.A.2 *supra*, the "most fundamental" responsibility of this Panel is to ascertain whether or not the United States afforded POSCO the "fair comparison" mandated by Article 2.4 of the Anti-Dumping Agreement.

4.61 As discussed in the Statement of Facts, throughout the proceedings in the investigations at issue, the US petitioners predicated their requests for anti-dumping orders on the claim that such relief was needed to protect the US industry from the adverse consequences of the so-called Asian economic crisis that accompanied the devaluation of the Korean won.[137] In essence, petitioners claimed that the anti-dumping orders were needed to protect them from an increase in imports after the devaluation.

4.62 In these circumstances, a fair analysis of whether POSCO was truly engaged in injurious dumping must necessarily focus on — or, at an absolute minimum, include — *pricing data after the devaluation of the won*. Yet, that is the very pricing data which was effectively excluded (or "walled off," in the petitioners' words) from the DOC's price comparisons by the "multiple averaging" methodology.

4.63 In other words, the "multiple averaging" methodology resulted in a finding of dumping based solely on pre-devaluation sales. That methodology was, therefore, flatly inconsistent with the injury analysis, which found injury based primarily on post-devaluation imports. The "multiple averaging" methodology was, therefore, particularly distortive in this case, and thus cannot be reconciled with the fair comparison requirement of Article 2.4 of the Anti-Dumping Agreement. The resulting anti-dumping measures are thus inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

C. THE COMPARISON OF NORMAL VALUE TO EXPORT PRICE WAS UNFAIR AND CONTRARY TO THE REQUIREMENTS OF THE ANTI-DUMPING AGREEMENT, BECAUSE THE UNITED STATES INFLATED THE NORMAL VALUE BY "DOUBLE CONVERTING" DOLLAR-PRICED SALES IN KOREA INTO WON AND THEN BACK INTO DOLLARS USING DIFFERENT EXCHANGE RATES

4.64 As discussed in the Statement of Facts, POSCO had a significant quantity of "local sales" of both SSPC and SSSS during the investigation periods. These "local sales" were negotiated and invoiced in US dollars, but the payments were made in Korean won. Significantly, to ensure that payment accurately reflected the actual dollar value of the sales, the amount of the Korean won payment for these "local sales" was not fixed at the time of the sales negotiation or at the time of invoice. Instead, the payment in Korean won was determined by applying the market exchange rate (as announced by the official Korean Exchange Bank) for the date of payment to the US dollar amount shown on the invoice. Thus, the economic reality is that the final payment for these sales is determined by the US dollar amount shown on the invoice, and not by the Korean won amount recorded in POSCO's accounting records at the time of invoice. In economic terms, these "local sales" are equivalent to sales that are invoiced and paid in US dollars.[138]

4.65 Nevertheless, in its final determinations, the United States chose to analyze these local sales based not on the US dollar price from the invoice, but on the Korean won amounts recorded in POSCO's accounting records at the time of invoice. This entailed a two-step process.

- First, the United States included the Korean won amounts from POSCO's accounting records in its calculation of the average price, in Korean won, for home-market sales. Since the won amounts in the accounting records were converted from the invoice

[137] See para. 3.48 *supra*.
[138] See paras. 3.49 - 3.55 *supra*.

prices in dollars (so that the books would be kept in a single currency, in accordance with normal accounting practices) at the market exchange rate announced by the official Korean Exchange Bank for the date of invoice, this meant that the US methodology effectively first converted the US dollar prices of the "local sales" from dollars into won at that rate.

- Then, the average home-market price in won was converted into US dollars using a weighted average exchange rate, based on the exchange rates announced by the New York Federal Reserve, for the dates of the *US sales* during the relevant period.[139]

Thus, the dollar-denominated prices for "local sales" were converted into Korean won using one exchange rate and then converted back into US dollars using a different exchange rate. Not surprisingly, this "double conversion" using different exchange rates distorted the price comparisons and inflated the dumping margins found by the United States.[140]

1. The "Double Conversion" of the Dollar-Denominated Home-Market Sales Prices Violated Article 2.4.1 of the Anti-Dumping Agreement, Which Permits Currency Conversions Only When Such Conversions Are Required

4.66 As discussed in Part IV.B.2 *supra*, Article 2.4.1 of the Anti-Dumping Agreement establishes the methodology for converting currencies in anti-dumping investigations. The introductory clause of Article 2.4.1 makes clear, however, that resort to this methodology is limited to those circumstances "[w]hen the comparison under paragraph 4 *requires* a conversion of currencies."

4.67 Past decisions by WTO panels indicate that an action may be considered to be "required" when there "is no other reasonable alternative."[141] If there is a "reasonable alternative," then the action is not "required" within the meaning of the WTO Agreements.

4.68 In this case, the United States clearly had a reasonable alternative to the double-conversion of currencies: It could simply have used the original dollar prices on POSCO's invoices. Needless to say, a home-market sale priced in dollars may be readily compared to an export sale priced in dollars without any need for currency conversion. Nevertheless, the United States passed over the obvious

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[139] The weighted average exchange rate was calculated by averaging the New York Federal Reserve exchange rates on the dates of each US sale, weighted by the quantity involved in each US sale.

[140] An example of the distortion caused by this double-conversion methodology is set forth in paragraphs 3.56 - 3.58, *supra*. In that example, which reflects the actual data for POSCO's sales of SSSS, the DOC's double-conversion methodology increased the normal value by { }.

[141] In the context of Article 11.1 of the Anti-Dumping Agreement, the *DRAMS* Panel held that an anti-dumping duty only remains "necessary" as long as "circumstances *require* [its] continued imposition" and "the need for the continued imposition of the duty must be demonstrable on the basis of the evidence adduced." *United States — Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* , Report of the Panel, WT/DS99/R, adopted on 19 Mar. 1999, at para. 6.42 (emphasis added).

The word "necessary" is understood by the Appellate Body (and by WTO and GATT panels) to limit certain exceptions in Article XX of GATT 1994 to circumstances where there is no other reasonable alternative. See *United States — Standards for Reformulated and Conventional Gasoline*, Report of the Panel, WT/DS2/R, at para. 6.24 ("If there were consistent or less inconsistent measures reasonably available to the United States, the requirement to demonstrate necessity would not have been met."), adopted on 20 May 1996 as modified by the Report of the Appellate Body, WT/DS2/AB/R, at 16-17 (distinguishing between "necessary" in Article XX(b) and " relating to" in Article XX(g), and critiquing the panel for applying the narrow "'necessary' test" to both Article XX(b) and XX(g)).

choice in favour of a more complex (and less accurate) methodology. This "double conversion" was unnecessary.[142]

4.69 By double-converting the dollar-denominated home-market prices of POSCO's local sales, the United States departed from the requirement in Article 2.4.1 that currency conversions be employed only when "required." As a result, the anti-dumping measures against SSPC and SSSS from Korea violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

2. The "Double Conversion" Methodology Employed by the United States Is Unreasonable and Departs from Established Practice Without Adequate Explanation, and Thus Is Inconsistent with the "Uniform" and "Reasonable" Administration of the Anti-Dumping Laws Required by GATT Article X:3(a) and Article 12 of the Anti-Dumping Agreement

4.70 As discussed in Parts IV.A.3 and IV.B.3 *supra*, Article X:3(a) of GATT 1994 obligates Members to administer their anti-dumping laws in a "uniform, impartial, and reasonable manner." Article X:3(a) establishes "certain minimum standards for transparency and procedural fairness" that are amplified by the procedural requirements of Article 6.1, 6.2, 6.9, and 12.2 of the Anti-Dumping Agreement. Together, these provisions establish a broad requirement that the investigating authorities interpret the relevant laws in a reasonable and consistent manner — and that they provide private parties with an explanation of their proposed interpretation of the relevant laws in a manner that will allow the private parties a "full" and "ample opportunity" to defend their interests.

4.71 In "double converting" the prices of the "local sales," the United States acted "unreasonably" and failed to comply with its procedural obligations in several respects. In addition, the "double conversion" caused a distortion in the calculation of POSCO's home-market price, which denied POSCO the benefits of the "fair comparison" between export price and home-market price to which it is entitled under Article 2.4 of the Anti-Dumping Agreement.

(a) The "Double Conversion" Methodology Employed by the United States Constituted a Departure from Its Previous Practice that Was Unwarranted, Contrary to the Evidence, and Inadequately Explained

4.72 As discussed in the Statement of Facts,[143] the "double conversion" of the prices of the "local sales" from dollars to won to dollars (at different exchange rates) was an unprecedented departure from the established policy of the DOC of "accept[ing] charges in the currency in which the charges are made."[144] In fact, neither the United States nor the petitioners in the investigations cited a single case before the investigations at issue where the United States treated a home-market sale priced in dollars as if it had been priced in the local currency.

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[142] In addition, the "double conversion" is inconsistent with the requirement of Article 2.4.1 that, when a currency conversion is required, investigating authorities should use the "rate of exchange on the date of sale." As discussed, for the "local sales" in Korea, the United States did use a "rate of exchange on the date of sale" for the conversion from dollars to won (specifically, the rate of the Korean Exchange Bank on the date of each local sale). For the conversion back to dollars, however, the United States did not use an exchange rate for that same date. Instead, the conversion back to dollars was effected at an exchange rate based on the weighted average of the rates prevailing on the dates of *different sales* (specifically, the weighted average of the rates of the New York Federal Reserve or DOC on the dates of POSCO's *US sales*.) See para. 3.57 *supra*. This methodology was inconsistent with the plain language of Article 2.4.1 and it was obviously distortive.

[143] See paras. 3.59 - 3.62 *supra*.

[144] Fresh Cut Roses from Colombia, ROK Ex. 52, at 7006 ("It is the Department's practice to accept charges in the currency in which the charges are made. In this instance, home market prices were charged in dollars. Therefore, the Department found it appropriate that respondent's home market sales were reported in dollar value since the dollar value was the currency in which the sales transactions were made.").

4.73 By contrast, there are several cases — most notably *Fresh Cut Roses from Colombia* — in which the United States properly declined to "double convert" home-market sales that were priced in dollars.[145] The United States claimed that the factual situation in *Fresh Cut Roses from Colombia* differed from the factual situation presented in the SSPC and SSSS cases. However, as discussed below, the purported distinctions offered by the United States made no sense.

4.74 The United States claimed that the SSPC and SSSS cases could be distinguished from the *Colombian Roses* case because "a comparison of the internal exchange rate used by POSCO to the market exchange rate used by the Department shows that the two exchange rates are quite dissimilar."[146] The United States claimed that this difference was "in contrast to *Fresh Cut Roses from Colombia* in which the Department verified that the payment in pesos reflected the market exchange rate at the time of payment."[147] This proposed distinction does not withstand scrutiny.

- *First*, the verification in the SSPC and SSSS case confirmed that the internal exchange rates used by POSCO were the market exchange rates announced by the official Korean Exchange Bank for the date of the home-market sale.[148] Thus, the "internal" rates used by POSCO were not arbitrarily selected figures. To the contrary, they were the actual market rates for conversions of Korean won into US dollars in the Korean exchange market.

- *Second*, because exchange rates fluctuate within the course of the day and in different markets, there is no reason to expect the exchange rates published by the Korean Exchange Bank to match exactly the exchange rates published by the New York Federal Reserve Bank some hours later. However, the actual differences between the rates were, in fact, quite small. For example, in the SSSS case, the United States indicated that the difference between the Korean Exchange Bank rates used by POSCO and the New York Federal Reserve Bank rates was, for all comparisons, *less than one per cent*.[149]

- *Finally*, it should be noted that the evidence indicates that, at least in the SSPC case, the United States made a clear error in its exchange rate comparison. The purported "market" exchange rates used in this comparison were not, as the United States claimed, the "Federal Reserve" rates. Instead, the purported "market" rates were, in

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[145] *Id.*; see also Silicon Metal from Argentina, ROK Ex. 53, at 37895-96.

[146] SSPC Final Determination, ROK Ex. 11, at 15456; accord SSSS Final Determination, ROK Ex. 24, at 30678.

[147] SSPC Final Determination, ROK Ex. 11, at 15456; SSPC Final Analysis Memorandum, ROK Ex. 12, at 5; SSSS Final Analysis Memorandum, ROK Ex. 25, at 3-4; accord SSSS Final Determination, ROK Ex. 24, at 30678;

[148] SSSS Sales Verification Report, ROK Ex. 19, at 14.

[149] According to the final analysis memorandum in the SSSS case,

> [A] comparison of the internal exchange rate used by POSCO to the market exchange rate used by the Department for Home Market Observation { } shows that the two exchange rates are dissimilar: POSCO's won/USD exchange rate for { } is { } won per dollar while the Federal Reserve rate for this date is { } won per dollar. Also, POSCO's won/USD exchange rate on the date of payment ({ }) is { } won per dollar, while the Federal Reserve exchange rate on the date of payment is { } won per dollar.

SSSS Final Analysis Memorandum, ROK Ex. 25, at 3. A simple calculation indicates that the differences between the POSCO rates and Federal Reserve rates identified by this analysis memorandum represent in all cases less than one percent of the Federal Reserve exchange rate.

fact, *adjusted exchange rates calculated by the US Department of Commerce* to implement provisions of US law that require a 60-day lag in exchange rates when a foreign currency has a "sustained movement" against the US dollar.[150] Moreover, these adjusted Commerce Department exchange rates were, for the relevant dates, quite different from the Federal Reserve rates.[151] In fact, the actual Federal Reserve rate was much closer to POSCO's "internal" rate than it was to the adjusted Commerce Department rate that the United States relied upon in its analysis. Compounding the error is the fact that the DOC lag rate has no bearing on cases where a foreign currency is depreciating against the dollar, as its role is strictly limited to cases of appreciation. Thus, the exchange rate comparison that the United States relied upon was deeply flawed.

4.75 In the SSSS decision, the United States offered an alternative basis for distinguishing the *Fresh Cut Roses* decision. It claimed that, in the *Fresh Cut Roses* case, "all prices and costs, both in the home market and in the US, were dollar denominated…." while in the case of SSSS "the vast majority of the costs incurred for home market and US sales are denominated and paid by POSCO in won."[152] Once more, however, the proposed distinction is unpersuasive.

- *First*, the proposed distinction has no bearing on t he issue before the Panel. POSCO has not asserted that the home-market sales or costs that were denominated in Korean won should not have been converted into US dollars using an appropriate exchange rate. Instead, it has asserted only that the US dollar-denominated home-market sales should not have been double-converted. The fact that there were other won-denominated sales and costs of SSSS, which obviously had to be converted into dollars, does not affect in any way the appropriateness of "double converting" the prices that already were in dollars.

- *Second*, the distinction proposed by the United States is contrary to its established practice in virtually all cases. According to the United States, the double-conversion was necessary to treat the dollar-denominated home-market prices consistently with the foreign-currency-denominated costs. In virtually every US anti-dumping investigation, however, some of the costs incurred in connection with sales to the United States (such as production costs, freight from the factory to the port, and brokerage and handling fees in the exporting country) are incurred and denominated in the foreign currency, while the sales prices are denominated in US dollars. The

[150] See DOC Notice on Currency Conversion, ROK Ex. 49.

[151] For example, the final analysis memorandum in the SSPC case stated that the Federal Reserve exchange rate on 23 November 1997 was 947.87 won per dollar. SSPC Final Analysis Memorandum, ROK Ex. 12 at 4. In fact, the Federal Reserve rate on that date was actually 1060.00 won per dollar. See New York Federal Reserve Daily Exchange Rates, ROK Ex. 50. The 947.87 won per dollar rate mentioned in the final analysis memorandum is actually the exchange rate for 23 November 1997 calculated by the DOC using its specialized exchange rate model for appreciating currencies — a model which, by its terms, should not have been applied to the Korean won in the first place, because the won was depreciating in value during the period under consideration. See DOC Adjusted Exchange Rates, ROK Ex. 51.).

The final analysis memorandum makes a similar error with respect to the exchange rates on 18 November 1997. See ROK Ex. 12 at 5.

In this regard, it is interesting to note that the "internal" rate used by POSCO for 23 November 1997 (which is also the rate published by the Korean Exchange Bank) was 1072.10 won per dollar. SSPC Final Analysis Memorandum, ROK Ex. 12, at 4; see also Korean Exchange Bank Daily Exchange Rates, ROK Ex. 44. In other words, the actual Federal Reserve rate was much closer to POSCO's "internal" rate than it was to the adjusted DOC rate that the United States erroneously relied upon in its analysis (*i.e.*, 1060.00 is much closer to 1072.10 than it is to 947.87).

[152] SSSS Final Determination, ROK Ex. 24, at 30678.

United States does not "double convert" the dollar-denominated US sales prices (first into the foreign currency at one exchange rate, and then back into dollars at another exchange rate) to be consistent with the treatment of the foreign-currency-denominated costs. It is inconsistent, then, to insist that such double-conversion is necessary for dollar-denominated home-market sales.

- *Finally*, the factual basis for the distinction proposed by the United States is suspect: The decision in *Fresh Cut Roses* makes no mention whatsoever of the currency of the exporter's *costs.*[153] Thus, this factor does not appear to have been of any significance to that decision.

4.76 Therefore, the unprecedented "double conversion" of dollar-denominated home-market sales prices by the United States in the circumstances of this case violates obligations of the United States under GATT 1994 and the Anti-Dumping Agreement. In particular, by failing to follow its established methodology and by providing incorrect and incoherent justifications for this failure, the United States acted in a manner that was neither "uniform" nor "reasonable," in violation of Article X:3(a) of GATT 1994. In addition, by providing incorrect and irrelevant arguments to justify its departure from the standard methodology, the United States failed to provide the statement of reasons required by Article 12.2 of the Anti-Dumping Agreement. As a result, the US anti-dumping measures against SSPC and SSSS from Korea violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

(b) The "Double Conversion" Methodology Adopted by the United States Unreasonably Penalizes Exporters for Differences Between Official Korean and US Exchange Rates, and Is Otherwise Unreasonable

4.77 As discussed in the Statement of Facts, the United States disregarded the economic reality of the "local sales" — *i.e.*, that the ultimate payment was dictated by the dollar price from the invoice and not by the Korean won amount recorded in POSCO's accounting records at the time of invoice. Instead, the United States applied a "double conversion" methodology that penalized POSCO by converting the prices of the "local sales" from dollars to won to dollars in a manner that artificially inflated the normal value and hence the dumping margin.[154]

4.78 The United States claimed that its "double conversion" of the prices of the "local sales" was necessary, primarily because the exchange rates used by POSCO did not match the exchange rates published by the Federal Reserve Bank of New York — which are based on the exchange rates at 12:00 noon in New York on the relevant dates.[155] In other words, the United States took the position that POSCO acted unreasonably by making currency conversions for accounting purposes using the market exchange rates announced by the official Korean Exchange Bank, and not the exchange rates set by a New York bank eight or nine hours after the close of business in Korea.[156] Significantly, the United States never even attempted to explain why the New York Federal Reserve exchange rates should be considered more accurate than the Korean Exchange Bank rates, or why a Korean company should be expected to use New York exchange rates with respect to its accounting in Korea of domestic transactions within Korea.

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[153] Fresh Cut Roses from Colombia, ROK Ex. 52, at 7005-06.

[154] See paras. 3.49 - 3.58 *supra*.

[155] See para. 3.59; DOC Notice on Currency Conversion, ROK Ex. 49, at 9436 n.4 ("The … exchange rates are collected by the New York Federal Reserve Bank from a sample of market participants. They are the noon buying rates in New York for cable transfers payable in foreign currencies.").

[156] Noon in New York is either 1 a.m. or 2 a.m. the following morning in Korea (depending on whether daylight saving's time is in effect in New York).

4.79 Moreover, in applying this rule in the SSPC case, the United States compared the exchange rate used by POSCO to the wrong exchange rate. While the stated justification for the "double conversion" was the alleged discrepancy between POSCO's "internal rate" (*i.e.*, the rate of the Korean Exchange Bank) and the Federal Reserve rate, the United States failed to use the Federal Reserve rate for that comparison.[157]

4.80 The consequence of the double-conversion methodology applied by the United States in this case was to increase the dumping margins found. As a practical matter, then, the United States ruled that a Korean company that made dollar-denominated "local sales" to Korean customers would be penalized (through the application of a distortive double-conversion methodology) whenever the exporter relied on the market exchange rates published by an official Korean bank and failed accurately to predict (1) the New York Federal Reserve rates announced some *eight or nine hours* after the close of business in Korea, or (2) the adjusted rates calculated some time afterwards by the DOC from the Federal Reserve rates.

4.81 Such a result cannot be consistent with the object and purpose of either Article VI of GATT 1994 or the Anti-Dumping Agreement. It is patently unreasonable for the United States to expect that a Korean company will use New York exchange rates rather than official Korean exchange rates to record Korean domestic sales in its accounting books. It is even more unreasonable for the United States to expect that a Korean company will use exchange rates in its accounting records exchange rates that are not actual market rates, but instead reflect after-the-fact calculations by the DOC.

4.82 Thus, the "double conversion" methodology and the rationale provided therefor are not "reasonable" and the United States failed to administer its anti-dumping laws in the manner required by Article X:3(a) of GATT 1994. The resulting anti-dumping measures accordingly violate Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

3. The Double-Conversion Methodology Adopted by the United States Unfairly Penalizes Exporters for Differences between Official Korean and US Exchange Rates, Even Though Such Differences Cannot Be Anticipated and Are Beyond the Exporters' Control

4.83 In addition to the substantive and procedural errors demonstrated above, the "double conversion" methodology also suffered from a larger problem: By penalizing POSCO for differences between the Korean and US exchange rates, which is clearly a factor beyond POSCO's control, the United States calculated the normal value in a manner that was unfair.

4.84 As discussed in Part IV.A.2 *supra*, the "most fundamental" responsibility of this Panel is to ascertain whether or not the United States afforded POSCO the "fair comparison" mandated by Article 2.4 of the Anti-Dumping Agreement. As discussed in the Statement of Facts, the "double conversion" methodology distorted the calculation of the normal value. By converting the prices of the "local sales," which constituted a significant percentage of POSCO's total sales, from dollars to won to dollars at different exchange rates, the United States distorted the calculation of normal value. Indeed, in the example provided above, the "double conversion" increased the normal value of the "local sale" by an astounding { }.[158]

4.85 This distortion in the calculation of the normal value inevitably denied POSCO a "fair comparison" between export price and normal value: The United States did not compare the export

[157] See paras. 3.60, 4.74 *supra*.
[158] See paras. 3.56 - 3.58 and paras. 4.24 - 4.27 *supra*.

price to the true normal value, but to an inflated normal value. An overstated dumping margin resulted from this *unfair* comparison.

4.86 The "double conversion" methodology also led to an "unfair comparison" in another respect. As demonstrated in Part IV.C.2 *supra*, this methodology "unreasonably" penalized POSCO for the differences between the exchange rates of the Federal Reserve and the Korean Exchange Bank. It was likewise "unfair" to penalize POSCO for these differences.

4.87 There can be no doubt that the differences in exchange rates were beyond POSCO's control. In particular, POSCO could not have predicted how exchange rates might change between the time they were fixed by the Korean Exchange Bank (during business hours in Korea) and the time they were fixed by the Federal Reserve (eight or nine hours later) or by the DOC (even later). And, as the judicial decisions of the United States have recognized, it is "unreal, unreasonable and *unfair*" for a finding of dumping to be based on "a factor beyond the control of the exporter."[159]

4.88 Consequently, the treatment of these "local sales" by the United States was inconsistent with the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement, and the resulting anti-dumping measures therefore violated Article 1 of the Anti-Dumping Agreement and Article VI of GATT 1994.

V. CONCLUSION

5.1 Anti-dumping investigations are, by their very nature, complex proceedings requiring detailed analysis of highly technical data and issues. The rules governing such investigations are, therefore, also complex and technical. The provisions of Article VI of GATT 1994 and the Anti-Dumping Agreement establish highly technical substantive and procedural rules that Members must follow before they may impose anti-dumping duties.

5.2 These technical rules are critical. Because dumping calculations are so detailed, decisions on what might appear to be minor technical or procedural issues may create dumping margins, or inflate small dumping margins enormously. Without close scrutiny of these technical issues, importing countries will invariably be tempted to use technicalities to impose unwarranted anti-dumping measures to satisfy the demands of politically important domestic industries.

5.3 As discussed above, it is clear that the United States failed to comply in the SSPC and SSSS investigations with the technical rules established by Article VI of GATT 1994 and the Anti-Dumping Agreement. As a substantive matter, the United States failed to comply with the substantive rules that, *inter alia*: (1) limit the permissible adjustments to export price and normal value to "differences which are demonstrated to affect price comparability;" (2) require that dumping margins be calculated by comparing a single average export price to a single average normal value; and (3) permit currency conversions only when they are required. As a procedural matter, the United States failed to conform to the standards that require Members, *inter alia*, to: (1) administer their laws in a "uniform, impartial and reasonable manner;" (2) give an exporter notice of all "essential facts" needed to allow a "full" and "ample opportunity" to defend its interests; and (3) provide a full explanation of the reasons for their decisions. As a technical matter, then, the anti-dumping measures imposed by the United States cannot be sustained.

5.4 The flaws in the methodologies employed by the United States were not, however, minor technicalities. Instead, they went to the very heart of the limitations imposed by GATT 1994 and the Anti-Dumping Agreement. The inflated duties imposed in these cases demonstrate how such technicalities can, if left unchallenged, eviscerate the disciplines on the abuse of anti-dumping

[159] Melamine Chemicals v. United States, ROK Ex. 56, at 933.

measures that the WTO Members had sought to impose. Without close scrutiny and effective oversight by Panels such as this one, importing countries will invariably be tempted to use technicalities just as they were used in this case, to impose unwarranted anti-dumping measures when convenient for domestic political purposes. This Panel now has the opportunity and the obligation to uphold the principle that methodologies that depart from the strict requirements of GATT 1994 and the Anti-Dumping Agreement, and result in inflated anti-dumping measures, will not be allowed to pass uncontested.

5.5 But the technical violations of the requirements of GATT 1994 and the Anti-Dumping Agreement are only one part of the error in the US methodologies. More fundamentally, the US methodologies were unfair. Each of the challenged methodologies placed POSCO, and all other exporters, in a situation where their exposure to anti-dumping measures was based not on their own sales practices, but on the whims of the investigating authorities and on unpredictable forces beyond their control. Thus, under the US methodology,

- An exporter that sold its products at exactly the same prices in both the United States and its home-market might be found to have dumping margins on all of its US sales if, after it made its sales, it turned out that one of its US customers went bankrupt and failed to pay.

- An exporter that sold its products for the same average prices in the United States and the home-market, might be found to have dumping margins on its sales, if the investigating authority decides to depart from its established precedents and chop up the investigation period into shorter "averaging periods" that distort the calculations.

- And, finally, an exporter that sold its products at the same price in US dollars in both the United States and the home market, might be found to have dumping margins on its sales if the investigating authority chooses to convert the dollar-denominated prices of some home-market sales into the foreign currency using one exchange rate, and then convert that foreign currency amount back into dollars using another exchange rate.

5.6 Obviously, these results cannot be consistent with the object and purpose of Article VI of GATT 1994 or the Anti-Dumping Agreement. Indeed, the "fair comparison" requirement of Article 2.4 of the Anti-Dumping Agreement provides this Panel with an independent justification for reviewing whether the challenged methodologies are unbiased and objective. And, under such a review, these methodologies cannot be sustained.

5.7 For the reasons presented in this Submission, particularly with regard to (1) the treatment of POSCO's sales to an unaffiliated US customer that later went bankrupt without paying POSCO, (2) the division of the investigation period into "multiple averaging periods," and (3) the treatment of POSCO's dollar-denominated home-market sales, Korea respectfully requests the Panel to find that the US anti-dumping measures at issue, including actions preceding those measures, are inconsistent with the following provisions of the Anti-Dumping Agreement and GATT 1994:

- Article VI:1 of GATT 1994 and Article 2.4 of the Anti-Dumping Agreement, which permit adjustments to be made only for differences that are demonstrated to affect price comparability;

- Article 2.4 of the Anti-Dumping Agreement, which also requires the investigating authorities to make a fair comparison of the export price and the normal value;

- Article 2.4.1 of the Anti-Dumping Agreement, which permits alterations to the standard price comparison methodology to account for currency movements only when the exporting country's currency is appreciating against the importing country's currency;

- Article 2.4.1 of the Anti-Dumping Agreement, which also permits currency conversions only when such conversions are required;

- Article 2.4.2 of the Anti-Dumping Agreement, which requires that the calculation of dumping margins be based on a comparison of a single average normal value to a single average of prices of all comparable export transactions;

- Articles 6.1, 6.2, and 6.9 of the Anti-Dumping Agreement, which require the investigating authorities to give exporters notice of all essential facts in order to provide them with a full and ample opportunity to defend their interests;

- Article 12.2 of the Anti-Dumping Agreement, which requires the investigating authorities to provide a full explanation of the reasons for their determinations;

- Article X:3(a) of GATT 1994, which requires each WTO Member to administer its laws, regulations, decisions, and rulings in a uniform, impartial, and reasonable manner; and

- Article VI of GATT 1994 and Article 1 of the Anti-Dumping Agreement, which only permit anti-dumping measures to be imposed in the circumstances provided for in Article VI and pursuant to investigations conducted in accordance with the Anti-Dumping Agreement.

5.8 Therefore, Korea requests that the Panel find that: (i) the United States has nullified or impaired a benefit accruing to Korea, directly or indirectly, under the WTO Agreements; and (ii) the United States is impeding the achievement of the objectives of the WTO Agreements.

5.9 Korea further requests that the Panel recommend that the United States bring its anti-dumping measures against SSPC and SSSS from Korea into conformity with the WTO Anti-Dumping Agreement and GATT 1994. And, specifically, Korea requests that the Panel suggest that the United States revoke the anti-dumping duty orders concerning SSPC and SSSS from Korea.

ANNEX 1-2

**ORAL STATEMENT OF KOREA
FIRST MEETING OF THE PANEL**

(13-14 June 2000)

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1. The United States Government has imposed duties on imports of Korean steel in violation of its obligations under the WTO Agreements. As the two governments were not able to resolve this matter through consultations, the Korean Government has found it necessary to request the establishment of this Panel.

2. I shall begin today with a brief overview of the case. Then, as the substantive errors at issue before this Panel concern the United States' treatment of three issues that arose in the calculation of the dumping margins, I shall take each issue in turn. Within my discussion on each issue, I shall present the factual background and Korea's argument. And then, I shall respond preliminarily to several general arguments made in the United States' First Submission. Following my oral statement, my colleagues and I would be honoured to answer questions from the Panel.

3. So that this presentation will not be unduly long, I shall not attempt to discuss today every single argument made by Korea and the United States in the First Submissions. Please understand that my focus on certain arguments today does not imply that Korea has withdrawn any other arguments, and it is not intended to preclude Korea from making additional arguments at a later stage.

A. OVERVIEW

4. In the past two-and-a-half years, the United States has launched many anti-dumping investigations covering virtually all steel products from countries all over the world. This dispute arises out of two of those anti-dumping investigations and the resulting anti-dumping measures. Specifically, this dispute concerns the US anti-dumping investigations and measures against imports of Stainless Steel Plate in Coils ("Plate") and Stainless Steel Sheet and Strip ("Sheet") from the Pohang Iron & Steel Co., Ltd. ("POSCO").

5. The United States preliminarily determined that the dumping margin was only 2.77% for Plate and only 3.92% for Sheet. In the final determinations, however, the United States changed its methodology for calculating the extent of dumping in several key respects. As a result of these changes, the final dumping margins shot up to 16.26% for Plate and to 12.12% for Sheet.[1]

6. The methodology used by the United States to calculate the final dumping margins for Plate and Sheet was improper. That methodology was not consistent with the methodology required by Article VI of GATT 1994 and by the Anti-Dumping Agreement. That improper methodology distorted the calculation of POSCO's dumping margins. Those distortions caused the United States to impose greater anti-dumping measures than would otherwise have been appropriate — if, indeed, any anti-dumping measures at all would have been appropriate under a proper methodology.

7. Anti-dumping duties have a single purpose in the WTO regime: to offset injurious dumping. Where there is no dumping, there can be no anti-dumping duties. Even where there is injurious dumping, anti-dumping duties can be imposed only to the extent of the dumping — and no more. These rules are an essential bulwark against abuse of anti-dumping duties. It is these rules that confine anti-dumping duties to their limited sphere. Without these rules, Members could readily circumvent their tariff bindings, most-favoured-nation commitments, and other obligations under the WTO Agreements.

8. To guard against abuse of anti-dumping measures, the WTO Agreements contain highly detailed substantive and procedural rules that Members must follow before they may impose anti-dumping duties. These rules are necessary, because the use of an improper methodology — even in

[1] See Korea's First Submission, paras. 3.13, 3.16, 3.22, 3.25.

what might appear to be a minor issue — can create dumping margins or inflate small margins enormously.[2]

9. To implement these rules, close scrutiny and effective oversight by dispute settlement Panels are critical. Otherwise, importing countries will invariably be tempted to use technical-sounding arguments to impose unwarranted anti-dumping duties when convenient for domestic political purposes. Thus, despite the technical nature of some of the arguments made in this case, this is not "only" a technical dispute. Instead, the flaws in the US methodologies for calculating the dumping margins on Plate and Sheet go to the very heart of the limitations imposed by GATT 1994 and the Anti-Dumping Agreement.

10. The starting point for Korea's legal argument is Article 1 of the Anti-Dumping Agreement. This Article is entitled "Principles." Its first sentence reads as follows: "An anti-dumping measure shall be applied *only* under the circumstances provided for in Article VI of GATT 1994 *and* pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." In a nutshell, the anti-dumping measures on Plate and Sheet violate this Article because (1) they have been applied even though the existence of dumping was not properly established and (2) they have been applied pursuant to investigations that were not conducted in accordance with the substantive and procedural requirements of the Anti-Dumping Agreement.[3]

11. As I mentioned earlier, the substantive errors at issue concern three issues that arose in the calculation of POSCO's dumping margins for Plate and Sheet. First, the United States reduced POSCO's export price to adjust for the fact that an unaffiliated US customer went bankrupt after receiving POSCO's goods without paying POSCO. Second, the United States split the investigation period into multiple sub-periods, calculated separate averages for each sub-period, and recombined the data into an overall average in a manner that effectively excluded from consideration sales that would have reduced POSCO's dumping margins. Third, the United States "double converted" POSCO's dollar-denominated sales in Korea from dollars to won and back to dollars at a different exchange rate, thereby creating or inflating the dumping margins. The WTO Agreements clearly do not allow dumping margins to be calculated so arbitrarily. Each of the methodologies used by the United States would place a cloud of uncertainty over exporters that would chill international trade. Thus, these methodologies are obviously, fundamentally flawed.

12. In addition to these substantive errors, the United States also failed to follow proper procedures in the Plate and Sheet investigations. These procedural errors constitute a legally distinct basis on which the Panel can and should find that the anti-dumping duties on Plate and Sheet are inconsistent with WTO disciplines. The procedural irregularities also serve to highlight the substantive errors committed by the United States.

13. These substantive and procedural errors led to the imposition of improper and excessive anti-dumping measures. In accordance with WTO rules and principles, the improper anti-dumping measures should not be allowed to stand. This Panel now has the opportunity and responsibility to uphold WTO disciplines by finding that the US measures at issue are inconsistent with WTO rules and by recommending that the United States bring its measures into conformity with those rules.

B. THE US TREATMENT OF THE UNPAID SALES

14. I shall now begin with the first of the three major issues in this case: the United States' treatment of POSCO's sales to a US customer that went bankrupt without paying POSCO for goods it received. I shall first describe the factual background on this issue before discussing Korea's views.

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[2] See Korea's First Submission, paras. 5.1 - 5.4.
[3] See Korea's First Submission, paras. 4.3 - 4.4.

1. Background

15. The ABC Company (as we call it) had been a valued US customer of POSCO. It is not affiliated with POSCO. It often bought on credit from POSCO. It had never previously defaulted on a payment due POSCO. Indeed, in the entire history of POSCO's exports to the United States, none of its US customers had ever previously defaulted. Then, during the period of investigation, the ABC Company went bankrupt. To date, it has not paid POSCO for certain sales.[4]

16. None of these facts are in dispute.

17. It is clear that the bankruptcy was an unprecedented, unanticipated event. It was beyond POSCO's control. As the United States has admitted, POSCO did not know that the customer would not pay when it set its prices.[5] Thus, the non-payment did not affect POSCO's pricing policies during the relevant period.

18. Nonetheless, the United States penalized POSCO by making an adjustment that reduced its export price and thus inflated or created the dumping margins.

19. The US Submission unnecessarily complicates the facts. It discusses extensively the US decision to treat the unpaid sales as "bad debt.[6] That discussion is irrelevant here. The issue is not whether or not the unpaid sales can be called "bad debt." The real issue is whether the US treatment of those unpaid sales was consistent with WTO rules.

2. Korea's Arguments

20. The United States' treatment of the unpaid sales was flawed in numerous respects, which are detailed in Korea's First Submission.[7] I shall focus on two of those respects here: *First*, the United States made a price adjustment that is not consistent with the WTO rules governing allowances for differences affecting price comparability. *Second*, the United States did not make a "fair comparison" between the export price and normal value.

21. Before turning to the details of these arguments, however, it is important to consider the consequences of permitting adjustments like those made by the United States. The adjustment for the non-payment by the ABC Company punished POSCO for an event beyond its control that occurred after it set its prices. If anti-dumping duties could be imposed in that manner, then no exporter anywhere in the world could ever sell its goods with assurance that it would not be found to be dumping. No matter how high the exporter set its actual export prices, there would always be the possibility that later events — even highly unpredictable events — would lead to adjustments that would reduce its export prices enough to cause a finding of dumping. All else being equal, a company that sold its goods for *more* in an export market than at home could still be found dumping *solely* as the result of the bankruptcy of an export customer. It is unfair for a finding of dumping to be based on later events beyond the exporter's control in this manner.

(a) A Customer's Failure to Pay Is Not a Difference Affecting Price Comparability

22. The adjustment made by the United States reducing POSCO's export price was improper.

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[4] See Korea's First Submission, paras. 3.30 - 3.39.
[5] US First Submission, paras. 103-104.
[6] US First Submission, paras. 54-58.
[7] Korea's First Submission, paras. 4.6 - 4.42.

23. An understanding of the function of price adjustments begins with the nature of dumping. What is dumping? Under Article VI of GATT 1994 and Article 2.1 of the Anti-Dumping Agreement, dumping generally occurs when the export *price* of a good is less than its *price* in the home market. The comparison of prices is, therefore, the key to a proper determination of dumping.[8]

24. Adjustments to prices are permitted if - and only if - they account for differences in the factors that affect those prices. Thus, Article 2.4 states in relevant part, "Due allowance shall be made . . . for differences which affect price comparability." The Article continues by enumerating five factors that are deemed to affect price comparability: "differences in conditions and terms of sale, taxation, levels of trade, quantities, [and] physical characteristics." Any other difference beyond these five can support an adjustment only if it is "demonstrated to affect price comparability.[9]

25. Korea has shown that ABC Company's failure to pay POSCO is not a factor affecting price comparability.[10] In response, the US Submission argues that the ABC Company's failure to pay POSCO is a "condition" of the sale.[11] Leaving aside for the moment the absurdity of that contention, it is important to consider what the United States does not argue. The US Submission does not argue that unpaid sales were an "other difference[] . . . demonstrated to affect price comparability." Thus, the United States concedes that, if the failure to pay was not a "condition and term of sale," then the adjustment was improper.

26. The US Submission takes the word "condition" out of context, selects one of the word's many dictionary definitions, and argues that this is a permissible choice to which this Panel must defer unquestioningly.[12] But the meaning of the phrase "conditions and terms of sale" is not ambiguous. When the word "condition" appears in the context of that standard phrase, as in Article 2.4, its meaning is evident. As the EC observes in its Third Party Submission, "The word 'conditions,' as used in Article 2.4, is largely synonymous with the word 'terms.' Both words allude to the conditions agreed by the seller and the purchaser, and not to the general conditions prevailing in the market in which the sale takes place.[13]

27. Furthermore, it is unclear from the US Submission just what the United States considers to be the relevant "condition" warranting the price adjustment.

- If the United States meant that the non-payment itself is the "condition" of sale, that cannot be correct. Even under the dictionary definition proposed by the United States, a non-payment can not be regarded as the "mode or state of being" of a sale, because it does not exist at the time of sale. POSCO did not know that the ABC Company would fail to pay until after the prices were set, the contract was executed, and the goods were delivered.

- On the other hand, the United States may have meant that the "condition" of sale is the extent to which the exporter anticipates the possibility of non-payment when setting its prices. In other words, under that view, the "condition" is the *risk* of non-payment. This view has the virtue of at least being consistent with the dictionary definition proposed by the United States. However, it too ultimately fails to justify the US adjustment. It is not enough that there be a "condition" of sale. Under Article 2.4, there must be a *difference* in the condition between the US market and the home market. Without such a difference, there is no need for an adjustment to compare the prices. In adjusting POSCO's prices, the United States made no

[8] See Korea's First Submission, paras. 4.10 - 4.13.
[9] See Korea's First Submission, paras. 4.14 - 4.16.
[10] See Korea's First Submission, paras. 4.17 - 4.23.
[11] US First Submission, paras. 82-83.
[12] US First Submission, paras. 82-83.
[13] EC Third Party Submission, para. 21.

showing of any relevant difference between the risk of non-payment in Korea and the United States.

28. Therefore, the adjustment for unpaid sales cannot be justified under Article 2.4.

29. Confronted with this reality, the United States has advanced a novel argument to circumvent its obligations under Article 2.4. The US Submission argues that, at least for some sales, the Department of Commerce did not make an adjustment to export price under Article 2.4, but rather made a deduction to construct the export price under Article 2.[14] That argument is, at best, incomplete. Article 2.3 addresses certain additional adjustments that are permitted only for the analysis of sales through affiliated importers. Consequently, the United States' proposed defense under Article 2.3 only applies to POSCO's sales through its affiliated distributor and not to POSCO's other US sales. But, as the US Submission admits, the Department of Commerce also made the same adjustments to POSCO's other US sales.[15] Article 2.3 does not, therefore, justify the adjustment made to these other sales.

30. Moreover, the US argument under Article 2.3 cannot be correct. Article 2.3 has a particular purpose: for sales through affiliated distributors, it allows the export price to be "constructed on the basis of the price at which the imported products are first resold to an independent buyer." Article 2.3 thus allows such calculations as are needed to look beyond the affiliated distributor to determine what the export price would be if the goods were sold directly from the exporter to an independent customer. Article 2.3 calculations are limited to that particular purpose. Article 2.3 does not allow investigating authorities to arbitrarily adjust prices for other reasons. To the contrary, any other changes must conform to Article 2.4's limitations on adjustments.

31. Non-payment by a customer is not related to the issue of affiliated distributors, so it is not the type of circumstance governed by Article 2.3. In fact, the US practice in the cases at issue prove that point: It is clear that the adjustment for unpaid sales was not made to account for the use of an affiliated distributor, because the Commerce Department made the same adjustment to all of POSCO's US sales regardless of their distribution channel. Therefore, despite the US claim that it was constructing export price under Article 2.3, in reality it was making price adjustments under Article 2.4.[16]

(b) The United States' Treatment of the Unpaid Sales Was Inconsistent with the "Fair Comparison" Requirement of Article 2.4 of the Anti-Dumping Agreement

32. There is also another problem with the United States' treatment of the unpaid sales: It caused the comparison of export price and normal value to be "unfair." It is therefore flatly inconsistent with the first sentence of Article 2.4.

33. The first sentence of Article 2.4 requires that "A fair comparison shall be made between the export price and the normal value." The "fair comparison" requirement imposes important limitations on anti-dumping investigations that go beyond the other substantive rules in Article 2.4. The "fair comparison" requirement of Article 2.4 is a free-standing and substantial rule governing anti-dumping investigations, and it is not satisfied merely by compliance with the other requirements of Article 2.[17]

34. The US Submission essentially denies the existence of the first sentence of Article 2.4. It argues that conformity with the rules on adjustments in the other sentences of Article 2.4 is "all that

[14] US First Submission, para. 76.
[15] US First Submission, para. 81.
[16] *Id.*
[17] See Korea' s First Submission, paras. 4.25 - 4.27 & ROK Ex. 54.

Article 2.4 requires.[18] And, it insinuates that Korea's arguments based on that sentence are trying to "add to or diminish the rights and obligations provided" in the WTO Agreements.[19]

35. The US position is obviously incorrect. The "fair comparison" requirement in the first sentence of Article 2.4 is express. The Appellate Body has consistently recognized that the WTO Agreements must not be read so as to render a whole sentence redundant or inutile.[20] Moreover, the changes from the predecessor provision of Article 2.4 in the Tokyo Round to the present text confirm that the "fair comparison" requirement is intended to be absolute and unconditional.

36. In the cases at issue, the price comparisons were clearly unfair. This is evident in several respects:

- It is unfair for the price comparison to have been affected by a factor that was beyond POSCO's control. POSCO was not affiliated with the ABC Company, and POSCO could not have prevented the ABC Company from failing to pay. Interpretative guidance in support of this view is found in a US judicial decision, which declared that it is "unreal, unreasonable, and *unfair*" for a finding of dumping to be based on "a factor beyond the control of the exporter.[21]

- It is unfair for the price comparison to take into account factors that were not considered by POSCO in its normal selling practices. As the United States concedes, "when POSCO set the prices, it was acting in accordance with its normal selling practices, not based on the subsequent bankruptcy.[22] Since POSCO did not take into account the ex-post bankruptcy when setting its prices ex-ante, there is no basis for the United States to make an ex-post price adjustment.

- Finally, it is unfair for the price comparison to take into account atypical sales. Again, interpretative guidance is found in a US judicial decision, which recognized that the inclusion of atypical sales may lead to unfair results. POSCO had never had a US customer default on a payment before the ABC Company did so during the investigation period, so those sales are undoubtedly atypical. Inclusion of those sales in the analysis is therefore manifestly unfair.

C. SPLITTING THE PERIOD OF INVESTIGATION INTO SUB-PERIODS

37. I shall now turn to the second main issue: the division of the period of investigation into sub-periods and the resulting practice of "multiple averaging."

1. Background

38. In both the Plate and Sheet cases, the United States divided the period of investigation into two sub-periods. In Plate, the first sub-period was ten months and the second was two months. In Sheet, the sub-periods were seven months and five months. In both cases, the second sub-period started in November 1997.[23]

39. Then, the United States calculated (1) a separate average normal value for each sub-period, (2) a separate average export price for each sub-period, and (3) a separate dumping margin for each

[18] US First Submission, para. 72.
[19] US First Submission, para. 62.
[20] See Korea's First Submission, para. 4.15 n. 99.
[21] See Korea's First Submission, para. 4.27.
[22] US First Submission, paras. 103-104.
[23] See Korea's First Submission, paras. 3.40 - 3.48.

sub-period. The separate dumping margins were then combined into a single dumping margin for each case. When the separate averages were combined, sub-periods with negative dumping margins were assigned a margin of zero. This is known as "zeroing" and it obviously minimizes the impact of negative margins on the overall average.

40. Of course, this multiple-averaging approach is not the normal methodology for calculating dumping margins. The normal methodology is to calculate a single weighted-average normal value and export price for each product for the full period of investigation, and then calculate the dumping margin based on the difference between the average normal value and export price. In these cases, that normal methodology would have resulted in low dumping margins for POSCO.

41. To avoid that result, the US petitioners asked the Department of Commerce to modify the dumping calculations to "wall off" POSCO's sales after October 1997 (which had relatively lower dumping margins). In its preliminary determination, the Department of Commerce rejected that request, calling it "unwarranted." In its final determination, however, the Department of Commerce reversed course, and adopted the multiple-averaging methodology. As a result, the dumping margins increased dramatically.

42. As mentioned, the multiple-averaging methodology adopted by the United States inflated the dumping margins because of "zeroing." If an exporter sold its goods at 10% below normal value for the first six months of the year and at 10% above normal value for the last six months, then (assuming equal sales volumes) one would expect it to be found that the exporter was not dumping for the year. And that is exactly what would be found if one calculated the dumping margin for the year as a whole. Under "multiple averaging," however, dumping would be found. The first sub-period would have a margin of 10%. Because of zeroing, the second sub-period would be assigned a margin of zero rather than its true margin of negative 10%. Thus, the exporter would be given a 5% dumping margin for the year.

43. So, the effect of dividing the investigation period into sub-periods is to allow the authorities to effectively exclude times when the dumping margin is inconveniently low, thus inflating the overall result.

2. Korea's Arguments

44. The multiple-averaging practice employed by the United States is directly contrary to the express language of Article 2.4.2 of the Anti-Dumping Agreement. That Article does not tolerate the manipulation of methodology in this arbitrary fashion. Rather, Article 2.4.2 expressly mandates that prices shall be compared on the basis of either "*a weighted average* normal value with *a weighted average* of prices of *all* comparable export transactions" or on a transaction-to-transaction basis.[24]

45. Article 2.4.2 repeatedly uses the distinctly singular phrase "*a* weighted average". That is, one average — not two averages. That is confirmed by the requirement for an average that takes into account "*all* comparable export transactions." Clearly, there can be only one average if it takes into account *all* data.

46. So, the text is unambiguous. And it is reinforced by the provision's context and object and purpose. Article 2.4.2 is part of Article 2.4. Its function is to promote the fairness of price comparisons in anti-dumping investigations, so as to ensure that anti-dumping measures are imposed only where there is dumping and to the extent thereof. An interpretation of Article 2.4.2 that permits the manipulation and effective exclusion of data cannot be squared with the object and purpose of Articles 2.4 and 2.4.2.

[24] See Korea's First Submission, paras. 4.45 - 4.48.

47. In response, the United States relies principally on a *post hoc* argument about the word "comparable" in Article 2.4.2. The US Submission asserts that the Department of Commerce concluded that Korean home-market sales after November 1997 "were not comparable" to earlier export sales because of the currency depreciation.[25] That assertion has no basis in the Final Determinations or the Final Analysis Memoranda. It is a *post hoc* rationale created for the benefit of this Panel, in a belated attempt to reconcile the Department's actions with the requirements of Article 2.4.2.

48. We shall respond more fully to this belated argument in our subsequent written submissions. For the present, we would offer the following initial observations:

- The language of Article 2.4.2 focuses on the comparability of the "transactions" (in particular, on "comparable export *transactions*"). Products sold at different levels of trade are not comparable, absent a price adjustment to make them so. Likewise, products with different physical characteristics (e.g., different models) are not comparable without a price adjustment. By contrast, in the absence of any changes in the transactions in each market due to the depreciation, there was no basis for finding that the depreciation changed the comparability of *transactions*.

- In the Plate and Sheet cases, there was no finding by the United States, and indeed no evidence, that anything about the home-market or export sales transactions had changed as a result of the depreciation. The prices, conditions and terms of sale, taxes, level of trade, quantities, and physical characteristics were not affected by the depreciation. The only change was in the exchange rate used by the United States to convert prices in won into dollars for purposes of the dumping calculations. Under Article 2.4.2 of the Agreement, that does not make the sales "non-comparable."

49. The US effort to define comparability in terms of exchange rates also ignores the nature of exchange rates. To begin with, exchange rates are not conditions of sale; they are tools for converting amounts from one currency to another. Moreover, they are necessarily volatile and imperfect tools. In hindsight, one might say that the Korean won was overvalued (at roughly 900 won per dollar) throughout much of 1997, until it "crashed" in November. The won then overshot the proper exchange rate and remained undervalued (at a rate as high as 1960 won per dollar in December 1997), until it finally rebounded to a mid-point of around 1400 won per dollar at the end of March 1998. The distortions caused by these exchange rate movements could have been minimized by the use of an averaging period that included both the period of overvaluation and the period of undervaluation. By contrast, the "multiple-averaging" methodology employed by the United States essentially calculated one dumping margin for the period when the won was overvalued and a separate margin for the period when the won was undervalued — and then effectively ignored the latter through "zeroing." It thus created and inflated dumping margins from the imperfections in exchange rate movements.

50. The United States has admitted that the purpose of its departure from the normal price comparison methodology was to increase the dumping margins.[26] It claims that this methodology was appropriate to address a situation of currency depreciation that would otherwise "disguise" dumping margins.[27] This argument has it backwards, however. The "correct" dumping margins are those that are calculated in accordance with the requirements of the Anti-Dumping Agreement. If

[25] US First Submission, para. 109; para. 137; see also para. 155 ("determined that [currency devaluation] had as much of an effect on comparability of transactions as did physical characteristics, levels of trade or high inflation").

[26] US First Submission, para. 137, 139, 155.

[27] US First Submission, para. 137.

such calculations result in low dumping margins, then the only permissible conclusion is that there were low dumping margins — and not that higher margins were somehow disguised. An effort to inflate the dumping margins in such circumstances is not a permissible remedy for "disguised" dumping. It is a violation of the Agreement.

51. The Anti-Dumping Agreement does establish specific rules for addressing currency movements in the dumping margin calculations. As a general matter, Article 2.4.1, which is the only provision in the Anti-Dumping Agreement that addresses currency movements, requires the investigating authorities to disregard currency fluctuations. Article 2.4.1 does expressly authorize a change from the normal methodology in cases involving sustained currency appreciation. But Article 2.4.1 does not permit any change from the normal methodology for currency depreciation. The multiple-averaging methodology is nothing more than an attempt to circumvent the requirements of Article 2.4.1 — by adjusting the calculation methodology for a currency depreciation even though Article 2.4.1 does not permit such a modification.[28]

52. This violation led to particularly unfair results in these cases, in contravention of the "fair comparison" requirement of Article 2.4. The US methodology excluded from the price comparisons the very sales that were the basis of petitioners' injury claims: the sales late in the investigation period. A price comparison that excluded the most relevant sales cannot be said to be fair.[29] In response, the US Submission merely states that Korea's objection "has no bearing" on Article 2.4, because it addresses injury determinations that Korea is not currently challenging.[30] But that argument is not correct. Whether or not the injury determinations were legitimate, a calculation of the dumping margin that effectively excluded the period that was the basis for the injury determination is plainly unfair and cannot be upheld under the "fair comparison" requirement of Article 2.4.

53. In short, the "multiple averaging" methodology used by the United States is inconsistent with (1) the requirements of Article 2.4.2 requiring the comparison of a single weighted-average normal value to a single weighted-average export price, (2) the provisions of Article 2.4.1 which permit adjustments to the dumping calculation methodology only for sustained appreciation in the exporter's currency and not for depreciations, and (3) the "fair comparison" requirement of Article 2.4.

54. Finally, please allow me to make an aside here to clarify a point obfuscated by the US Submission: Korea does not argue that Article 2.4.2 precludes Members from calculating separate averages for different products.[31] That is a very different issue from dividing and recombining the investigation period, and it is not in dispute here. A ruling by this Panel that clarified that Article 2.4.2 prohibits splitting the investigation period into sub-periods would have no effect on Members' ability to calculate separate averages for separate products.

D. THE "DOUBLE CONVERSION" OF DOLLAR-DENOMINATED LOCAL SALES

55. I shall next turn to the third major issue: the "double conversion" of dollar-denominated local sales to won and back to dollars at a different exchange rate.

1. Background

56. Most of POSCO's sales in Korea are denominated in won. But some of POSCO's sales in Korea are denominated in dollars instead. These are known as "local sales.[32]

[28] See Korea's First Submission, paras. 4.49 - 4.53.
[29] See Korea's First Submission, paras. 4.59 - 4.63.
[30] US First Submission, para. 167 n. 151.
[31] See US First Submission, para. 153.
[32] See Korea's First Submission, paras. 3.49 - 3.62.

57. When calculating normal value, the United States refused to use the dollar value of Korea's local sales. Instead, the United States converted the dollar value into won at one exchange rate, calculated normal value in won, and then converted the won normal value into dollars at a different exchange rate. The potential for distortion is obvious. In fact, an example set forth in paragraph 3.58 of Korea's Submission demonstrates how this methodology increased the normal value of one actual sale by more than 70%.

58. Let me try to explain the reason for this distortion. The United States determined the won amount of these sales using POSCO' s internal conversion, which converted the dollars into won using the official Korean Exchange Bank rate on the date of the invoice for the *home-market* sale. But the United States then converted the won amount back into dollars using the Federal Reserve exchange rate on the date of the *US* sale. By using the exchange rate from one date to convert the dollar price into won, and then using a different exchange rate for a different date to convert the won amount back into dollars, distortion was inevitable.

59. The United States attempts to defend this methodology by arguing that the local sales were really made in won, so that the United States only made one conversion from won to dollars.[33] That view is simply not correct, and it is not supported by the facts of this case.

60. The evidence shows that local sales are negotiated in a foreign currency (typically, US dollars), and invoiced in that same currency. On the payment date, the customer converts the dollar amount due into won at the market rate published by the official Korean Exchange Bank, and pays POSCO the resulting amount in won. Because the won amount is determined by applying the exchange rate on the date of payment to the dollar amount shown on the invoice, it is clear that the true economic value of the invoice is fixed by the dollar amount.

61. The United States claims that it acted appropriately in ignoring the dollar amount shown on the invoice, because the invoices also showed an amount in won. It should be emphasized, however, that the won amounts shown on the invoices were not the amounts that the customer actually paid. Instead, the won amount shown on the invoice was simply an accounting convenience, since the transactions have to be recorded in won in POSCO's accounting records. As mentioned, the actual won amount of the payment was determined by multiplying the dollar price shown on the invoice by the exchange rate on the date of payment. That amount did not correspond to the won amount shown on the invoice, which was calculated using an earlier and different exchange rate.

62. This point is illustrated by the sample accounting entries at paragraph 3.54 of Korea's Submission (which, I should mention, have been revised from our initial submission to correct a typographical error). Those tables show that the economic value for local sales is fixed in dollars at the time of sale. Significantly, this accounting was verified by the Department of Commerce during the investigations, and it has not been disputed by the United States in this proceeding.

63. It is clear, then, that the prices for the local sales were really fixed in dollars, and not in won. Nevertheless, the United States treated these sales as if the won amounts shown on the invoices were the real prices - even though those won amounts were simply an accounting convenience and did not correspond to the amounts actually paid by the customer. By the same token, the United States simply ignored both the dollar prices shown on the invoices (which determined the amount actually paid) and the actual amount in won that the customer paid.

[33] US First Submission, para. 172 ("The United States also concluded . . . that these home market sales were in Koran won, not US dollars.").

2. Korea's Arguments

64. Article 2.4.1 only permits currency conversion when "require[d]" for a comparison under Article 2.4. Clearly, a "double conversion" is not required. The local sales are valued in US dollars and they can be compared with other US dollar sales without need for conversion to won and back.[34]

65. The "double conversion" also denied POSCO the "fair comparison" required by Article 2.4. The United States did not compare export price to normal value, but to an inflated normal value. The price comparisons were not based on POSCO's actual prices, but on prices fabricated by the United States through the unnecessary application of distortive exchange rates.[35]

66. The United States attempts to avoid these problems by repeating that its calculations used the exchange rate on the date of sale, as requested by POSCO and required by Article 2.4.[36] That statement is disingenuous. The problem in this case is not that the United States selected the wrong exchange rate. Rather, the problem is that the United States used a double conversion, applying the exchange rates in an inconsistent manner. The inconsistency arose because the United States made the final conversion from won to dollars using not the exchange rate on the date of the home-market sale (which had been used to calculate the won amount), but the exchange rate on the date of the US sale (which could differ considerably from the exchange rate used to calculate the won amount). The mere repetition of the fact that the United States used the exchange rate on the "date of sale" does not cure the problem caused when one "date of sale" is used for the initial conversion from dollars to won, and another "date of sale" is used for the conversion back from won to dollars.

67. Finally, it should also be noted that the "double conversion" is inconsistent with established US practice. As explained in Korea's Submission, the United States has a well-established policy of accepting prices and charges in the currency in which they are made. In *Roses from Colombia*, for example, the United States properly declined to "double convert" the home-market sales that were priced in dollars. The United States departed from that practice here. Its reasons for doing so made no sense. The many problems with the US reasoning are detailed in Korea's Submission.[37] For now, I'd like to emphasize only one key point. The US Submission admits that its stated rationale for making the "double conversion " is in error. Hidden in Footnote 161 is the admission that "Korea is correct that the Department mistakenly used adjusted exchange rates in the SSPC case.[38] That footnote goes on to explain why the United States considers that its error does not matter. But those explanations are irrelevant. The United States has conceded that its anti-dumping measures are based on a faulty rationale.

E. PROCEDURAL ISSUES

68. In addition to the substantive errors that I have already discussed, the United States also failed to comply with the procedural requirements of the WTO with respect to each of the three main issues before this Panel. In the interests of time, I will not belabour these procedural points. Instead, I will simply refer the Panel to the detailed discussion in Korea's Submission, and will of course be happy to answer any questions the Panel may have about them.[39]

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[34] See Korea's First Submission, paras. 4.66 - 4.69.
[35] See Korea's First Submission, paras. 4.83 - 4.88.
[36] See, e.g., US First Submission, para. 175.
[37] See Korea's First Submission, paras. 4.70 - 4.82.
[38] US First Submission, para. 173 n. 161.
[39] See Korea's First Submission, paras. 4.35 - 4.42, 4.54 - 4.58, 4.70 - 4.82.

F. RESPONSES TO ARGUMENTS IN THE US SUBMISSION

1. The "Burden of Presenting a *Prima Facie* Case"

69. I shall now respond preliminarily to several general arguments made in the US Submission, beginning with the "burden of presenting a *prima facie* case."

70. The US Submission states that a complaining party "bears the initial burden of coming forward with evidence and argument that establishes a *prima facie* case of a violation.[40] This statement, while true, is wholly irrelevant. Korea *has already* borne that burden. Korea has come forward with evidence and argument that establishes a *prima facie* violation. Although the US Submission introduces contrary argument on certain points, it does not dispute that Korea has met its initial burden. And, considering the ample evidence and argument submitted by Korea, the United States could not do so.

71. Instead, it seems that the United States had a different purpose for making this statement. The US Submission set up a phantom argument that Korea did not make in an attempt to obscure a key point in this case.

72. The United States argues at great length that Korea's burden is not affected by the fact that anti-dumping measures are a derogation from the trade-liberalization purposes of the WTO.[41] The US argument implies that Korea argued that it is exempt from the initial burden of presenting a *prima facie* case. But Korea never made such an argument. To the contrary, Korea introduced considerable evidence and argument to meet its initial burden.

73. So, what is the significance of the fact that anti-dumping measures are a derogation from the main thrust of the WTO? The authority to impose anti-dumping duties is narrowly limited to circumstances where there is injurious dumping, and anti-dumping duties cannot exceed the dumping margin. This has always been the rule under GATT 1947, and it is very explicit in Articles 1 and 9.3 of the Anti-Dumping Agreement. These limitations are essential to the proper functioning of the WTO regime. Without these limitations, Members could readily circumvent their tariff bindings and most-favoured-nation commitments simply by labeling any new duties as "anti-dumping duties" without regard to whether there was any dumping to offset. It is precisely because of the centrality of calculating the dumping margin that the substantive and procedural rules governing that calculation are so important. The detailed rules of the Anti-Dumping Agreement must, therefore, be interpreted in accordance with this object and purpose.

2. The Standard of Review

74. The US Submission also complains that "Korea invites the Panel to step into the shoes of the DOC and engage in a *de novo* review of the facts.[42] That statement has no basis. Korea never invited *de novo* review.

75. To the extent that there are factual disputes, Korea expects that this Panel will assess the facts of this matter in accordance with Article 17.6(i) of the Anti-Dumping Agreement. Under that Article , factual conclusions are to be rejected if the facts were not established properly or they were not evaluated objectively and without bias. Thus, contrary to the United States' suggestion, the Anti-Dumping Agreement does not preclude the Panel from reviewing factual conclusions altogether. To

[40] US First Submission, para. 36.
[41] US First Submission, paras. 37, 39.
[42] US First Submission, para. 27.

the contrary, Article 17.6(i) expressly requires that factual conclusions be reviewed under an appropriate standard.

76. In any event, there actually are very few, if any, facts in dispute. For all of the substantive issues, the question is solely whether the US methodology for dealing with the facts conforms to its WTO obligations.

77. As a separate matter, the United States also misstates the rule for construing the Anti-Dumping Agreement in Article 17.6(ii). The United States contends that "the relevant question in every case is not whether the challenged determination rests upon the best or the 'correct' interpretation of the Anti-Dumping Agreement, but whether it rests upon a 'permissible interpretation' (of which there may be many).[43] That argument virtually ignores the first sentence of Article 17.6(ii), while distorting the meaning of the second. In fact, this Panel is expressly charged with interpreting the Anti-Dumping Agreement in accordance with customary rules of treaty interpretation. If that process leads the Panel to conclude that there is a correct interpretation, then an anti-dumping measure based on a different interpretation cannot stand. Only in those rare circumstances where the interpretative process leads the Panel to conclude that "there is more than one permissible interpretation," does the second sentence of Article 17.6(ii) apply.

3. Administration of the Antidumping Laws under Article X:3(a) of GATT 1994

78. Article X:3(a) of GATT 1994 requires each WTO Member to "administer … its laws, regulations, decisions and rulings" relating to duties and other restrictions on imports (such as anti-dumping measures) "in a uniform, impartial and reasonable manner.[44] The United States contends that somehow this provision did not restrict the ability of the Department of Commerce to interpret and apply the US antidumping laws in these cases in a manner that was both inconsistent with past practice and highly arbitrary.[45]

79. That proposition is clearly without merit. When the Department makes its determinations in antidumping investigations as the US "administering authority," it plainly is "administering" the US laws (which, in the US common-law system, include not only codified statutes and regulations, but also past judicial and agency decisions). If it applies those laws inconsistently from case to case in reliance on flawed or arbitrary distinctions, then it cannot be said to be "administer[ing] … its laws, regulations, decisions and rulings … in a uniform, impartial and reasonable manner."

80. Of course, an administering authority must have the ability to tailor its decisions to the facts of each case. Article X:3(a) clearly does not preclude that. However, it does require that the decisions in each case be reached in a "uniform, impartial and reasonable manner." When the Department of Commerce simply ignores past precedent, or when it refuses to follow past decisions based on meaningless, arbitrary or erroneous distinctions, then it has not complied with Article X:3(a), and a Panel should not permit its actions to pass unchallenged.

4. POSCO's Decision Not to Seek Domestic Judicial Review

81. The United States refers to domestic judicial review as if that were the proper forum to decide Korea's claim that the United States has failed to administer its anti-dumping laws and regulations in the "uniform, impartial, and reasonable" manner required by GATT Article X:3(a)[46] That cannot be correct. GATT 1994 is a "covered agreement," and dispute settlement before this Panel is the proper

[43] US First Submission, para. 35.
[44] See Korea's First Submission, paras. 4.35 - 4.37.
[45] See, e.g., US First Submission, paras. 41-48.
[46] See, e.g., US First Submission, para. 51.

forum to hear Korea's claims. This Panel has the responsibility to determine whether the United States has administered its anti-dumping laws and regulations in a "uniform" and "reasonable" manner. That inherently entails consideration of whether the decisions at issue are consistent with previous US decisions and of the reasoning for any departures.

82. Domestic appeals and WTO dispute settlement are fundamentally different. They are between different parties, are established under different systems of law, serve different purposes, follow different procedures, apply different substantive rules, and offer different remedies. In these circumstances, a decision by POSCO whether or not to pursue a domestic appeal in the United States can have no impact on the Korean government's ability to pursue its sovereign rights through WTO dispute settlement.

83. Therefore, despite the US suggestion, *POSCO's* decision not to pursue a domestic appeal is wholly irrelevant to *Korea's* claims under Article X:3(a).

5. Remedies

84. Finally, the United States opposes Korea's request for the Panel to suggest that the United States revoke its anti-dumping orders concerning Korean Plate and Sheet. The United States argues that revocation "far exceeds what would be necessary to bring these measures into conformity with the [Anti-Dumping] Agreement.[47] That argument, however, ignores the plain dictates of Article 1 of the Anti-Dumping Agreement. Under Article 1, antidumping measures may be applied "only … pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." If the United States did not conduct its investigations of Plate and Sheet in accordance with the provisions of the Agreement, then it does not have the authority, under Article 1, to maintain antidumping measures. The proper remedy for the violations described in Korea's Submission is, therefore, the revocation of the measures.

G. CONCLUSION

85. In conclusion, the anti-dumping measures imposed by the United States against Plate and Sheet, and the US investigations leading to the imposition of those measures, are inconsistent with numerous substantive and procedural requirements of the WTO Agreements. This Panel now has the opportunity and responsibility to uphold WTO rules by finding the US anti-dumping measures inconsistent with those rules and by suggesting that the United States revoke those measures.

[47] US First Submission, para. 196.

ANNEX 1-3

WRITTEN QUESTIONS FROM KOREA

FIRST MEETING OF THE PANEL

(13-14 June 2000)

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I. UNPAID SALES

1. In its oral statement, the United States describes that it classified POSCO's US sales through POSAM as constructed-export-price ("CEP") sales, while it classified POSCO's direct sales to US customers as export-price ("EP") sales.[1] The United States then describes that it made (or did not make) the following adjustments for "bad debt" expenses:

- For the CEP sales, the United States deducted the allocated US "bad debt" expense from the price to the first unaffiliated customer.[2]

- For the CEP sales, the United States did not add the allocated US "bad debt" expense to the normal value that was compared to the constructed export price.[3]

- For the EP sales, the United States did not deduct the allocated US "bad debt" expense from the sales price to the first unaffiliated customer.[4]

The United States did not address the fourth circumstance, however. In other words, the United States did not state whether, for those sales classified as EP sales, the allocated US "bad debt" expense was added to the normal value that was compared to the export price. Would the United States please confirm whether the allocated US "bad debt" expense was added to the normal value that was compared to the export price for the sales classified as "EP" sales?

2. If the allocated US "bad debt" expense was added to the normal value that was compared to the export price for EP sales, is it the position of the United States that this adjustment was authorized by Article 2.3 of the Anti-Dumping Agreement?

3. Is it the US position that there are no limits on adjustments that may be made under Article 2.3 of the Anti-Dumping Agreement? If there are limits, what are they?

4. The United States contends that, if "the seller agrees to sell on credit ... [it] accepts a credit expense, including the *risk* of non-payment."[5] It also states that, in this case, "POSCO agreed to sell to this US customer on credit and in doing so accepted the *risk* of non-payment as a condition of sale."[6] The United States contends that POSCO's acceptance of this *risk* "is sufficient to warrant including bad debt in an Article 2.4 adjustment."[7] In light of these assertions,

(a) What evidence was there in the Plate and Sheet cases regarding the risk of non-payment at the time that POSCO made its US sales to the ABC Company (and, according to the United States, agreed to accept the risk of non-payment)?

(b) Was there any evidence in the Plate and Sheet cases demonstrating that, at the time POSCO made its sales to the ABC Company, there was a difference in the risk of non-payment for sales to customers in the United States and for sales to customers in Korea?

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[1] *See* US Oral Statement, paras. 9 and 10.
[2] *See* US Oral Statement, para. 9.
[3] *See* US Oral Statement, para. 11.
[4] *See* US Oral Statement, para. 9.
[5] US Oral Statement, para. 15 (emphasis added).
[6] US Oral Statement, para. 17 (emphasis added).
[7] US Oral Statement, para. 17.

(c) If there was no difference in the risk of non-payment for sales in Korea and the United States at the time POSCO made its sales, what is the basis for claiming that there was a difference in the conditions and terms of sale?

5. Does the actual bad debt experience that occurs after a sale is made provide an accurate measure of the risk of bad debt before the sale was made?

6. The United States asserts that the risk of non-payment is equivalent to the risk that a warranty expense will be incurred. The past decisions by the United States have recognized that warranty expenses may fluctuate from year to year and that, where there are fluctuations in warranty expenses, the use of a historical average is appropriate to avoid distortions. The standard questionnaire used by the Department of Commerce therefore requests information on the historical warranty expense experience for sales in the home market and the United States. Did the Department of Commerce request information on POSCO's historical bad debt experience in the home market or the United States in the Plate and Sheet cases? Did the United States evaluate whether the bad debt experience during the investigation periods in those cases was consistent with POSCO's historical experience?

7. The United States has contended that, under US law, adjustments for differences in "conditions and terms of sale" are referred to as "circumstance-of-sale" adjustments.[8] The Department of Commerce's regulations state that circumstance-of-sale adjustments will normally be made only for "direct selling expenses" (or for expenses that the seller assumes on behalf of the buyer).[9] In these circumstances, what is the significance of the finding by the Department of Commerce that the "bad debt" expense on POSCO's US sales was a "direct" selling expense?

8. What evidence is there on the records of the Plate and Sheet investigations to indicate that POSCO (or any of its affiliates) experienced actual bad debt expenses on any sales of Plate or Sheet to the United States prior to the sale to the ABC Company?

9. Is it the position of the United States that investigating authorities may include any export sales in the calculation of export price, no matter how aberrational they are and no matter how much their inclusion distorts the calculation of the dumping margins? Is it the US position that there are no limits at all on the investigating authorities' discretion to include export sales in the price comparison, including the "fair comparison" requirement of Article 2.4?

II. MULTIPLE AVERAGING

1. In employing its "multiple-averaging" comparison methodology (*i.e.*, comparing sub-period averages to sub-period averages and combining the results) in the Plate and Sheet cases, did the Department of Commerce treat the dumping margins for sub-periods that had negative margins as if they were zero margins? In other words, did the United States employ the practice known as "zeroing"?

2. Article 2.4 specifically refers to a number of "differences" for which adjustments are permitted because they affect "price comparability". This list includes differences in physical characteristics and differences in levels of trade. Where does Article 2.4 indicate that differences in the timing of sales constitute "differences affecting price comparability"?

[8] *See* US Oral Statement, para. 11.
[9] *See* 19 C.F.R. ' 410(b).

III. DOUBLE CONVERSION OF LOCAL SALES

1. If the prices for the "local sales" were fixed in dollars, as POSCO contended, would it have been appropriate for the Department of Commerce to base its normal-value calculations on won amounts shown on the invoices that did not correspond to the amounts actually paid? Would it have been appropriate in such circumstances to base the normal-value calculations on the US dollar prices set forth on the invoices?

2. When the United States reviewed the local sales during the verifications in the Plate and Sheet cases, did it confirm that the dollar prices shown on the invoices matched the dollar prices reported by POSCO?

3. The United States admits that POSCO told it during the course of both the Plate and Sheet investigations that the prices for its "local sales" were fixed in dollars and not in won.[10] The United States also admits that, in the verification in the Sheet case, the Department of Commerce obtained evidence confirming that the amount the customer actually paid for these "local sales" was based on the dollar prices shown on the invoices, and not on the won amounts shown on the invoices.[11] Was there any evidence indicating that any Korean customer who purchased Plate or Sheet in a "local sale" actually paid the won amount shown on the invoice? If there was no evidence that any Korean customer who purchased Plate or Sheet in a "local sale" actually paid the won amount shown on the invoice, what evidence was there to refute POSCO's testimony that the prices for these sales were fixed in dollars, and not in won?

4. Is it the normal practice of the Department of Commerce to verify that the amounts shown on the invoices to home-market customers correspond to the amounts actually paid by those customers? Is there any evidence that the Department of Commerce departed from that practice in the Plate and Sheet investigations?

5. Were the Plate and Sheet investigations the first anti-dumping investigations where some of the home-market sales were dollar-denominated local sales? Does the United States agree or disagree with the statement on para 4.72 of Korea's First Submission that "neither the United States nor the petitioners in the [Plate and Sheet] investigations cited a single case before the investigations at issue where the United States treated a home-market sale priced in dollars as if it had been priced in the local currency"?

6. Does the United States agree that the records of the Plate and Sheet cases show that POSCO's "internal exchange rate" was the rate published by the Korean Exchange Bank? If not, please describe the evidence to the contrary in the record.

7. Is it the US position that the fact that the currency conversion was made for accounting purposes in a home-market sale is determinative of, or relevant to, whether that sale was valued in dollars or won? If so, please explain the basis for that position.

[10] *See* US Oral Statement, paras. 36 and 38.
[11] *See* US Oral Statement, para. 39.

ANNEX 1-4

RESPONSES OF KOREA TO QUESTIONS POSED BY THE PANEL AND BY THE UNITED STATES

FIRST MEETING OF THE PANEL

(29 June 2000)

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II. RESPONSES OF KOREA TO QUESTIONS POSED BY THE UNITED STATES 142

NOTE: In this submission, including the exhibits, Korea has placed information which POSCO has previously designated as business proprietary information in brackets ("{ }"). This information has been omitted and the brackets left in the text."{ }"

This submission sets forth the responses of the Republic of Korea to the questions posed by the Panel during the First Meeting of the Panel. For the convenience of the Panel and the Parties, each of the questions is reproduced below, followed by Korea's response.

As an initial matter, Korea notes that several of the Panel's questions inquire about facts on the record of the SSPC and SSSS investigations. Korea respectfully submits that, if the US anti-dumping measures are to be upheld, they must be upheld on the basis of the reasons articulated in the final determinations and the final analysis memoranda. The United States may not introduce *post hoc* arguments to support its actions. Nor may it now rely on facts in the record that it did not rely upon in the final determinations and the final analysis memoranda.

In the recent *High Fructose Corn Syrup* case under the Anti-Dumping Agreement, the Panel noted that "the only discussion concerning the retroactive application of anti-dumping duties is contained in" one paragraph of the final determination, which had "no analysis" of the relevant facts. On this basis, the *HFCS* Panel found that the Mexican investigating authority (SECOFI) had failed to provide adequate support for its ruling, and the Panel expressly declined to look at other parts of the record for possible support.[1] The *HFCS* Panel also cited the Tokyo Round anti-dumping decision in *Polyacetal Resins* for the proposition that allowing *post hoc* arguments would undermine the goals of "transparency" and "orderly dispute settlement."[2]

Accordingly, Korea respectfully submits that this Panel should not allow the United States to defend its measures by pointing to any facts or reasons not mentioned in its final determinations or analysis memoranda — although the Panel may consider other facts in the record as necessary to evaluate whether the United States properly established and evaluated the facts within the meaning of Article 17.6(i). For that reason, Korea will answer questions about the record principally with respect to the facts relied upon in the US final determinations and analysis memoranda, and will also provide additional information about other record evidence as appropriate.

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[1] *See Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R, adopted 24 Feb. 2000, para. 7.192, which stated:

> In this case, we have no record of SECOFI's establishment or evaluation of the facts concerning this issue. [The one relevant paragraph] cannot reasonably be read as findings and conclusions by SECOFI establishing and evaluating facts leading to the conclusion that in the absence of provisional measures, material injury to the Mexican sugar industry would have occurred. Moreover, we cannot agree that it is our task to discern the necessary findings and conclusions from the entirety of the analysis in the final determination, the preliminary determination, or the entire case record. Therefore, we conclude that the retroactive levying of final anti-dumping duties in this case is inconsistent with Article 10.2 of the AD Agreement.

[2] Id. at para. 7.104 n. 592, citing *Korea — Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, Report of the Panel, ADP/92, adopted on 27 Apr. 1993, paras. 209-10 ("where the Panel noted that the purpose of the requirement for explanations of final determinations in public notices . . . was transparency, that this purpose would be frustrated if, in dispute settlement, the country imposing the measure could rely on reasons not set forth in the public notice, which latter would be inconsistent with orderly dispute settlement, because a full statement of reasons 'enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism . . . was appropriate . . .'.").

I. RESPONSES OF KOREA TO QUESTIONS POSED BY THE PANEL

A. GENERAL

Q.1. (For the United States) Does the United States agree with Korea that the first sentence of Article 2.4 represents a "free-standing and substantial" rule? If not, please explain your view, taking into account the differences between the Tokyo Round AD Code and the WTO AD Agreement in this respect.

The contrast between the current first sentence of Article 2.4 and the predecessor provision in the Tokyo Round Anti-Dumping Code is striking. The Tokyo Round Code did not contain a separate sentence commanding that "[a] fair comparison shall be made between the export price and the normal value," as the current Anti-Dumping Agreement provides. Instead, the Tokyo Round Code provided only that,

> In order to effect a fair comparison ... the two prices shall be compared at the same level of trade ... and in respect of sales made at as nearly as possible the same time.[3]

The language of the Tokyo Round Code thus explicitly linked the "fair comparison" requirement to the requirements that the comparison be made between sales at the same level of trade and at the same time. In other words, before the Uruguay Round, a comparison that complied with the other requirements of the Anti-Dumping Code was deemed to be "fair."[4]

There is no such linkage in the current Anti-Dumping Agreement. Instead, the "fair comparison" requirement is stated in a sentence that is independent of the other requirements of Article 2.4. It follows, then, that the "fair comparison" requirement of the first sentence of Article 2.4 must be construed as imposing disciplines other than those required by the other provisions of Article 2.4. Any other interpretation would render the first sentence of Article 2.4 "inutile."[5]

B. MULTIPLE AVERAGING

Q.1. (For Korea) In its first submission (para. 4.46), Korea argues that Article 2.4.2 "does not allow for the comparison of 'multiple averages' to 'multiple averages'." In its oral statement at the first meeting, however, Korea states (para. 54) that it does not argue that Article 2.4.2 precludes Members from calculating separate averages for different products. In light of the nature of Korea's arguments (focus on the singular "a weighted average" and use of the word "all") please explain how Article 2.4.2 can be interpreted to permit "multiple averaging" based on product type while not permitting multiple averaging based on

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[3] Tokyo Round Anti-Dumping Code, Article 2:6.

[4] *See EC — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Report of the Panel, ADP/137, adopted on 30 Oct. 1995, para. 492 ("the wording of Article 2:6 [of the Tokyo Round Code] 'in order to effect a fair comparison' made clear that if the requirements of that Article were met, any comparison thus undertaken was deemed to be 'fair.'").

[5] In this regard, it is instructive to recall Professor Franck's conclusion about the significance of the free-standing "fair comparison" requirement in the first sentence of Article 2.4:

> Article 2.4 of the WTO Anti-Dumping Agreement calls for a WTO panel to determine not only whether the anti-dumping measures at issue result from an anti-dumping investigation that satisfied the substantive and procedural requirements spelled out elsewhere in the same Agreement (including elsewhere in Article 2.4), but should also — and most fundamentally — determine whether the comparison of export price to normal value was "fair."

Franck Memorandum, ROK Ex. 54, at 1-2.

sub-periods. Please explain in addition Korea's view about the consistency with Article 2.4.2 of multiple averaging in the context of level of trade and quantities.

There is nothing in the Anti-Dumping Agreement that permits the investigating authority to divide the investigation period into separate sub-periods to account for currency movements. There are provisions that permit separate dumping calculations for different products and for different levels of trade.

Article 2.4.2 provides that the average normal value must be compared to the average price for "comparable export transactions." The word "comparable" means, in essence, "capable of being compared."[6] The determination of whether sales should be included in the average export price and normal value (for any product comparison) must, therefore, be based on an analysis of the limitations on comparisons imposed by the Anti-Dumping Agreement. Transactions that can be compared under the provisions of the Anti-Dumping Agreement are "comparable" transactions. Transactions that cannot be compared under the provisions of the Anti-Dumping Agreement are not "comparable" transactions.

There are, of course, a number of substantive limitations on the transactions that may be included in comparisons under the Anti-Dumping Agreement:

First, Article 2.1 of the Anti-Dumping Agreement only permits comparisons of products with identical (or, in the absence of identical, the most similar) physical characteristics.[7] Sales of products with less similar physical characteristics are, therefore, not "comparable transactions."

Second, the second sentence of the *chapeau* of Article 2.4 only permits comparisons at the same level of trade. This means that sales at different levels of trade are not "comparable transactions."

Third, the second sentence of the *chapeau* of Article 2.4 also requires that comparisons be made "in respect of sales at as nearly as possibly the same time." This means that when the transaction-to-transaction methodology is used, sales in different parts of the investigation period may not be "comparable transactions." Similarly, when the average-to-average methodology is used, the sales in each market must, *on average*, have been made at the same time in order to be considered "comparable transactions."

Fourth, the first sentence of the *chapeau* of Article 2.4 — which requires that a "fair comparison" be made — only permits comparisons of transactions that may fairly be compared. This mean that transactions whose comparison would lead to unfair results are not "comparable transactions."

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[6] The dictionary defines "comparable" as:

1. capable of being compared: **(a)** having enough like characteristics or qualities to make comparison appropriate — *usu.* used with *with* ... **(b)** permitting or inviting comparison often in or two salient points only — *usu.* used with *to* ...

2. suitable for matching, coordinating or contrasting **:** EQUIVALENT, SIMILAR ....

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY.

[7] Article 2.1 provides that "a product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the *like product* when destined for consumption in the exporting country." As the United States has recognized in its implementation of this provision, the phrase "like product when destined for consumption in the exporting country" means the product that is identical (or, in the absence of an identical product, most similar) in physical characteristics to the exported product. *See* Tariff Act of 1930, as amended, § 771(16), 19 USC. § 1677(16) (definition of "foreign like product.") (ROK Ex. 1).

These substantive limitations define the transactions that are "comparable" within the meaning of the Anti-Dumping Agreement. If transactions may be included in the comparisons under these rules, then they are "comparable" (*i.e.*, "capable of being compared") under the Agreement.

On the other hand, there are no provisions in the Anti-Dumping Agreement that limit, due to movements in exchange rates, the transactions that may be included in comparisons. Article 2.4.1 is the only provision of the Anti-Dumping Agreement addressing exchange rates. That provision does require investigating authorities to adjust the dumping calculation methodology to ensure that currency fluctuations are ignored and that exporters are "allowed" 60 days to adjust export prices in response to a sustained movement in the exchange rate. However, the provisions of Article 2.4.1 do not in any way limit the ability of the investigating authority to compare transactions before and after the currency fluctuation or sustained movement. They do not indicate that sales before the fluctuation or sustained movement cannot be compared to sales during or after the fluctuation or sustained movement.

Indeed, the United States has specifically recognized this fact. In its first submission, it specifically rejected the argument that the Article 2.4.1 "establishes a limit on which transactions may be considered 'comparable' within the meaning of ... Article 2.4.2."[8]

Q.2. (For Korea) Is it the view of Korea that Article 2.4.2 prohibits multiple averaging based on sub-periods in all cases, or only in cases where such averaging is asserted to be justified as a result of a devaluation? What is Korea's view about the consistency with Article 2.4.2 of multiple averaging based on sub-periods in the context of (a) high inflation in the exporting country; (b) differing proportional volumes of sales in the home and export markets combined with consistent upward or downward trends in global prices of a product during the POI?

The issue of the permissibility of a "multiple-averaging" methodology in situations involving high inflation or consistent upward or downward trends in global prices is not presented in this case. Nevertheless, Korea would note that those situations present different issues than the depreciation of a currency.

Most importantly, in circumstances where there is high inflation or consistent trends in global prices, there are discernible differences in the conditions and terms of sale — especially in the prices charged by a seller within a particular market. By contrast, a currency depreciation does not require a seller to change the prices it charges within a market. Instead, it simply involves a change in the tool that is used by investigating authorities to facilitate the comparison of export price and normal value by putting both numbers in the same currency.

The evidence in these cases demonstrates that POSCO's prices (and other sales terms) in Korea and in the United States changed little throughout the investigation periods — despite the depreciation of the Korean won. In other words, there was no evidence of a change in POSCO's selling practices due to the currency depreciation. Consequently, the analogy the United States has attempted to draw to situations involving high inflation or consistent price trends is not persuasive.

Q.3. (For Korea) In respect to Korea's claim that the use of multiple averages based on sub-periods is inconsistent with Article 2.4.2 of the ADP Agreement, is it Korea's view that it is always inconsistent with Article 2.4.2 to calculate weighted averages for sub-periods within the period of investigation? Or does Korea consider that the use of multiple averages is only prohibited by Article 2.4.2 where the methodology that is then used to combine those weighted averages to arrive at an overall margin of dumping involves "zeroing"? If the latter is the case, please explain how the issue of "zeroing" is within the Panel's terms of reference.

[8] US First Submission, para. 142.

As explained in Korea's First Submission, the Anti-Dumping Agreement does not permit the practice of splitting the investigation period into separate sub-periods for purposes of calculating the average normal value and export price. As a practical matter, however, the splitting of the period would have had little significance if the United States had not combined the margins for each sub-period by "zeroing" any negative margins. The adverse effect of the "multiple-averaging" methodology was, therefore, a direct result of the practice of "zeroing."

In this connection, it may be useful to clarify what Korea does and does not claim with respect to "zeroing." Korea has not claimed in this proceeding that "zeroing" *per se* violates the Anti-Dumping Agreement. That would be outside the Panel's terms of reference.

On the other hand, Korea does claim that the "multiple averaging" methodology used by the United States violates the Anti-Dumping Agreement. To the extent that "zeroing" was an integral part of the "multiple averaging" methodology, it is properly within the Panel's terms of reference, and it is properly the subject of Korea's arguments.

It clearly is possible for the Panel to address the issue of "multiple averaging" without addressing the issue of "zeroing" *per se*.[9] For example, "zeroing" may be permitted in the special circumstances where an average-to-transaction methodology is permitted. Or, "zeroing" may be permitted where separate dumping margins are calculated for different "like products" or for different "levels of trade." However, those issues are not presented here. Instead, the issue presented here is whether the United States was permitted to inflate the dumping margins by splitting the investigation period, when the Anti-Dumping Agreement does not permit such a calculation.

Q.4. (For the United States) Please explain how, in the view of the United States, exchange rates can affect the comparability of export prices and prices in the market of the exporting country.

Under the Anti-Dumping Agreement, the exchange rate is simply a tool that is used to convert an amount in one currency into another when required for a price comparison.[10] As discussed above, in the response to question B.1, nothing in the Agreement suggests that movements in exchange rates are to affect the choice of transactions to be included in the comparison. As the *Cotton Yarn* panel observed, "The exchange rate in itself is not a difference affecting price comparability."[11]

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[9] In this regard, it is Korea's view that the requirement in Article 2.4.2 of a comparison of a single average normal value to a single average export price was intended, in large measure, to eliminate the problem caused by "zeroing." Prior to the negotiation of the current Anti-Dumping Agreement, a number of major users of anti-dumping laws (including the United States) regularly calculated dumping margins by comparing an average normal value to the export prices for individual transactions and then "zeroing" any negative margins found. This methodology was challenged under the Tokyo Round Anti-Dumping Code, and a number of WTO Members sought to prohibit this methodology in the Uruguay Round negotiations. The provisions of Article 2.4.2 represent a carefully negotiated bargain among the WTO Members concerning the methodology that is to be used to calculate dumping margins. *See* Terrence P. Stewart, ed., II *The GATT Uruguay Round: A Negotiating History, 1986 - 1992*" (1993) (ROK Ex. 77).

[10] Thus, Article 2.4.1 establishes the rules for selecting exchange rates that must be followed "[w]hen the price comparison under [Article 2.4] requires a conversion of currency...."

See EC — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, Report of the Panel, ADP/137, adopted on 30 Oct. 1995, para. 494 (an exchange rate "is a mere instrument for translating into a common currency prices that have previously been rendered comparable in accordance with the second sentence of [Tokyo Round Code] Article 2:6," the predecessor of Article 2.4 of the Anti-Dumping Agreement).

[11] *Cotton Yarn*, para. 494 (construing the Tokyo Round Code's predecessor provision of Article 2.4).

In short, the structure of the Agreement indicates that the exchange rate is to be considered only after the investigating authority has identified the "comparable transactions" — that is, the transactions that may be included in the comparison under the relevant provisions of the Anti-Dumping Agreement. Thus, the exchange rates cannot affect the "comparability" of export and home-market prices.

Q.5. (For Korea) The United States contends that Korea's fair comparison claim with respect to multiple averaging is in fact a claim under Article 3 of the AD Agreement which is outside the Panel's terms of reference. Please respond.

There is no basis for the US attempt to recast Korea's Article 2.4 "fair comparison" claim as belonging under Article 3.

Korea is not currently challenging the injury determinations made by the United States in the Sheet and Plate cases. Korea is challenging the methodology by which the United States determined the dumping margins that were, *inter alia*, used in the injury analysis. The calculation of those dumping margins is, of course, subject to the disciplines of Article 2 of the Anti-Dumping Agreement — including the "fair comparison" requirement of Article 2.4.

In this regard, it must be noted that the argument made by the United States invites inconsistency. If Korea were to challenge the US reliance in its injury analysis on improperly calculated dumping margins under Article 3, the US response would undoubtedly be that such issues must be addressed under Article 2. Or, to put it in more concrete terms, the US International Trade Commission (which is responsible for the injury analysis under US law) would undoubtedly argue that it simply takes the dumping margins announced by the Department of Commerce ("DOC") as a given, and it is not permitted to conduct its own separate dumping analysis. The United States should not be allowed to evade international scrutiny of its anti-dumping measures simply because it has bifurcated responsibility for administering its anti-dumping laws.

C. TREATMENT OF UNPAID SALES

Q.1. (For both parties) Were all of the sales to ABC Company in the plate and sheet investigations made through POSAM? If not, please provide details.

All of POSCO's sales to the ABC Company in the Plate and Sheet investigations were made through POSAM.

Q.2. (For both parties) Was there any evidence/argument in the record of the plate and/or sheet investigations relating to whether POSCO had any knowledge of ABC company's precarious financial condition at the time it made the sales in question? If so, please specify.

As noted in Korea's First Submission, the DOC specifically found that "at the time the [sales] were made, POSCO was not aware that the customer would declare bankruptcy."[12] The United States appears to concede this point.[13] All of the relevant evidence in the record of the Plate and Sheet investigations supports the conclusion that POSCO had no knowledge of the ABC Company's precarious financial condition at the time it made its sales.[14]

[12] *See* Korea's First Submission, para. 4.18 and n.101.
[13] *See* US First Submission, paras. 102-04.
[14] { }

Q.3. (For both parties) Does the record in the plate and/or sheet investigations contain any information regarding non-payment by either US or Korean customers other than ABC company? If so, please specify.

Significantly, there is no indication in the discussion of the "bankrupt sales" issue in either the final determinations or final analysis memoranda for SSPC or SSSS that the DOC considered evidence of other non-payments, in Korea or the United States, in deciding whether to make an adjustment for the unpaid sales to the ABC Company. The United States did not identify any evidence indicating that sales to US customers were inherently more risky than sales to home-market customers. The United States did not request or examine data concerning POSCO's historical bad debt experience in the two markets, from which an analysis of the risk of non-payment might be discerned.[15]

In both the Plate and Sheet investigations, the record clearly shows that POSCO had no prior non-payments on sales to the United States through its affiliated distributor, POSAM. This is true for all products, and not only for Plate and Sheet. POSAM did not even have a "bad debt" account.[16]

Korea is not aware of any record evidence as to whether POSCO ever had any non-payments on any sales to the United States through other channels. Korea observes that the mere existence of bad debt accounts in Korea covering worldwide exports would not in itself show that there had ever been any non-payments in the United States.

Q.4. (For the United States) The United States contends that, in respect of sales through POSAM, the United States deducted an allocated portion of the US bad debt expenses as part of the construction of the export price. Please indicate where in the record of the investigations this statement can be verified.

The record demonstrates that the United States deducted an allocated portion of the costs of the unpaid US sales from the sales prices to unaffiliated US customers for the sales made through POSAM. However, there is no indication in the final determinations or analysis memoranda that this adjustment was intended to "construct" the export price under Article 2.3, and not as an adjustment for "differences affecting price comparability" under Article 2.4.

It is significant that the DOC's final determinations indicated that the unpaid sales were being classified as a "direct" selling expense, and not as an "indirect" selling expense. Under US law, this was a signal that the DOC had determined that it would be appropriate to make a "circumstance of sale" adjustment for those expenses.[17] In its oral statement, the United States conceded that

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[15] If the United States had intended to make an adjustment for the differences in the costs of credit insurance (or for some other measure of the differences in risk of non-payment) in the two markets, it was required by the last sentence of Article 2.4 of the Anti-Dumping Agreement to "indicate to the parties in question what information [was] required." The record of the SSPC and SSSS cases does not contain any request from the DOC for information regarding either the differences in the costs of credit insurance or any other measures of the differences in the risks of non-payment in the two markets.

[16] *See* POSAM Verification Report (SSSS), at 7 (ROK Ex. 61) ("We also examined the accounts where other such negative invoices would have been recorded for both 1997 and 1998, and found no indication that POSAM had negated other sales invoices or recorded bad debt in these accounts. We also spoke with the accounting staff and reviewed the accounts on POSAM's computer system. We found no indication of the existence of a bad debt account, and no discrepancies with POSAM's response.").

[17] Thus, Section 351.410 of the DOC's regulations provides that:

> (a) *Introduction*. In calculating normal value the Secretary may make adjustments to account for certain differences in the circumstances of sales in the United States and foreign markets. (*See* section 773(a)(6)(C)(iii) of the Act.) This section clarifies certain

"circumstance of sale" adjustments under US law correspond to an adjustment under Article 2.4.[18] Consequently, a finding by the DOC that unpaid sales were "direct" selling expenses was necessarily a finding that an adjustment under Article 2.4 would be appropriate for them.

It is also significant that the United States conceded during the Panel's first meeting that the DOC made the adjustment for the cost of non-payment *both* to the indirect "constructed export price" sales *and* to the direct "export price" sales. The adjustment made to comparisons involving direct "export price" sales for the cost of non-payment cannot be justified under Article 2.3, because Article 2.3 only applies to indirect "constructed export price" sales through an affiliated importer. Consequently, the adjustment to the comparisons involving direct "export price sales" must be justified, if at all, under Article 2.4.

The most charitable interpretation, then, is that the United States now intends to argue that the adjustment to the indirect "constructed export price" sales was made under Article 2.3, while the adjustment to the comparisons involving direct "export price" sales (which was calculated in the *same* manner based on the *same* factual situation as the adjustment to indirect sales) was made under Article 2.4. Such an argument is, however, untenable.

The language of Article 2.4 addressing the adjustments for "differences affecting price comparability" does not make any distinction between direct "export price" sales and indirect "constructed export price" sales. The adjustment are, in both circumstances, the same. Consequently, the special adjustments required to "construct" the export price do not replace the normal adjustments. Instead, they are made *in addition to* the normal adjustments.

This conclusion is reinforced by a close analysis of the language of the third and fourth sentences of Article 2.4. The adjustments for "differences affecting price comparability" are described in the third sentence of Article 2.4. The fourth sentence of Article 2.4 then describes additional adjustments that are made only when constructing an export price (*i.e.*, for comparisons involving the indirect "constructed export price" sales). Significantly, the fourth sentence does not state that the special constructed export-price adjustments are to be made *in lieu* of the normal adjustments described in the third sentence. Instead, the fourth sentence states that, for comparisons involving the indirect "constructed export price" sales, the special adjustments are "also" to be made.[19] In other words, the normal adjustments described in the third sentence of Article 2.4 are made for all comparisons (including both direct "export price" sales and indirect "constructed export price" sales), and then, for the indirect "constructed export price" sales, the special adjustments described in the

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> terms used in the statute regarding circumstances of sale adjustments and describes the adjustment when commissions are paid only in one market.
>
> (b) *In general*. With the exception of the allowance described in paragraph (e) of this section concerning commissions paid in only one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for *direct selling expenses* and assumed expenses.

19 C.F.R. § 351.410(b) (emphasis added).

[18] *See* US Oral Statement, para. 11.

[19] The relevant language is as follows. The third sentence of Article 2.4 provides that:

> Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

The fourth sentence of Article 2.4 then states that:

> In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should *also* be made.
>
> (Emphasis added.)

fourth sentence are "also" made. Consequently, the adjustments made to construct the export price are in addition to, and not a replacement for, the adjustments made for "differences affecting price comparability."

Because the United States made the adjustment for the actual costs of non-payment to the direct sales by POSCO, it has effectively taken the position that this adjustment was intended as a normal adjustment under the third sentence of Article 2.4 for "differences affecting price comparability." It cannot, therefore, also assert that the same costs are an appropriate adjustment to construct the export price, because the fourth sentence of Article 2.4 explicitly states that the adjustments to construct the export price are made in addition to, and not *in lieu* of, the normal adjustments under the third sentence of Article 2.4 for "differences affecting price comparability."

The United States must, therefore, defend its adjustment under the third sentence of Article 2.4. In these circumstances, its arguments concerning the permissible adjustments to construct an export price under Article 2.3 are irrelevant.

Q.5. (For the United States) Korea states (oral statement at the first meeting, para. 25) that the United States does not argue in its first submission that unpaid sales were an "other difference []. . . demonstrated to affect price comparability". Is Korea correct that the United States does not advance such an argument?

The United States did not proffer any argument, in its First Submission or Oral Statement, that the non-payments by the ABC Company were an "other difference []. . . demonstrated to affect price comparability" within the meaning of Article 2.4. Any attempt by the United States now to make such an argument would have to fail on both procedural and substantive grounds.

As a procedural matter, Article 2.4 permits adjustments only for differences that are *demonstrated* to affect price comparability. The determinations (and the underlying records of the Plate and Sheet cases) did not contain any "demonstration" that the non-payment had affected price comparability. Thus, the procedural requirements of Article 2.4 were not met.

As a substantive matter, the customer's failure to pay could not have affected price comparability. POSCO did not know, and could not have known, that a particular US customer would fail to pay at the time POSCO set its prices, so the non-payment did not affect POSCO's pricing policies. Thus, for the reasons set forth in paragraphs 4.17 to 4.23 of Korea's First Submission, there simply is no basis for any claim that the actual cost of non-payment was an "other difference ... demonstrated to affect price comparability."

Q.6. (For both parties) Article 2.4 provides that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale . . . ." The use of the term "on its merits" could be taken to suggest that differences in conditions and terms of sale will not always affect price comparability. Do you agree? Please explain your answer.

Korea believes that it is incumbent on the investigating authorities to determine whether an adjustment is warranted. The phrase "on its merits" reinforces the obligation of the investigating authorities to ensure that the adjustments are warranted and the resulting comparisons are "fair." Of course, an adjustment for a difference in "conditions and terms of sale" that did not affect price comparability would not be warranted and would not result in a fair comparison, and thus should be rejected "on its merits."

Q.7. (For the United States) The United States states in its first submission (para. 84) that "[s]elling expenses such as warranty costs and bad debt not only reflect conditions of sale in the

market, they are also an element of price. Therefore, differences in such selling expenses affect price comparability." Please provide further elaboration of the US view regarding when differences "affect price comparability".

It is clear that the price for a transaction is inextricably bound with the terms of the transaction. The price for a transaction is, of course, the outcome of a negotiation between buyer and seller. In that negotiation, the seller offers a bundle of goods and ancillary items (such as warranty coverage or delayed payment options). Any changes in that bundle necessarily affects the outcome of the negotiations. Thus, the price cannot be analyzed apart from the bundle being sold.

Warranty coverage and delayed payment options are clearly a part of the bundle of items being sold in a negotiation. The investigating authorities may, therefore, properly adjust for the *expected* value of those items at the time the sale was made.

By the same token, the *risk* of default that arises when the seller agrees to delayed payment may also be part of the bundle being sold. And, where evidence supports such a conclusion, the investigating authorities may properly adjust for the *risk* of default. However, such an adjustment must be based on analysis of the *risk* that could be foreseen at the time of the negotiation. It cannot be based on an "ex-post" event (such as the fortuity that a particular customer happened to default after the sale was made), because that ex-post occurrence by itself provides no indication of the anticipated *risk* of default that might have been considered when the prices were set.

In its First Submission, the United States contended that the adjustment it made for the costs of non-payment was analogous to the adjustments it routinely makes for warranty expenses. It also asserted that the adjustment for warranty expenses is based on an "ex-post" event (*i.e.*, an actual warranty claim for damaged or defective merchandise) that could not have been considered when the prices were set.[20] This analogy, however, demonstrates the flaw in the US treatment of the costs of non-payment in the SSPC and SSSS cases.

Under its normal practice, the DOC does not simply allocate current warranty expenses over current sales to determine the amount of the warranty adjustment for the sales under investigation. Instead, the DOC has explained that:

> The Department's normal practice in computing warranty expenses is to use historical data over a four- or five-year period preceding the filing of the petition to estimate the likely warranty expenses on POI [*i.e.*, period of investigation] sales.[21]

The DOC has also explained that, if the warranty expenses incurred during the investigation period do not correspond to historical experience, the DOC will rely on historical experience to calculate the warranty adjustment.[22]

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[20] *See, e.g.*, US First Submission, para. 86.

[21] *Large Newspaper Printing Presses from Germany*, 61 Fed. Reg. 38166, 38185 (July 23, 1996) (ROK Ex. 65). *See also Koenig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d 834, 855 (Ct. Int'l Trade 1998) ("Commerce's normal practice in computing warranty expenses is to use historical data from a four- or five-year period preceding the filing of the petition to estimate the probable warranty expenses on POI sales.") (ROK Ex. 66).

[22] *See Bicycles from the People's Republic of China*, 61 Fed. Reg. 19026, 19042 (Apr. 30, 1996) ("Our examination of Motiv's historical warranty costs indicate that the reported POI warranty costs may not be reflective of what Motiv's true warranty expenses will be on its POI sales. Accordingly, we have used the historical warranty expenses.") (ROK Ex. 67); *Television Receivers from Japan*, 56 Fed. Reg. 38417, 38421 (Aug. 13, 1991) ("Although we generally use warranty expenses incurred during the period of the review, the

In short, the DOC's methodology for calculating the warranty adjustment includes safeguards to ensure that the adjustment reflects the exporter's historical experience, and not just the aberrant data for a single year. Such safeguards are essential to the calculation of an adjustment for the *risk* of warranty expenses that the seller accepted when it agreed to the warranty terms of the sale.

The DOC failed to employ such safeguards, however, when calculating the adjustment for non-payment costs in the SSPC and SSSS cases. As a result, the United States cannot argue that those adjustments provided a proper measure of the *risk* of non-payment in the US and Korean markets.

Q.8. (For the United States) Article 2.4 of the ADP Agreement requires that a Member make due allowances for "differences which affect price comparability". It could be argued that this means that, where there are differences that should affect the relative prices charged by an exporter in his home market and export market, the Member should make appropriate adjustments. Applying this approach to the case at hand, the logic of the United States' adjustments in respect of unpaid sales is that POSCO should be charging higher prices in the US market than in the Korean market because defaults are more likely for US purchasers than for Korean purchasers. Please comment.

The "logic" of the US position is that (1) the actual non-payment by the ABC Company during the investigation period demonstrates that the risk of non-payment was higher in the US market than in Korea and, (2) given this supposed greater risk, POSCO's export price should have been higher than its home-market price by the full costs of the actual non-payment. However, this "logic" is not correct.

First, an actual one-time occurrence of an event is not a reliable indicator of the risk of that event. It is true that, during the relevant period, POSCO experienced a single large default by one US customer. But that does not mean that defaults are more likely for US customers than for Korean customers. Probabilities simply cannot be determined by a single event — no matter how large that event may be — because there is no way of telling whether that single event is part of a common pattern or a once-in-a-lifetime occurrence. The probabilities can only be determined by considering a pattern of occurrences over a sufficiently lengthy period of time.

Second, the more reliable, longer term evidence on record actually showed that the risk was higher in Korea than in the United States. This evidence showed that POSCO had never previously suffered a non-payment by a US customer, while it has had multiple experiences of non-payment by Korean customers. There is no evidence in either the Plate or Sheet cases that defaults are more likely for US purchasers than for Korean purchasers.

Third, even if one accepts *arguendo* that the risk of non-payment is greater in the United States than in Korea (and that the US final determinations had adequately demonstrated that to be so), the adjustment made by the DOC would still be improper. By adjusting for the full cost of the actual non-payment, the DOC did not adjust for difference in risk at all. Rather, the adjustment for the actual event grossly exceeded a proper adjustment for any difference in risk between the two markets. The United States is confusing the small risk of being hit with lightning with the large damage that is caused if one happens to be one of the few people so hit.

The DOC noted that "POSAM could have chosen to insure itself against the risk that this (or any) customer would not pay, as do other companies which sell on a credit basis."[23] Such insurance goes to the heart of the US error: The true measure of the difference in risk of non-payment between

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Department will consider longer historical periods to provide a more accurate estimate of the eventual warranty expenses for the merchandise under review.") (ROK Ex. 68).

[23] SSSS Final Determination, at 30674 (ROK Ex. 24).

the two markets would be the (small) difference in the premiums on identical policies in the two markets, and not the (uncertain and potentially very large) difference in the actual amount of non-payment in a single year.

Q.9. (For both parties) In its first submission (para. 65), the United States asserts that it is Article 2.1 of the ADP Agreement, and not Article 2.4, that addresses what sales may be used to establish the export price and normal value. The United States further notes Article 2.1 expressly limits the determination of normal value to sales in the ordinary course of trade, that there is no such limitation in respect of the export price, and that this absence of a limitation must be interpreted as intentional. It could be argued that it follows that Article 2.1 precludes a Member from excluding any export sales. The United States however contends (para. 70) that it may exclude export sales in certain circumstances. Please comment.

It is true that Article 2.1 places some limitations on the transactions that may be included in the comparison of normal value and export price. However, those clearly are not the only limitations imposed by the Anti-Dumping Agreement. For example, the *chapeau* of Article 2.4 also indicates that comparisons should be made between sales at the same level of trade and at the same time, and it further provides that the comparison must be "fair." These provisions thus provide additional limitations on the transactions that may be included in the comparisons.

In any event, to the extent that the United States argues that Article 2.1 precludes investigating authorities from excluding atypical export sales, that argument is obviously undone by the US concession that it has the discretion to exclude such sales. Indeed, a US judicial decision has held that such exclusions are warranted where the inclusion of atypical sales would lead to an "unfair" result.

In short, Article 2.1 and the first sentence of Article 2.4 are complementary: Even if the inclusion of a sale would conform to Article 2.1, it must be excluded where necessary to ensure a "fair comparison" under Article 2.4.

Q.10. (For Korea) Korea argues that the "fair comparison" requirement of Article 2.4 of the AD Agreement requires a Member to exclude "atypical sales" where the inclusion of those sales would "distort the results" by increasing the margin. In Korea's view, would a Member also be entitled to exclude "atypical" export sales where those sales would "distort the results" by decreasing the margin?

Korea believes that atypical export sales should be excluded from the dumping calculations whenever the inclusion of those sales would "distort the results." It should not matter whether the distortions involve aberrational increases or decreases in the dumping margins — the goal should be to avoid distortions.

Q.11. (For Korea) In the context of its "multiple averaging" claims, Korea emphasizes that the language "all comparable export prices" precludes "multiple averaging". Can this view be reconciled with Korea's position that the US DOC was required to exclude certain "atypical" export prices from its dumping margin calculations altogether?

There is no conflict between Korea's argument that atypical export sales should be excluded from the calculation of the export price when necessary to ensure a "fair comparison" under Article 2.4 and its argument that Article 2.4.2 precludes splitting the investigation period into sub-periods. In fact, Korea's arguments highlight the way that Article 2.4 (including its *chapeau* and its sub-paragraphs) is intended to work together as a unitary whole.

The *chapeau* of Article 2.4 requires, *inter alia*, a "fair comparison." It follows that any sale that cannot be included in a "fair comparison" must be excluded.

Article 2.4.2 must be read in context, as part of Article 2.4. Thus, it cannot be read to require the inclusion of atypical sales that would distort the calculation of the dumping margin and lead to an "*unfair* comparison." Indeed, this is made explicit in the text of Article 2.4.2 itself: The opening clause of Article 2.4.2 makes that provision "subject to the provisions governing fair comparison" in the *chapeau*.

It is clear, therefore, that the function of Article 2.4.2 is not to determine which sales should be included in the analysis (an issue that is governed by other provisions of the Anti-Dumping Agreement). Instead, its purpose is to determine the means of comparing those sales that are to be included pursuant to other provisions of the Anti-Dumping Agreement. This context indicates that Article 2.4.2 should not be construed to require the inclusion of sales that are otherwise required to be excluded. Rather, the obligation to compare an average normal value to an average of "*all comparable export transactions*" should be read as an obligation to compare the average normal value to "*all export transactions that are required to be included in the comparison under the applicable rules of the Agreement.*" In this way, the phrase "all comparable export transactions" in Article 2.4.2 can be read consistently with the requirement of the *chapeau* to exclude atypical, distortive sales. In other words, an "atypical" sale that must be excluded from the comparison to achieve the "fair comparison" required by the *chapeau* of Article 2.4 is not a "comparable" transaction within the meaning of Article 2.4.2.

Q.12. (For the United States) The United States observes (first submission, para. 71) that companies, including POSCO, routinely establish reserve accounts for bad debt. Did the United States have before it in the record of the plate or sheet investigations any information regarding precisely how POSCO and/or POSAM treated bad debt for accounting purposes? Specifically, did POSCO and/or POSAM establish a reserve for bad debt? If so, how was that reserve calculated? Did any such reserve distinguish between anticipated levels of unpaid sales in different markets?

The DOC explicitly stated in the final determinations in both SSPC and SSSS that "POSAM does not maintain separate bad debt accounts."[24]

In addition, Korea understands that the DOC verified precisely how POSCO and POSAM treated the non-payments by the ABC Company: (1) POSAM had no "bad debt" account or "bad debt" reserves; (2) POSAM issued negative invoices for the { } invoices that were unpaid; (3) POSAM had already paid POSTEEL and POSTEEL had paid POSCO before the ABC Company's bankruptcy; (4) POSAM was not reimbursed by POSCO or POSTEEL for the non-payments; and (5) POSAM issued no other negative invoices during 1997 or 1998.[25] The DOC also generally verified the accounting systems for POSCO, POSTEEL, and POSAM.[26]

POSCO does have bad debt accounts and reserves. Korea notes that *POSCO's* bad debt accounts and reserves were not implicated by the ABC Company's non-payments, because POSCO

[24] SSPC Final Determination, at 15449 (ROK Ex. 11); SSSS Final Determination, at 30674 (ROK Ex. 24).

[25] See POSAM Verification Report (SSPC), at 8-9 and Ex. 5 (ROK Ex. 82); POSAM Verification Report (SSSS), at 6-7 and Ex. 6 (ROK Ex. 61).

[26] See POSCO Sales Verification Report (SSPC), at 3-4 (ROK Ex. 6); POSCO Sales Verification Report (SSSS), at 6 (ROK Ex. 19); POSAM Verification Report (SSPC), at 2 (ROK Ex. 82); POSAM Verification Report (SSSS), at 3 (ROK Ex. 61).

was paid by POSAM.[27] Therefore, there is very little information about these accounts on the record. Korea understands that these accounts do not distinguish between anticipated levels of unpaid sales in different markets, and observes that the mere existence of bad debt accounts in Korea covering worldwide exports would not in itself show that there had ever been any non-payments in the United States.

Q.13. In its oral statement, the United States argued that POSCO effectively wrote off the unpaid sales. Is the US referring to the issuing of negative invoices by POSAM (thereby cancelling the sales made to the company that went bankrupt) or does the US have in mind another event? In the view of the US, does the cancellation of the sales concerned preclude the possibility that repayment of the amounts outstanding is obtained by POSCO through bankruptcy proceedings?

In Korea's view, this question is uniquely directed to the United States.

D. CURRENCY CONVERSION

Q.1. (For both parties) The United States suggests (first submission, para. 182) that the invoices for what Korea refers to as POSCO's "dollar-priced local sales" reflect a price both in dollars and in won ("The reported won amounts were reflected on POSCO's invoices and records"). See also Final Determination in SSSS, p. 59536 (indicating that "for HM channel 2 sales the shipping invoice also shows the won price"). Korea (first submission, para. 3.52) by contrast suggests that the sales in question were invoiced only in dollars and that the invoice did not reflect an amount in won. In its oral statement at the first meeting, however, Korea acknowledged that both dollars and won appeared on the invoices. Please clarify whether the invoices reflected a price in dollars only, or prices in both dollars and won, or whether this varied depending on the invoices in question.

Paragraph 3.52 of Korea's First Submission was not intended to suggest that none of the invoices used by POSCO for "local sales" referred to an amount in won. Rather, Paragraph 3.52 was intended to emphasize that the value of the "local sales" was fixed in dollars and not in won. That point is not affected by whether some (or even all) of the invoices referred to an amount in won *in addition to* the amount in dollars. Rather, the fact that the "local sales" are fixed in dollars is ascertained by the fact that the dollar value remained constant from invoice to payment, while the won value did not.

Paragraph 3.52 of Korea's First Submission did not address whether or not the invoices also referred to an amount in won, because Korea did not (and does not) consider that to be material to the issue at hand. The won value listed on the "local sales" invoice was an accounting convenience (because POSCO must record the invoice amount in its accounting records in won using the exchange rate on the date of invoice); it was not a binding amount; and it had no effect on the amount due (which was determined by converting the dollar amount from the invoice into won using the exchange rate on the date of payment).

In this regard, it should be noted that the invoice was not the only document the DOC reviewed for the local sales that recorded the agreed-upon sales price. For example, the DOC also

[27] See POSAM Verification Report (SSSS), at 7 (ROK Ex. 61) ("Company officials reported that only POSAM had recognized the loss of these sales in its accounting records, and that it had not been compensated for the lost sales by either POSTEEL or POSCO. POSAM had already paid POSTEEL and POSTEEL had subsequently paid POSCO prior to the customer's bankruptcy. POSAM was not reimbursed by POSTEEL or POSCO, and bears the risk of present and future uncollected invoices. . . . We found . . . no discrepancies with POSAM's response.").

verified that the initial orders for the local sales were denominated in dollars, and not in won.[28] In addition, the DOC also verified that the "shipping lists" sent to the customer listed the agreed-upon dollar prices (but not any won amounts, except for a separate charge for freight in won).[29]

Q.2. (For both parties) To the extent that the some or all of the invoices reflected won as well as dollar amounts, was the amount actually paid in won the same as the amount reflected in the invoice? Please provide details.

There is no evidence in the Plate or Sheet investigations of any local sales transactions where the non-binding won amount listed on the invoice was identical to the amount actually paid in won. If there had been any such instances, it would have been pure happenstance. The economic value of the "local sales" was fixed in dollars and the amount paid in won varied with the dollar-won exchange rate. The won amount paid would only be the same as the won amount listed on the invoice in those rare circumstances where the exchange rate on the date of payment happened to be the same as the exchange rate on the date of invoice. In all other cases, POSCO would reflect an exchange gain or an exchange loss in its accounting records.

In fact, the DOC verified that the won amount shown on the invoice for local sales was not the same as the won amount actually paid by the customer. Thus, the Verification Report in the SSSS case reported that:

> Observation { } (HM#1): This observation represented a local sale from POSCO to { }, which involved a recognized loss on foreign currency exchange. We tied the individual sale from POSCO's order sheet to a cumulative shipping list/invoice and tax invoice. *As local sales are dollar denominated, and paid in won equivalents, POSCO records the sale in its won equivalent, reflected in the tax invoice to the customer. On payment, the exchange rate is determined based on the rates given to POSCO by the Korean Exchange Bank for Inward Remittance*. For this sale, POSCO recognized an exchange rate loss of { }. This difference between the recorded sales amount and payment amount is reflected in the "Foreign Exchange Currency Loss of Transaction for Local Sales" account. We examined all journal entries, ledgers, bank documents, and publicly available information (re: Korea Exchange Bank, Foreign Exchange rates), and found no discrepancies.[30]

Korea notes that the DOC verification report found local sales to be "dollar denominated" notwithstanding its examination of the three factors that the DOC now claims to prove the opposite: POSCO kept its books in won, POSCO was paid in won equivalents of the dollar price, and POSCO relied on the Korean Exchange Bank's exchange rates.[31]

Q.3. (For both parties) Please provide a comprehensive statement, supported by citations to relevant portions of the record, as to exactly what evidence and arguments were put before the USDOC and at what time in each investigation in respect of the issue whether the "local sales" were dollar or won sales. Please address, inter alia, what evidence was placed before the

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[28] *See* SSSS Sales Verification Report, at 14 ("We tied the individual sale from POSCO's order sheet to a cumulative shipping list/invoice and tax invoice.") A sample verified order sheet and explanatory form demonstrating that the order was denominated in dollars (with a "D" for dollars in Box 10) is provided at ROK Exhibit 78.

[29] A sample verified shipping list is provided at ROK Exhibit 80.

[30] *See* SSSS Sales Verification Report, at 14 (ROK Ex. 19) (emphasis added).

[31] *See* SSPC Final Determination, at 15456 (ROK Ex. 11); SSSS Final Determination, at 30678 ("the local sales were paid in won and recorded in POSCO's accounting records in won, and the exchange rates used by POSCO were dissimilar from those used by the Department") (ROK Ex. 24).

USDOC in each investigation regarding the receipt by POSCO of won amounts that differed from any won amounts reflected in the invoices.

The United States has belatedly made in its Oral Statement the argument that POSCO did not provide sufficient, timely evidence to the DOC demonstrating that the economic value of the "local sales" was fixed in US dollars and not in won. Korea believes that this US argument is untimely and meritless.

As discussed in the introduction to these answers, and in response to Question 15 below, the United States cannot raise *post hoc* arguments to defend its anti-dumping measures. There is absolutely no suggestion in the final determination or final analysis memorandum for either SSPC or SSSS that the US decision was based on a failure by POSCO to provide sufficient and timely information. This new argument should be rejected outright.

In any event, the US argument is meritless. There is no question that the DOC had adequate evidence in both investigations to conclude that the local sales were dollar denominated.[32]

The United States has admitted that POSCO told it during the course of both the Plate and Sheet investigations that the prices for its "local sales" were fixed in dollars and not in won.[33] The United States has also admitted that, in the verification in the Sheet case, the DOC obtained evidence confirming that the amount the customer actually paid for these "local sales" was based on the dollar prices shown on the invoices, and not on the won amounts shown on the invoices.[34] Thus, there was evidence (in the form of POSCO's written testimony and verification documents) that the prices were fixed in dollars.[35]

On the other hand, there was no evidence at all to contradict POSCO's statements. Indeed, there was no evidence that any Korean customer who purchased Plate or Sheet in a "local sale" actually paid the won amount shown on the invoice.

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[32] Indeed, the DOC *did conclude* in SSSS that the local sales were "expressly linked to a dollar value," although it arbitrarily stated that they were nevertheless won-denominated. SSSS Final Determination, at 30678 (ROK Ex. 24).

[33] *See* US Oral Statement, paras. 36 and 38.

[34] *See* US Oral Statement, para. 39.

[35] More specifically, on 16 October 1998, POSCO provided DOC dollar-based calculations for the local sales and argued that these sales should be accepted in dollars per the DOC's longstanding practice of accepting charges in the currency in which they were incurred. *See* POSCO's Response to SSPC Supplemental Cost Questionnaire, at 1-2 (ROK Ex. 83). At the SSPC verification in November 1998, DOC conducted sales traces of local sales among other home-market sales traces and, in keeping with its standard practice, DOC examined all documentation from order to payment. This would have included several order sheets marked with a "D" for dollars (in Box 10 for POSCO sales and Box 7 for POSTEEL sales), and accounting records showing that the prices were fixed in dollars. *See* SSPC Sales Verification Report, at Ex. 6 (ROK Ex. 6), Ex. 23-24 (ROK Ex. 84).

SSSS followed a similar pattern. On 23 November 1998, POSCO provided dollar-based calculations, explained in detail the reasons why local sales must be regarded as dollar-denominated, and provided sample documentation. *See* POSCO's Response to SSSS Supplemental Sales Questionnaire, at 19, B-26. (ROK Ex. 85). The accuracy of this submission was certified by POSCO and its counsel. Id. At verification in February 1999, the DOC explicitly verified that "local sales are dollar denominated." SSSS Sales Verification Report, at 14 (ROK Ex. 19). As mentioned in response to Question 2 above, DOC reached this conclusion despite familiarity with all of the factors that the DOC now claims warrant the opposite result. The DOC expressly stated in its report that it examined the "Accounts Receivable (Ledger) (indicating both sale and payment)" for every home-market sales trace. Id. at 13. This included at least two local sales. *See* id. at Ex. 17, 20 (ROK Ex. 46, 86).

The United States has contended that Korea is improperly asking the Panel to re-weigh the evidence in a *de novo* review. But the truth is that there is nothing to weigh. All of the evidence was on POSCO's side, and there was no evidence at all to contradict it.

Q.4. (For both parties) Is there anything in the record of the investigations indicating why these sales were paid in won if, as argued by Korea, they were in fact denominated in dollars?

The final determinations and final analysis memoranda do not explain why local sales are paid in won. Korea is not aware of any other relevant evidence in the record. There is no indication that the DOC ever requested such an explanation.

The DOC's failure to request this information precludes it now from relying on the absence of information to justify its failure to make a "fair comparison." The final sentence of the *chapeau* of Article 2.4 is explicit: "The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison."

Q.5. (For Korea) The United States considers that whether the "dollar-priced local sales" were in fact dollar sales or won sales was an issue of fact to which the standard of review in Article 17.6(i) of the AD Agreement applies. Do you agree? If not, why not?

Korea does not agree that there is a factual issue. Article 17.6(i) does not apply to the issue of local sales.

To begin with, there are no relevant facts in dispute. The United States has admitted that POSCO told it during the course of both the Plate and Sheet investigations that the prices for its "local sales" were fixed in dollars and not in won.[36] The United States has also admitted that, in the verification in the Sheet case, the DOC obtained evidence confirming that the amount the customer actually paid for these "local sales" was based on the dollar prices shown on the invoices, and not on the won amounts shown on the invoices.[37] Thus, there was evidence (in the form of POSCO's written testimony and verification documents) that the prices were fixed in dollars. And there was no evidence at all contradicting POSCO's position.

The United States has never disputed these essential facts. Instead, the United States has essentially taken the position that, under these facts, the Anti-Dumping Agreement permits the United States to effectively convert the dollar value of the sales into won using the exchange rate on the date of invoice (and then back to dollars at a different rate). That is not a factual issue. It is a methodological choice defended by a legal argument.

The question for this Panel is whether the methodological choice made by the United States was consistent with the WTO Agreements. Specifically, the questions are whether the United States made an unnecessary currency conversion, conducted an "unfair comparison" of normal value and export price, and administered its anti-dumping laws in an unreasonable manner.

Q.6. (For Korea) Korea states (first submission, para. 4.64) that the amount of the Korean won payment for local sales was not fixed at the time of the sales negotiation or invoice, but rather "was determined by applying the market exchange rate . . . for the date of sale to the US dollar amount shown on the invoice." In that same submission (para. 3.52), Korea states that the conversion is performed "on the date on which the customer pays". Please clarify.

[36] *See* US Oral Statement, paras. 36 and 38.
[37] *See* US Oral Statement, para. 39.

Korea's view of the facts concerning the "local sales" issue are described in detail in Paragraphs 3.49 to 3.55 of its First Submission, including Paragraph 3.52 and the sample accounting entries of Paragraph 3.54 (as corrected by Korea's corrigendum). It has been Korea's consistent position that the amount paid in won was determined by the market dollar-won exchange rate on the "date of *payment*," as opposed to the "date of invoice." Nevertheless, it seems that when these facts were summarized in Paragraph 4.64, a typographical error was made and the phrase "date of sale" was used inadvertently. Korea meant to say "date of payment" and regrets any confusion caused.

Q.7. (For the United States) Do you agree that the exchange rates that you refer to as POSCO's "internal exchange rates" are the market exchange rates announced by the Korean Exchange Bank'?

As noted in Korea's First Submission, the DOC verified that POSCO's "internal exchange rates" were, in fact, the same as the market exchange rates announced by the Korean Exchange Bank.[38]

Q.8. (For the United States) The United States asserts (first submission, para. 192) that, "[c]ontrary to Korea's claim, a comparison of the exchange rates demonstrates that during the month of November 1997, the rates varied by as much as { } percent." Please state the source for this statement. Is the United States here comparing POSCO's "internal" exchange rate to the US Federal Reserve's daily exchange rate or to the USDOC's "official exchange rate"?

Korea is not aware of the source of the statements by the United States concerning the differences between the Korean Exchange Bank rates and the exchange rates used by the DOC. It should be noted that the DOC's analysis memoranda found differences of less than 1 percent when it compared the Korean Exchange Bank rates to the Federal Reserve rates.[39] The DOC found larger differences only when it incorrectly compared the Korean Exchange Bank rates to the modified rates calculated by the DOC to implement the special exchange rate provisions of US law.[40]

Korea believes that the differences between the exchange rates of the Korean Exchange Bank and of the New York Federal Reserve (or the DOC itself) are completely irrelevant to the question whether POSCO's local sales were denominated in won or in dollars. Korea is not aware of any attempt by the United States to justify the relevance of the exchange differences to the issue at hand. Nevertheless, Korea notes that nothing about an exchange rate difference that never exceeded { }% — even at the most turbulent time for the won — could possibly justify the double-conversion methodology's distortion of { } in the calculation of normal value.

Finally, as explained in Korea's Second Submission, the comparisons offered by the United States in its first submission are flawed, because they ignore the significant time differences between the United States and Korea. The Federal Reserve rates are based on a survey of New York banks at 12:00 noon on each date. But 12:00 noon in New York on any given day is 2:00 in the morning the next day in Korea. Or, to put it the other way, 12:00 noon in Korea on any date is 10:00 at night the previous day in New York. Thus, a comparison that matches exchange rates on the "same" date actually compares exchange rates determined 14 hours apart.

When exchange rates are shifting rapidly, as they were in November 1997, this 14-hour difference can be critical. Indeed, if one compares the exchange rates at the same time (rather than on the same calendar date), the differences identified in the US brief simply disappear. The following table illustrates this point:

[38] *See* Korea's First Submission, n.68.
[39] *See* Korea's First Submission, n.78.
[40] *See* Korea's First Submission, para. 3.60.

Date of Sale In Korea	Date in New York at Time of Sale in Korea	Korean Exchange Bank Rate on Date of Sale	Federal Reserve Bank Rate at Time of Sale in Korea	Percentage Difference
10 Nov. 1997	9 Nov. 1997	975.5	985	0.97%
18 Nov. 1997	17 Nov. 1997	986.7	992	0.54%
20 Nov. 1997	19 Nov. 1997	1031.4	1040	0.83%
21 Nov. 1997	20 Nov. 1997	1134.5	1139	0.40%

Q.9. (For the United States) The United States asserts (first submission, para. 177) that "Article 2.4.1 cannot be read to require that currency conversions be avoided in any particular circumstances." In the view of the United States, would a Member be permitted by the AD Agreement to engage in currency conversion in a case where all the sales in both markets were indisputably both invoiced and paid in the same currency? If not, what provision of the AD Agreement would regulate such behaviour?

Korea's views on this issue have been set forth in detail in its First Submission. Korea reserves the right to comment on any responses provided by the United States to this question. Korea also respectfully submits that the task before the United States is not simply to explain why the Anti-Dumping Agreement permits a currency conversion when a conversion is not required. Instead, the United States must explain why two conversions at different exchange rates are permitted.

Q.10. (For the United States) Assume that the United States had determined that the sales in question were dollars sales, not won sales, and that there was no dispute among the parties on this point. Would it in the view of the United States have been consistent with Article 2.4.1 of the AD Agreement to nevertheless convert those sales into won and then back into dollars? Would any other provision of the AD Agreement be implicated?

As explained above, in the response to question 9, Korea's views on this issue have been set forth in detail in its First Submission. Korea reserves the right to comment on any responses provided by the United States to this question.

Q.11. (For the United States) Please clarify how USDOC established the exchange rate applied to the sales which it found were won-denominated. Did it use the "official exchange rate" or daily exchange rates? Did it convert as of the date of sale of the "local sales" or as of some other date? Please address specifically Korea's statements in footnote 142 to its first submission and para. 58 of its oral statement, referring to the exchange rate on the date of the US sale.

The Panel should be aware that the DOC has interpreted the US anti-dumping statute as requiring that currency conversions be made using the exchange rate on the date of the US sale.[41]

[41] *See Notice: Change in Policy Concerning Currency Conversions*, 61 Fed. Reg. 9434 (8 Mar. 1996) ("Section 773A of the Tariff Act of 1930, as amended, (the 'Act') provides that [the DOC] will convert foreign currencies at the exchange rates *on the date of the US sale*, subject to certain exceptions. Those exceptions require [the DOC] to ignore 'fluctuations' in the exchange rate and to provide respondents in an investigation at least 60 days to adjust prices after a 'sustained movement' in the exchange rate." (emphasis added)) (ROK Ex. 49).

Q.12. (For Korea) Article 2.4.1 provides that currency conversions "should" be made using the rate of exchange on the date of sale. This would appear to be non-mandatory language. Please comment.

The term "should" is sometimes hortatory and sometimes mandatory. Whether any particular use of the word is hortatory or mandatory must be determined in accordance with the customary rules of treaty interpretation (Articles 31 and 32 of the Vienna Convention on the Law of Treaties).

Korea does not believe it is necessary for this Panel to address the meaning of the word "should" in Article 2.4.1. That word would be relevant if Korea argued that the United States was required to use one exchange rate and erred by using a different exchange rate, and the United States responded by denying that it was required to use a particular exchange rate. But that is not the situation here. Rather, Korea's argument is as follows: (1) Article 2.4.1 is the only provision in the Anti-Dumping Agreement that addresses the use of exchange rates in calculating dumping margin; (2) Article 2.4.1 specifies the exchange rates to be used "when the comparison under paragraph 4 *requires* a conversion of currencies"; and (3) by implication, the Anti-Dumping Agreement does not allow investigating authorities to make currency conversions (regardless of the exchange rate selected) when such conversions are not "require[d]."

Q.13. (For the United States) In respect of the differences between POSCO's "internal" exchange rate and that of the NY Federal Reserve, Korea notes (first submission, para. 4.74) the existence of a time-lag between Korea and New York which it considers explain those differences. Please comment.

Korea's First Submission noted that there is a time-lag between Korea and New York which may explain some of the differences between the exchange rates announced by the Korean Exchange Bank (which are used by POSCO for internal purposes) and the rates announced by the Federal Reserve. However, that time-lag is not the only possible source of the differences in the two rates. It should also be noted that the Federal Reserve rate is not an exact calculation. Instead, it is based on an unscientific telephone poll of a few banks in New York City, and thus is subject to errors. Moreover, because the Federal Reserve rate reflects only the local market conditions in New York City,[42] it may not reflect conditions in other markets where the Korean won may be more (or less) heavily traded.

The time-lag between the Korean Exchange Bank's rates and the Federal Reserve rates also raises a separate issue. As discussed in Korea's First Submission, the DOC justified its use of the double-conversion methodology that inflated POSCO's dumping margins because POSCO's internal rates did not match the Federal Reserve rates. The DOC failed to recognize, however, that POSCO could not have used the Federal Reserve rates in its accounting records in "real time," because the Federal Reserve rates were not announced each day until long after the close of business in Korea.[43] Thus, the DOC improperly held POSCO to a standard that could never have been met.

Q.14. (For the United States) In its oral statement (para. 41), the US asserts that the USDOC did not engage in a "double conversion" because it took directly the won amounts reported by POSCO for the so-called "local" sales. However, in the "preliminary analysis memorandum" for sheet & strip, the USDOC recognized that "for all sales in the home market involving dollar denominated transactions, we have applied a currency conversion to Korean won on the date of the home market sale" (item L., at page 9). Is this not an indication that the USDOC converted

[42] *See* Korea's First Submission, n.77.
[43] *See* Korea's First Submission, para. 3.60.

the "local" dollar sales into won prior to converting them into dollars and that in so doing the USDOC did undertake a "double conversion"?

Korea believes that the claim by the United States that it did not engage in a double conversion is untenable. It does not matter whether the United States actually made the initial conversion from dollars to won itself, or whether it simply used information reported to it by POSCO (which had already been subject to that conversion). The point is that the United States chose to use the calculated won amounts rather than the actual dollar amounts. The United States then chose to convert those won amounts back into dollars using the exchange rate on the date of the US sale — which was not the same as the exchange rate that had been used previously to convert the dollar amounts into won. The overall methodology therefore involved a double-conversion of the dollar amounts using inconsistent exchange rates. This double-conversion methodology is improper — regardless of whether the initial conversion was made by the United States or simply adopted by the United States from the figures in POSCO's accounting records.

Q.15. For the United States. In its oral statement (para. 39), the US explains that the USDOC was not provided enough evidence by POSCO attesting the fact that POSCO received won amounts other than the amounts reflected in the invoices. The US seems to suggest that this is one of the reasons why the USDOC refused to consider the "local" sales as dollar sales. Could the US explain why this important argument appears to be omitted from the determinations and memoranda relevant to the case?

There is absolutely no suggestion in the final determinations or analysis memoranda in either the SSPC or SSSS cases that the US decision was based upon a failure by POSCO to provide sufficient and timely information. Instead, this argument was made by the United States for the first time in its Oral Statement during the Panel's first meeting.

This new argument by the United States should be rejected. As discussed in the introduction to these answers, the United States is precluded from raising *post hoc* justifications for its anti-dumping determinations. This Panel should determine the conformity of the US anti-dumping determinations with the WTO Agreements solely on the basis of the justifications provided in the final determinations themselves.[44]

[44] *See generally Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R, adopted 24 Feb. 2000, para. 7.192; *Korea — Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, Report of the Panel, ADP/92, paras. 212, 228.

II. RESPONSES OF KOREA TO QUESTIONS POSED BY THE UNITED STATES

This submission sets forth the responses of the Republic of Korea to the questions posed by the United States during the First Meeting of the Panel. For the convenience of the Panel and the Parties, each of the questions is reproduced below, followed by Korea's response.

Q.1. In paragraph 26, Korea states that the words "conditions" and "terms" are largely synonymous, implying that there are some distinctions. Please confirm whether, in Korea's view, there is a difference in meaning between the word "conditions" and the word "terms" as used in Article 2.4.

Article 2.4 of the Anti-Dumping Agreement does not use the words "conditions" and "terms" independently. Rather, Article 2.4 uses the phrase "conditions and terms of sale." This is a well-known phrase. The focus of the Panel's interpretive inquiry should, therefore, be on the meaning of the phrase as a whole, without attempting to parse its meaning through a tortured construction of the individual words.

Nevertheless, if a word-by-word construction is necessary, we offer the following observations: The words "conditions" and "terms" do not stand alone in Article 2.4. Instead, they are modified by the words "of sale" — in the phrase "conditions and terms of sale." The meaning of the individual words "conditions" and "terms" must, therefore, be considered in that context.

A "sale" is, of course, a form of contract or agreement. Thus, the meaning of the words "conditions" and "terms" would have to be ascertained based on their normal usage in the context of contracts and agreements. In this regard, the word "condition" (in the context of contracts and agreements) is generally understood to refer to a prerequisite that must be met before a contingent contractual provision comes into force (as in the phrase "condition of closing" that often appears in, for example, real estate contracts).[45] The word "term" is generally understood (in the context of contracts and agreements) to refer either to specific provisions of an agreement[46] or to the duration of the agreement.[47]

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[45] Definitions from dictionaries that take a word out of context are, of course, of limited utility in interpreting the meaning of a phrase like "condition or term of sale." However, it is worth noting that Black's Law Dictionary offers the following definitions of the word:

> **Condition.** A future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event. Provision making effect of legal instrument contingent upon an uncertain event ....
>
> A clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation.... A qualification, restriction, or limitation modifying or destroying the original act with which it is connected; and event, fact, or the like that is necessary to the occurrence of some other, though not its cause; a prerequisite; a stipulation....

Interestingly, Black's Law Dictionary also recognizes that a "condition" may be a "mode or state of being; state or situation; essential quality; property; attribute; status or rank." However, it indicates that those are not the primary "legal" definitions of the word and, more importantly, it does not use those definitions in the context of contracts and agreements.

[46] Thus, the Uniform Commercial Code (which is a primary source of contract law in the United States), states that:

> "Term" means that portion of an agreement which relates to a particular matter.

Uniform Commercial Code, § 1-201(42).

[47] Thus, Black's Law Dictionary gives the following definitions:

The words "condition" and "term" do not have precisely the same meaning in the context of sales agreements. One might ordinarily think of the word "term" as describing the contract provisions, while the word "condition" describes the prerequisites that must be met before contractual obligations take force. Thus, a sale agreement may have numerous "terms" — including "price terms" that determine how much must be paid, "payment terms" that determine when payment is due, "delivery terms" (or "terms of sale") that determine how delivery must be made and when title will transfer, or "warranty terms" that determine what obligations the seller has if the goods are damaged or prove defective. One would not ordinarily refer to any of those "terms" as "conditions" of the sale. However, one would refer to the prerequisites described by those terms as creating "conditions" — for example, compliance with delivery terms may be a "condition" of receiving payment, or filling out and mailing in a warranty card may be a "condition" of receiving warranty coverage.

As this discussion shows, the words "conditions" and "terms" are not ordinarily used interchangeably. However, both words are used to describe aspects of the obligations created in a sale agreement. The "conditions and terms of sale" are, therefore, the agreed-upon bundle of rights and obligations created by the sale agreement.

In any event, failure to pay amounts due under a contract is plainly not a "condition" or "term" of the contract. It is a *breach* of the contract.

Q.2. In its oral statement, in reference to the second table on page 27 of Korea's First Submission, Korea stated that the United States calculated "invoice price in won" (i.e., column D of the table). Please confirm whether the United States calculated this figure, or whether this figure was reported to the United States by POSCO in its questionnaire response, and recorded in POSCO's books and records.

As Korea has explained previously, the amount in won used by the DOC to calculate the normal value for local sales was based on the figures recorded by POSCO in its normal accounting records. These won amounts were calculated by POSCO by multiplying the dollar prices for the sales by the exchange rate on the date of the invoice. As discussed above, these won amounts did not correspond to the prices actually paid by POSCO's Korean customers.

It appears that the United States believes that, because it did not itself actively convert the dollar prices into won, it is not "guilty" of a double-conversion. That position is, however, untenable.

> **Term.** A word or phrase; an expression; particularly one which possesses a fixed and known meaning in some science, art or profession.
>
> A fixed and definite period of time; implying a period of time with some definite termination. Period of determined or prescribed duration. A specified period of time; *e.g.* term of lease, loan, contract, court session, public office, sentence....

(citation omitted). In the context of a "term of sale," the word "term" generally means a specific provision of the sale contract and not the duration of the contract, because sale contracts generally do not have a "duration" per se.

As discussed in Korea's Responses to the Panel's Questions, the United States chose to use the converted won amounts (which did not represent the fixed prices for the sales) rather than the actual dollar amounts (which did represent the fixed prices for the sales). The United States then chose to convert those won amounts back into dollars using the exchange rate on the date of the US sale — which was not the same as the exchange rate that had been used previously to convert the dollar amounts into won. The overall methodology therefore involved a double-conversion of the dollar amounts using inconsistent exchange rates. This double-conversion methodology is improper — regardless of whether the initial conversion was made by the United States or simply adopted by the United States from the figures in POSCO's accounting records.

ANNEX 1-5

SECOND SUBMISSION OF KOREA

(29 June 2000)

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INTRODUCTION

1. This submission by the Republic of Korea ("Korea") responds to the arguments presented by the United States in its First Submission and during the first meeting of the Panel, as well as to the arguments presented by the third parties in their written submissions and oral presentations, concerning the anti-dumping measures imposed by the United States against the Pohang Iron and Steel Co., Ltd. ("POSCO") as a result of the investigations of Stainless Steel Plate in Coils ("SSPC") and Stainless Steel Sheet and Strip in Coils ("SSSS") from Korea.

2. As an initial matter, it should be noted that the first round of written submissions, and the first meeting of the Panel, have narrowed the issues in this proceeding considerably — as the United States has retreated significantly from a number of the positions it had taken previously. In particular,

- With respect to the "unpaid" sales issue, the United States has conceded that the adjustment for the cost of unpaid sales was made to both direct "export price" and indirect "constructed export price" sales — which means that the adjustment has to be justified, if at all, under Article 2.4 of the Anti-Dumping Agreement. The Article 2.3 defense advanced earlier by the United States is therefore clearly insufficient, because Article 2.3 does not apply at all to direct "export price" sales.

  The United States has also conceded that an adjustment under Article 2.4 is appropriate only for differences in the *risk* of non-payment in each market — because only the *risk* is known at the time the "conditions and terms of sale" are fixed. This concession is fatal to the US case, because the United States did not purport to measure differences in the *risk* of non-payment in the SSPC and SSSS cases. Instead, the United States simply made an adjustment for the actual cost of the non-payment that POSCO happened to experience during the investigation period — despite evidence indicating that this non-payment was unanticipated and disproportionate to POSCO's normal experience on US sales. Once it is conceded that an adjustment is appropriate only for the *risk* of non-payment, it is clear that the adjustment for actual non-payment costs was flawed.

- With respect to the "multiple averaging" issue, the United States has conceded that Article 2.4.2 requires the calculation and comparison of a single average normal value to a single average export price for all "comparable transactions" — which means that the multiple-averaging methodology is permissible only if the sales before and after the depreciation of the Korean won were not "comparable transactions." Significantly, the United States has also conceded that the exchange-rate provisions of Article 2.4.1 (which are the only provisions of the Anti-Dumping Agreement addressing changes in exchange rates) do not "establish a limit on which sales may be considered 'comparable' within the meaning of Article 2.4.2." Thus, the United States has effectively conceded that there is no basis under the Agreement for treating pre- and post-depreciation sales as non-comparable transactions. The multiple-averaging methodology cannot, therefore, be consistent with the requirements of Article 2.4.2.

- And, finally, the United States has conceded that its double-conversion methodology for the "local sales" would only have been appropriate if the sales had been denominated in Korean won, and not in US dollars. The United States also has conceded that the information verified by the US Department of Commerce (the "DOC") confirmed that the economic substance of these sales was fixed in dollars, and that the initial conversion of these dollar amounts to won (which was done by POSCO for internal accounting purposes) was not consistent with the

exchange-rate methodology required by the Anti-Dumping Agreement. These concessions necessarily mean that the DOC's final determinations — which relied on extraneous factors such as the differences between POSCO's "internal" exchange rates and the official US exchange rates — failed to address the fundamental issue. Instead, because the orders, invoices and payments were all fixed in dollars, and the initial conversion to won was inconsistent with the Agreement's requirements, the DOC's double-conversion methodology cannot be upheld.

3. In short, the concessions the United States has made are fatal to its case. The anti-dumping measures on SSPC and SSSS should not, therefore, be allowed to remain in effect.

ARGUMENT

I. ISSUES CONCERNING PANEL PROCEDURES

4. In its submissions, the United States has argued that the Panel's role in this proceeding should be narrowly circumscribed to essentially shield the US anti-dumping measures from meaningful review. Thus, the United States argues that the Panel is not even permitted to consider the merits of Korea's claims, because, it contends, Korea allegedly failed to meet the burden of proof in some as-yet unspecified manner. The United States also argues that the Panel should accept the US decisions under some extreme rule of deference — in part because it contends that the issues raised by Korea involve "factual" questions (even though there actually are no facts in dispute) and in part because it has decided that its own interpretations of the Anti-Dumping Agreement on the relevant issues are "permissible."

5. These procedural arguments by the United States are, however, off the point. They misstate the requirements of the Anti-Dumping Agreement, and they mischaracterize the claims Korea has actually made. As discussed below, they certainly do not provide a basis for the Panel to ignore the substantive claims Korea has presented.

A. THE BURDEN OF PRESENTING A *PRIMA FACIE* CASE

1. Anti-Dumping Measures Are a Derogation from the Main Thrust of the WTO, But that Does Not Affect the Burden to Establish a *Prima Facie* Case

6. The First Submission of the United States asserted that a complaining party "bears the initial burden of coming forward with evidence and argument that establishes a *prima facie* case of a violation."[1] Significantly, the US Submission did not argue that Korea had failed to meet its burden. Instead, it seems that the United States had a different purpose for making this statement: To set up a phantom argument that Korea did not make in an attempt to obscure a key point in this case.

7. The US Submission argued that Korea's burden is not affected by the fact that anti-dumping measures are a derogation from the trade-liberalization purposes of the WTO.[2] The US argument

[1] US First Submission, para. 36.
[2] US First Submission, paras. 37, 39.

The US Submission denied that anti-dumping measures are a derogation from the main thrust of the WTO regime. Naturally, the United States failed both to provide any alternative to Korea's view that the main thrust of the WTO regime is to liberalize and promote trade and to reconcile tariff-raising measures with the liberalization and promotion of trade. Instead, the United States hid behind a tangential legal argument. According to the United States, the Appellate Body found in *Wool Shirts* that the transitional safeguard mechanism in the Agreement on Textiles and Clothing ("ATC") was not an "exception" and that the "reasoning" of that finding "applies with equal force to anti-dumping measures." US Submission, para. 38, discussing

implies that Korea argued that it is exempt from the initial burden of presenting a *prima facie* case. But Korea never made such an argument. To the contrary, Korea introduced considerable evidence and argument to meet its initial burden.

8. The true significance of the fact that anti-dumping measures are a derogation from the main thrust of the WTO lies in the nature of WTO disciplines on anti-dumping measures. As Korea explained in its First Submission, the authority to impose anti-dumping duties is narrowly limited to circumstances where there is injurious dumping, and anti-dumping duties cannot exceed the dumping margin. This has always been the rule under GATT 1947, and it is very explicit in Articles 1 and 9.3 of the Anti-Dumping Agreement.[3]

9. These limitations are essential to the proper functioning of the WTO regime. Without these limitations, Members could readily circumvent their tariff bindings and most-favoured-nation commitments simply by labeling any new duties as "anti-dumping duties" without regard to whether there was any dumping to offset. Dumping calculations thus play a vital role in preserving the integrity of other WTO obligations — and so these calculations are themselves subject to detailed substantive and procedural disciplines. The object and purpose of these detailed rules, then, is to restrict the use of anti-dumping measures to circumstances where (among other conditions) dumping has been fairly established. These detailed rules must, of course, be interpreted in accordance with that object and purpose.

2. Korea Has Met its Burden to Establish a *Prima Facie* Case of a Violation by the United States

10. It was only in its Oral Statement that the United States argued for the first time that Korea "failed to meet its burden of proof." Specifically, the United States argued as follows:

> It is obvious that Korea believes the United States should have weighed the evidence differently and taken different approaches to certain issues in the underlying investigations. It has simply failed to demonstrate that the United States was required by the Anti-dumping Agreement to do so. There is much rhetoric in Korea's submission about the United States "penalizing" POSCO, underscored by the insinuation that the United States ignored its own legal precedent to do so. But legally and factually there is no case.[4]

It is readily apparent that these conclusory assertions by the United States are insufficient to establish that Korea failed to produce sufficient evidence and argument to present a *prima facie* case. The US

United States - Measure affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, at 16. That argument is flawed. The Appellate Body did not in fact rule on whether the transitional safeguard mechanism is an "exception." Rather, it simply found that the GATT cases regarding the burden of production for GATT "exceptions" did not apply in the context of the ATC. That is, it ruled that the normal rules applied: the complaining party had the initial burden and, when that was satisfied, the defending party had the burden to respond. (The latter point is noticeably missing from the US discussion of burden issues generally and *Wool Shirts* in particular. It is quite ironic that the United States heavily relies on *Wool Shirts* when that decision held that the complaining party (India) met its initial burden, but *the defending party (the United States) failed its later burden*.) Moreover, the reasoning of the Appellate Body was strictly focused on the unique aspects of the ATC as a transitional arrangement within the WTO and there is absolutely nothing about the *Wool Shirts* decision that suggests that anti-dumping measures should not be regarded as a derogation from basic GATT norms. *See Wool Shirts*, at 16.

[3] See Korea's First Submission, para. 4.2.
[4] US Oral Statement, para. 3.

Oral Statement did not point to a single concrete example of a missing piece of required evidence or argument.

11. Nor could the United States have done so. Korea bore its burden by providing ample evidence and argument in its First Submission to demonstrate the United States' substantive violations concerning each of the three key issues, as well as the various procedural violations. For example, with regard to the unpaid sales issue, Korea provided evidence and argument showing that there were unpaid sales, that the United States made an adjustment for those unpaid sales, that the United States included the unpaid sales in its calculation of export price, and that the adjustment and the inclusion in the dumping calculation were improper, unfair, and inconsistent with WTO procedures. If anything more than that is required to make a *prima facie* case, the United States has failed to suggest what that might be. Korea, therefore, clearly met its burden of presenting a *prima facie* case.

B. THE STANDARD OF REVIEW

1. Article 17.6(i) Requires the Panel to Review Factual Conclusions to Determine Whether the Facts Were Both Properly Established and Evaluated Objectively and Without Bias

12. In an effort to avert legitimate Panel scrutiny of the DOC's factual conclusions, the US Submission mischaracterized Korea's position. Specifically, the US Submission complained that "Korea invites the Panel to step into the shoes of the DOC and engage in a *de novo* review of the facts."[5] That statement has no basis. Korea never invited *de novo* review.

13. To the extent that there are facts in dispute, Korea expects that this Panel will assess the facts of this matter in accordance with Article 17.6(i) of the Anti-Dumping Agreement. Under that Article , factual conclusions are to be rejected by the Panel if the facts were not established properly or if they were not evaluated objectively and without bias. Thus, contrary to the United States' suggestion, the Anti-Dumping Agreement does not preclude the Panel from reviewing factual conclusions altogether. To the contrary, Article 17.6(i) expressly contemplates Panel "assessment of the facts of the matter" and requires that factual conclusions be reviewed under an appropriate standard. Decisions of other panels demonstrate that the appropriate standard of review is "whether a reasonable, unprejudiced person could have" made the factual determinations at issue "based on the evidence relied upon."[6]

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[5] US First Submission, para. 27.

[6] *See Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R, adopted 24 Feb. 2000, paras. 7.94 - 7.95 ("whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiation"). The *HFCS* decision applied the standard of review announced in *Guatemala — Anti-Dumping Investigation regarding Portland Cement from Mexico*, Report of the Panel, WT/DS60/R, adopted 25 Nov. 1998, as modified by the Appellate Body on other grounds, paras. 7.54 - 7.57, which in turn applied the standard of review in *United States — Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, Report of the Panel, 34S/194, adopted 3 June 1987, paras. 332-35.

Although it pre-dates the Uruguay Round, the observation of the *Electrical Transformers* Panel about the importance of reviewing factual conclusions under an appropriate standard still rings true today: That Panel rejected the defending party's argument that its factual determinations were not reviewable, because that "would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT." *New Zealand — Imports of Electrical Transformers from Finland*, Report of the Panel, L/5814 -32S/55, adopted on 18 July 1985, para. 4.4.

14. In any event, the US argument is largely irrelevant. There actually are very few, if any, facts in dispute — especially in light of the significant concessions made by the United States at the first Panel meeting. To be precise,

- On unpaid sales, there is no dispute that there were unpaid sales, that the DOC included the unpaid sales in its analysis, and that the DOC also made an adjustment for the cost of non-payment in its analysis of all US sales (including the direct sales made by POSCO and the indirect sales through POSAM).

- On multiple-averaging, there is no dispute that the Korean won depreciated significantly against the US dollar late in 1997, that the DOC split the investigation periods into sub-periods, that the DOC calculated separate averages for each sub-period, and that for those sub-periods with "negative margins" the DOC "zeroed" those "negative margins" when calculating the overall margin.

- On double-conversion, there is no dispute that the orders for the "local sales" were placed in US dollars (and not in won), that the invoices showed both the agreed-upon dollar price and an amount in won calculated by applying the Korean Exchange Bank's exchange rate in Seoul on the date of invoice, that the won amount on the invoice was recorded in POSCO's accounting records, that the customer paid in won by converting the dollar price using the Korean Exchange Bank's exchange rate in Seoul on the date of payment, that the won amount of the payment did not correspond to the won amount on the invoice, that the DOC chose to calculate normal value based on the won amounts recorded in POSCO's accounting records instead of the actual dollar prices of the sales and to convert that amount back into dollars at a different exchange rate announced by a different bank (the New York Federal Reserve) on a different date (the date of the *US sale*), and that the double conversion in fact caused distortions in calculation of the normal value.

For none of the substantive issues, therefore, are there any key facts in dispute. There are only legal questions concerning the propriety, fairness, and reasonableness of the US methodology.

2. Article 17.6(ii) Requires the Panel to Construe the Anti-Dumping Agreement in Accordance with Customary Rules of Interpretation of Public International Law

15. The United States repeats in this case its now-familiar attempt to import a concept of extreme deference from US domestic law into the WTO regime.[7] Specifically, the US First Submission contended, "[T]he relevant question in every case is not whether the challenged determination rests upon the best or the 'correct' interpretation of the Anti-Dumping Agreement, but whether it rests upon a 'permissible interpretation' (of which there may be many). If it does then this Panel must uphold the determination."[8]

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[7] The so-called *Chevron* doctrine of US law — which requires the courts to defer to an agency's interpretation of the laws it administers — is based on concepts of governance peculiar to the US domestic system (such as the "separation of powers" among the three branches of the federal government). *See Adams Fruit Co. v. Barrett*, 494 US 638, 649 (1990) ("A precondition to deference under Chevron is a congressional delegation of administrative authority.") (ROK Ex. 59), *superseded by statute on other grounds as stated in Deck v. Peter Romein's Sons, Inc.*, 109 F.3d 383 (7th Cir. 1997). *Chevron* deference has no application in the WTO context. The US attempt to bring *Chevron* to the WTO was not successful in the Uruguay Round negotiations, it was not successful in past cases such as *DRAMS*, and it should not succeed here.

[8] US First Submission, para. 35. In an oral aside at the first meeting of the Panel, the United States clarified its position, indicating that it meant to say that any "permissible interpretation" of the Anti-Dumping Agreement is "correct" and "must be sustained." This clarification is the high-water-mark of the US demand for deference, revealing the extreme, unquestioning deference the United States seeks.

16. That assertion (which is unsupported by any argument) misstates the rule for construing the Anti-Dumping Agreement in Article 17.6(ii). Article 17.6(ii) provides:

> [T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The US view virtually ignores the first sentence of Article 17.6(ii),[9] while distorting the meaning of the second.

17. In fact, this Panel is expressly charged with interpreting the Anti-Dumping Agreement in accordance with customary rules of treaty interpretation (such as Articles 31 and 32 of the Vienna Convention on the Law of Treaties). If that process leads the Panel to conclude that there is one correct interpretation of a particular provision, then an anti-dumping measure based on a different interpretation cannot stand. Only in those rare circumstances where the customary interpretative process leads the Panel to conclude that there is "more than one permissible interpretation," does the second sentence of Article 17.6(ii) apply. That is, Article 17.6(ii) only provides for deference to a defending party's interpretation of a provision *after* the Panel has already completed the interpretative process *and* affirmatively found "more than one permissible interpretation." Thus, the US view has it backwards. It is not the Panel's role to ask first (and only) whether the US interpretations of the Anti-Dumping Agreement are "permissible" — instead, that question only arises at the end of the customary interpretative process. Any other interpretation would render the first sentence of Article 17.6(ii) "inutile," and would undo the carefully wrought balance of interests that is reflected in Article 17.6(ii) as negotiated.

18. In *DRAMS*, another case arising under the Anti-Dumping Agreement between the same two parties as in this case, the parties argued at length about the US claim for special deference to its legal interpretations.[10] The *DRAMS* Panel found it possible to rule for Korea without making a definitive "general" statement about the meaning of Article 17.6(ii). Nevertheless, the Panel's comment on Article 17.6(ii) is highly instructive:

> In arriving at our finding, we examined the matter in accordance with the terms of Article 17.6, including 17.6 sub-para (ii). In interpreting the relevant provisions of the AD Agreement in the course of addressing the claims and arguments before it, we have done so in accordance with customary rules of interpretation of public international law. We note that, in making certain of its arguments in response to the claims of Korea, the United States characterised those arguments as constituting a "permissible interpretation" of the terms of the AD Agreement. As a matter of fact, where we failed to find these arguments persuasive, we rejected them on the basis that they were not consistent with the AD Agreement and, in reaching such a view,

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[9] Indeed, in its oral statement, the United States wholly ignored the first sentence, describing the second sentence alone. US Oral Statement, para. 50.

[10] Korea commends the relevant portion of the descriptive part of the *DRAMS* Panel report to this Panel for further discussion of this issue. *See United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, Report of the Panel, WT/DS99/R, adopted on 19 Mar. 1999, at paras. 4.44 - 4.74. Korea further commends to the Panel's attention the excellent Article on this subject by the eminent WTO scholar John Jackson, which (as discussed further in *DRAMS*) completely undercuts the intellectual basis for the US position. *See* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 Am. J. Int'l L. 193 (1996) (ROK Ex. 60).

> we did so on the basis of the customary rules of interpretation of public international law. The fact that the arguments concerned had been presented as a "permissible interpretation" did not, in the circumstances of this case, alter the legal basis upon which we were able to, and did, evaluate them, viz. the customary rules of interpretation of public international law. We further observe that, as a consequence, there is neither warrant nor need in this case to enquire further as to whether the AD Agreement "more generally," as it were, admits of further interpretation.

Thus, in the course of rejecting interpretations advanced by the United States as "permissible," the *DRAMS* Panel made two important points about how Article 17.6(ii) functions. First, it re-affirmed the primacy of customary rules of interpretation in construing the Anti-Dumping Agreement. Second, it clearly rejected the notion that mere invocation of the phrase "permissible interpretation" automatically "alter[s] the legal basis" upon which a panel may evaluate a legal argument.

II. THE FLAWS IN THE US ANTI-DUMPING DETERMINATIONS AND IN THE RESULTING ANTI-DUMPING MEASURES

A. UNPAID SALES

19. As explained in Korea's First Submission, the "ABC Company," which was one of the customers of POSCO's US affiliate POSAM, failed to pay POSAM for certain purchases of SSPC and SSSS. In its preliminary determinations, the United States excluded the sales to the ABC Company from its analysis on the grounds that they were "atypical," and it made no adjustment for the costs arising from the ABC Company's failure to pay. In its final determination, however, the United States reversed course: It included the sales to the ABC Company in its analysis, and it made an adjustment to the price comparisons for all of POSCO's US sales (including sales through POSAM and direct sales from POSCO to other customers) based on the allocated "cost" of non-payment. The adjustment for the non-payment costs substantially increased the dumping margins found on POSCO's sales.[11]

20. Korea has challenged the revised US methodology on two basic grounds: *First*, Korea contends that the adjustment made to the price comparisons is not permissible under Article 2.4 of the Anti-Dumping Agreement — which permits only adjustments for differences between the export and home-market sales that are demonstrated to affect price comparability, and which also requires that any adjustments be consistent with a "fair comparison." *Second*, Korea contends that the inclusion of these atypical sales in the dumping calculations constitutes a separate violation of the "fair comparison" requirement of Article 2.4.

21. In its responses, the United States has essentially conceded Korea's case. The United States contends, in essence, that it was appropriate to make adjustments for differences in the *risk* of non-payment in the two markets, and that the inclusion of these sales did not distort the results because their terms and conditions (when judged before the non-payment) were not atypical. But these defences do not relate to the methodology actually employed by the United States.

22. Contrary to the US suggestions before this Panel, the United States did not make an adjustment for differences in the *risk* of non-payment, and it did not include the sales in its analysis based solely on the terms and conditions set before the non-payment. Instead, the United States made an adjustment for the actual event of non-payment — even though it has admitted that POSCO had no reason to know the ABC Company would not pay at the time the sales were made — and it included the sales in its analysis as unpaid sales. The United States has not offered any defense for that methodology. Its determinations must, therefore, be overturned.

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[11] *See* Korea's First Submission, paras. 3.30 - 3.39.

1. The US Adjustment for the Actual Costs of Non-Payment Violated the Requirements of Article 2.4

(a) The Post-Sale Costs of Non-Payment Do Not Affect Price Comparability and, As a Result, They Cannot Form the Basis for an Adjustment Under Article 2.4

23. As described in Korea's First Submission, Article 2.4 permits adjustments only for certain specified items. In particular, Article 2.4 allows adjustments only for "differences in conditions and terms of sale, taxation, levels of trade, quantities [and] physical characteristics," and for "other differences which are also demonstrated to affect price comparability." No other adjustments are permitted under Article 2.4 for comparisons of the export price to normal value.

24. The adjustment for the actual costs of non-payment does not fall within any of the adjustments specified in Article 2.4. The actual non-payment by the ABC Company on some sales did not reflect a *difference* in the "conditions and terms of sale," because sales with identical conditions and terms clearly can have different actual payment experience. (Indeed, the ABC Company itself paid in full for some purchases that had the same conditions and terms as the sales for which it did not pay.)[12] Actual non-payment also clearly does not reflect a difference in "taxation, levels of trade, quantities [and] physical characteristics."

25. Finally, actual non-payment cannot be considered a reflection of an "other difference[] ... demonstrated to affect price comparability" for both procedural and substantive grounds. As a procedural matter, there was no "demonstration" in either the DOC determinations or the underlying administrative record that the difference in actual non-payment experience affected price comparability. As a substantive matter, the actual non-payment could not have affected price comparability, because the prices were fixed well before it was known that the ABC Company would not pay. Thus, the actual cost of non-payment is not a permissible adjustment under Article 2.4.

(b) The US Adjustment for the Costs of Non-Payment Was Based on the Unreasonable Assumption that Those Costs Affected the Price Comparability of US Sales that Were Paid in Full, But Not of Sales in Other Markets that Were Also Made on Credit

26. As a separate matter, Korea's First Submission also explained that the method used by the United States to adjust for the costs of non-payment was inconsistent with the requirements of Article 2.4, because it made an adjustment to the comparisons for all US sales (including US sales for which POSCO was paid in full). As Korea noted in its First Submission, it was unreasonable to assume that the costs of non-payment affected the prices of all US sales (including sales that were paid in full) but not the prices of sales made on credit in other markets.[13] If an adjustment was to be made, it should have been made either only to the unpaid sales or to all sales in all markets on which POSCO extended credit.

27. The United States apparently agrees that, if an adjustment for the costs of non-payment is made, it should be made to all sales on which POSCO extended credit. Thus, the US First Submission contended that:

> [W]hile bad debt is a normal, anticipated expense, specifically what transactions, or even what customer, will generate a bad debt is not known in advance. *All transactions and customers sold on credit are a potential source of bad debt.*

[12] *See* Korea's First Submission, para. 3.30.
[13] *See* Korea's First Submission, paras. 4.20 - 4.23.

> Therefore, it is reasonable to reflect an allocated portion of that expense in *all* prices.[14]

This statement provides a succinct explanation why, if an adjustment for the cost of non-payment was to be made to sales that were paid in full, it should have been made to *all* sales that were made on credit, and not just to the sales in the US market.

(c) The Adjustment for the Actual Costs of Non-Payment Violates the Fair Comparison Requirement of Article 2.4

28. As Korea has explained previously, the first sentence of Article 2.4 provides that "A fair comparison shall be made between the export price and the normal value." This "fair comparison" requirement by its terms is not conditioned on any other provision of the Agreement; it is not tied to particular adjustments; and it is not limited to specific situations. Instead, it is a free-standing obligation that requires that any comparisons between export price and normal value be "fair."

29. A "fair comparison" requires, at a minimum, that the exporter be held accountable only for events that are within its control. As the domestic judicial decisions of the United States have held, it is "unreal, unreasonable and *unfair*" for a finding of dumping to be based on "a factor beyond the control of the exporter."[15]

30. The adjustment made in the SSPC and SSSS cases for the actual cost of non-payment increased POSCO's dumping margins by either reducing the export price or increasing the normal value (depending on the channel through which the sale was made and the adjustments made by the DOC). The factor that gave rise to that adjustment — that is, the failure of the customer to pay — was plainly beyond POSCO's control, as the United States has itself conceded.[16] Consequently, the adjustment effectively penalized POSCO for an event beyond its control, in violation of the "fair comparison" requirement of Article 2.4.

31. The consequences of the US methodology on this issue are particularly troubling. In effect, the US methodology will subject any exporter to the risk of substantial anti-dumping duties, no matter how carefully the exporter monitors its sales to ensure that its export prices are above its home-market prices. Even in such cases, if one of the exporter's customers happens not to pay, the United States would find dumping and impose substantial duties. Such a result cannot be reconciled with any of the purposes of the Anti-Dumping Agreement, and it is patently unfair.

(d) The Defences Offered by the United States Do Not Justify the Adjustment It Made

32. The United States has offered five defences to justify the adjustment it made. *First*, it contends that the adjustment for the actual costs of non-payment was authorized by Article 2.3 of the Anti-Dumping Agreement as an adjustment to "construct" the export price for a sale through an affiliated importer. *Second*, it asserts that the adjustment was proper under Article 2.4, because the "risk" of non-payment is a "condition" of sale. *Third*, it claims that its adjustment for the unpredictable after-sale costs of non-payment is consistent with its treatment of warranty expenses, which, it claims, are similarly unpredictable. *Fourth*, it argues that the adjustment was required by a past decision by a US domestic court (in the *Daewoo* case) — which, the United States claims, held that bad debt expenses must be treated as "direct" expenses. And, *fifth*, it claims that the "fair

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[14] US First Submission, para. 89 (emphasis added).

[15] *Melamine Chemicals v. United States*, 732 F.2d 924, 933 (Fed. Cir. 1984) (emphasis added) (ROK Ex. 56).

[16] *See* US First Submission, para. 86 ("Many selling expenses, in addition to bad debt, are not within the exporter's control and the amount of the associated expense is not known at the time of sale.").

comparison" requirement of Article 2.4 does not impose an independent constraint on anti-dumping methodologies. These arguments are, in the end, unpersuasive.

33. As described more fully below, the defense offered by the United States under Article 2.3 is both irrelevant and wrong: It is now undisputed that the United States made the adjustment not only to sales through an affiliated importer, but also to direct sales to unaffiliated importers (for which the United States could not have been "constructing" an export price under Article 2.3). Moreover, even if the adjustment had been made only to sales through an affiliated importer, the adjustment was not consistent with the "object and purpose" of Article 2.3 and thus cannot be justified under Article 2.3.

34. The defense offered by the United States under Article 2.4 — that an adjustment must be made for differences in the *risk* of non-payment in the two markets — is inconsistent with the adjustment actually made by the United States. It might indeed have been appropriate to make an adjustment for differences in the *risk* of non-payment. But, as described more fully below, the United States did not make such an adjustment. Instead, the United States ignored the evidence regarding the risks of non-payment in the two markets, and made an adjustment for the actual amount of non-payment that happened to have occurred. Because the actual non-payment experience is not an appropriate measure of the *risk* of non-payment, the US methodology cannot be reconciled with the arguments the United States has made before this Panel.

35. The US analogy to the treatment of warranty expenses is also unpersuasive, because the United States did not treat the costs of non-payment in the same manner as it treats warranty expenses. As discussed more fully below, the DOC's normal practice is to estimate the warranty expenses on the sales under investigation based on historical experience for a longer period (as much as four or five years). Where the current experience departs from the historical norm, the DOC will base its adjustment on the historical experience. By contrast, the DOC did not request data on POSCO's historical bad debt experience, and it made no effort to determine whether the non-payment by the ABC Company was consistent with that experience. In short, its approach to non-payment was not consistent with its normal treatment of warranty expenses.

36. The US reliance on the US judicial decision in the *Daewoo* case is also misplaced. To begin with, the *Daewoo* decision only addressed the treatment of "bad debt" under US law: It did not purport to resolve the issue whether an adjustment for bad debt is consistent with the Anti-Dumping Agreement. Moreover, even if *Daewoo* were relevant, it would not support the US claims. Both the US courts and the DOC have held consistently that the *Daewoo* decision *does not* require that bad debt expenses be treated as "direct" selling expenses in all cases. And, significantly, the DOC has steadfastly refused to treat bad debt expenses as "direct" selling expenses in numerous cases *after* the *Daewoo* decision.

37. Finally, the US interpretation of the "fair comparison" requirement of Article 2.4 cannot be correct. The "fair comparison" requirement of Article 2.4 is set forth in a separate, and mandatory sentence — which stands in stark contrast to the more conditional "fair comparison" language of the prior Tokyo Round Anti-Dumping Code. Thus, the US interpretation of the "fair comparison" language of Article 2.4 would not only render the entire first sentence of Article 2.4 "inutile," it would also frustrate the clear intent of the Anti-Dumping Agreement.

(i) The US Arguments under Article 2.3 of the Anti-Dumping Agreement Are Irrelevant

(a) The Panel Must Consider Korea's Responses to the Article 2.3 Defense Offered by the United States under the Terms of Reference for this Proceeding

38. As mentioned, Korea's First Submission demonstrated that the US adjustment for the costs of non-payment was inconsistent with the requirements of Article 2.4. Korea focused its arguments on

Article 2.4 for two reasons: *First*, the adjustment could not be justified under any other provision of the Anti-Dumping Agreement, because it was made to both direct "export price" and indirect "constructed export price" sales. And, *second*, the US determinations had referred to this adjustment as an adjustment for a "direct selling expense," which, under US law, signified that the DOC had determined that a "circumstance of sale adjustment" (the US law equivalent of an adjustment under Article 2.4) was appropriate.

39. In its First Submission, the United States responded that Korea's arguments under Article 2.4 were irrelevant, because the adjustment for the cost of non-payment was made under Article 2.3, and not under Article 2.4.[17] In its Oral Statement, the United States also suggested that any responses to that argument cannot be considered by the Panel, because "Korea has not made a claim under Article 2.3."[18] Before turning to the merits of the US arguments under Article 2.3, it may be useful first to touch briefly on the US assertion that responses to its arguments are irrelevant.

40. As a logical matter, it simply is not possible for the Panel to consider the merits of Korea's arguments under Article 2.4 without first deciding whether the US defense under Article 2.3 has merit. If the US is correct that its adjustment was properly made solely under Article 2.3, then Korea's claims under Article 2.4 are flawed, because the adjustment was not made under Article 2.4. On the other hand, if the US assertion is not correct, then the adjustment must (as Korea has claimed) be considered under the provisions of Article 2.4. Thus, the Panel must decide whether the US defense under Article 2.3 has merit before it can decide Korea's claims under Article 2.4. The responses to the US arguments under Article 2.3 are, therefore, plainly relevant to a determination of whether the adjustments were properly made under Article 2.4.

41. Indeed, the US suggestion to the contrary is patently absurd. If adopted, the US suggestion would mean that any defending party in a dispute could avoid meaningful Panel review simply by claiming that its methodology was justified under some entirely separate provision of the Agreement. In such cases, the US interpretation would prevent a Panel from even considering whether the separate provision invoked by the defense actually applied.

42. In short, the effective functioning of the dispute settlement system requires that Panels be permitted to consider not only the defences offered by the defending party, but also the responses by the complaining party that demonstrate the inapplicability of those defences. For that purpose, consideration of Article 2.3 is plainly within the Panel's terms of reference.

(b) Because the Adjustment for Non-Payment Was Made to Direct "Export Price" Sales, It Cannot Also Have Been Made to "Construct" an Export Price under Article 2.3

43. As mentioned, the United States has argued that the requirements of Article 2.4 do not govern its adjustment for the cost of non-payment, because, it claims, the adjustment was actually made under Article 2.3.[19]

44. Article 2.3 provides that, when merchandise is sold by the exporter to an affiliated importer, the investigating authority is permitted to "construct" an export price based on the resale price from the affiliated importer to its unaffiliated customer.[20] Article 2.3 does not provide concrete guidance

[17] *See* US First Submission, paras. 74 - 80.
[18] US Oral Statement, para. 20.
[19] *See* US First Submission, paras. 74 - 80.
[20] Article 2.3 provides that:

regarding the adjustments that can be made to construct an export price in such situations. Instead, that guidance is provided by the *fourth sentence of Article 2.4*, which provides the following clarification:

> In the case referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

45. In its prepared statement for the Panel's first meeting, the United States initially suggested that it had made the adjustment for the costs of non-payment *only* to construct an export price for the sales that POSCO made through its affiliated importer POSAM.[21] After some prompting, however, the United States finally conceded that this suggestion was erroneous. In fact, the United States made the *same* adjustment both to the indirect "constructed export price" sales *and* to the direct "export price" sales.

46. In these circumstances, the adjustment made to comparisons involving direct "export price" sales for the cost of non-payment cannot be justified under Article 2.3, because Article 2.3 only applies to indirect "constructed export price" sales through an affiliated importer. Consequently, the adjustment to the comparisons involving direct "export price" sales must be justified, if at all, under Article 2.4.

47. The most charitable interpretation, then, is that the United States now intends to argue that the adjustment to the indirect "constructed export price" sales was made under Article 2.3, while the adjustment to the comparisons involving direct "export price" sales (which was calculated in the *same* manner based on the *same* factual situation as the adjustment to indirect sales) was made under Article 2.4. Such an argument is, however, untenable.

48. The language of Article 2.4 addressing the normal adjustments for "differences affecting price comparability" does not make any distinction between direct "export price" sales and indirect "constructed export price" sales. The adjustment are, in both circumstances, the same. Consequently, the special adjustments required to "construct" the export price do not replace the normal adjustments. Instead, they are made *in addition to* the normal adjustments.

49. This conclusion is reinforced by a close analysis of the language of the third and fourth sentences of Article 2.4. The adjustments for "differences affecting price comparability" are described in the third sentence of Article 2.4. The fourth sentence of Article 2.4 then describes

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> where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer.

[21] In summary, the description provided by the United States indicated that it had adjusted export price and normal value as follows:

- For indirect sales through POSAM, the United States "deducted all expenses associated with that sale, including an allocated portion of the US bad debt expense.
- For the direct sales (not made through POSAM), "there was no deduction from that export price for any selling expenses, including bad debt.
- For the comparisons to the indirect sales through POSAM, "there was no upward adjustment to normal value.

See Revised US Oral Statement, paras. 8-12.

Incredibly, the US description made absolutely no mention of any adjustment to normal value for comparisons to the direct US sales. In fact, as the United States was subsequently forced to admit, an upward adjustment was made to normal value for those comparisons as an adjustment for the cost of the non-payment on US sales. Of course, this upward adjustment to normal value had the same effect as reducing the export price.

additional adjustments that are made only when constructing an export price (*i.e.*, for comparisons involving the indirect "constructed export price" sales). Significantly, the fourth sentence does not state that the special constructed export-price adjustments are to be made *in lieu* of the normal adjustments described in the third sentence. Instead, the fourth sentence states that, for comparisons involving the indirect "constructed export price" sales, the special adjustments are "also" to be made.[22] In other words, the normal adjustments described in the third sentence of Article 2.4 are made for all comparisons (including both direct "export price" sales and indirect "constructed export price" sales), and then, for the indirect "constructed export price" sales, the special adjustments described in the fourth sentence are "also" made. Consequently, the adjustments made to construct the export price are in addition to, and not a replacement for, the adjustments made for "differences affecting price comparability."

50. Because the United States made the adjustment for the actual costs of non-payment to the direct sales by POSCO, it has effectively taken the position that this adjustment was intended as a normal adjustment under the third sentence of Article 2.4 for "differences affecting price comparability." It cannot, therefore, also assert that the same costs are an appropriate adjustment to construct the export price, because the fourth sentence of Article 2.4 explicitly states that the adjustments to construct the export price are made in addition to, and not *in lieu* of, the normal adjustments under the third sentence of Article 2.4 for "differences affecting price comparability."

51. The United States must, therefore, defend its adjustment under the third sentence of Article 2.4. Its arguments concerning the permissible adjustments to construct an export price under Article 2.3 are, therefore, irrelevant.

(c) Article 2.3 Does Not Permit an Adjustment for the Actual Costs of Non-Payment

52. The US argument that it made the adjustment for the actual costs of non-payment under Article 2.3 suffers from a further flaw: Such an adjustment is not authorized by Article 2.3, and it is not consistent with the object and purpose of Article 2.3.

53 As mentioned, the concrete guidance regarding the adjustments permitted to construct an export price under Article 2.3 is set forth in the fourth sentence of Article 2.4, which provides that:

> In the case referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

54. The failure of the final customer to pay for its purchases does not fall within the adjustments described in this provision. The non-payment cannot occur in either the chain of events or the functions performed until after the resale transaction has been made. In other words, non-payment does not occur *between* importation and resale. Instead, payment (or non-payment) by the final customer occurs only *after* the resale.

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[22] The relevant language is as follows. The third sentence of Article 2.4 provides that:

> Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

The fourth sentence of Article 2.4 then states that:

> In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should *also* be made.

(Emphasis added.)

55. In this regard, it should be noted that the additional argument advanced by the European Communities — which attempts to define the limitations inherent in the word "between" in a functional rather than temporal sense — does not alter the analysis.[23] Costs that are incurred as a result of resale are not "between" importation and resale in either a "functional" or "temporal" sense. Instead, the customer's failure to pay can occur, as a functional matter, only *after* the resale transaction has been made. Thus, an adjustment for non-payment by the final customer is not a permissible adjustment (as defined by the fourth sentence of Article 2.4) for purposes of constructing an export price under Article 2.3.

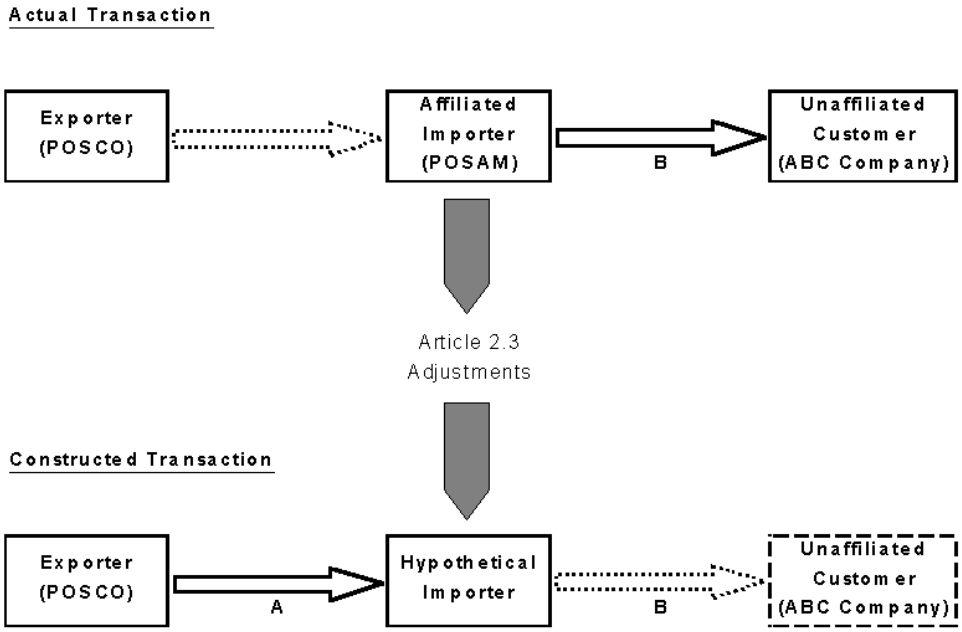
56. More generally, an adjustment for the non-payment by the final customer is not consistent with the object and purpose of Article 2.3. The purpose of the adjustments under Article 2.3 is, of course, to "construct" an export price for sales made through an affiliated importer based on the re-sale price charged by the affiliated importer to its unaffiliated customer. In other words, the goal is to calculate what the exporter would have charged an unaffiliated importer acting at the same level of trade as the affiliated importer, by deducting an appropriate "mark-up" from the price the affiliated importer charges its customers.

57. The basic purpose of the calculation may be illustrated as follows: Suppose that an exporter (POSCO) sells to an affiliated importer (POSAM), which re-sells to an unaffiliated customer (ABC Company) at a price of B. The idea of the adjustments under Article 2.3 is to determine what the exporter (POSCO) would have charged a hypothetical unaffiliated importer (Hypothetical Importer) that re-sold the merchandise to the same unaffiliated customer (ABC Company) at a price of B. The following diagram depicts what is supposed to happen:

[23] According to the EC,

> The formula "between importation and resale" does not refer to a certain period of time. If so, it would be very easy for related importers to circumvent the rules on the construction of the export price by either advancing or delaying the payment of expenses. Rather, that formula purports to define the scope of the expenses that are attributable to the functions performed by a typical related importer. "Bad debt" expenses would not be incurred if the imported goods were not re-sold and therefore belong to that function.

EC Oral Statement, para. 10. In short, the EC contends that the word "between" in the fourth sentence of Article 2.4 must be understood in a "functional," and not "temporal," sense.



The purpose of the adjustments under Article 2.3 is to calculate A in this diagram — that is, the price from the exporter to a hypothetical unaffiliated company operating at the same level of trade as the actual affiliated importer. In other words, Article 2.3 assumes that the price to the final, unaffiliated customer (price B in the diagram) will be the same whether the sale is made through an affiliated or unaffiliated importer. It then instructs the investigating authorities to construct the price (A) that the hypothetical unaffiliated importer would have paid to the exporter by deducting a reasonable mark-up from the actual resale price.

58. To determine whether an item may properly be included in the adjustments under Article 2.3, therefore, it is necessary to determine whether it is the type of item that might reasonably be included in an unaffiliated importer's mark-up. It is clear that an unaffiliated importer would try to include in its mark-up any duties, freight costs, salesmen salaries and overhead expenses that it incurred in connection with the re-sales. It is also clear that the importer would try to include a reasonable profit in its mark-up. However, an importer would not be able to include the actual costs of any non-payment by its customers in the mark-up, because the price for the sale from the exporter to the importer (A) and the price for the sale from the importer to its customer (B) would have been fixed before the importer could know that the customer would fail to pay.

59. To put this another way, if the final customer failed to pay, there is no question that the hypothetical unaffiliated importer would incur a loss. But, it is equally clear that the unaffiliated importer would not be able to pass this loss on to the exporter, because the importer's sale to its customer is a distinct transaction from the exporter's sale to the importer. Consequently, it is not appropriate to deduct the actual costs of non-payment on the importer's re-sales from the re-sale price (B) for purposes of calculating the hypothetical price (A) from the exporter to an unaffiliated importer. An adjustment for actual costs of non-payment is, therefore, inconsistent with the object and purpose of Article 2.3.

(ii) The US Has Effectively Conceded that an Adjustment for the Actual Cost of Non-Payment Is Not Consistent with Article 2.4

(a) A Customer's Actual Failure to Pay Is Not a "Condition or Term of Sale"

60. In its First Submission, the United States has asserted that the adjustment it made for the failure of the ABC Company to pay was an appropriate adjustment under Article 2.4 of the Anti-Dumping Agreement, because non-payment is part of the "conditions and terms of sale" for which an adjustment is explicitly permitted.[24] In support of this argument, the United States relied on one possible dictionary definition of the word "condition" as meaning "mode or state of being."[25] It therefore contended that the "conditions of sale" include "the mode or circumstances under which the sales are made in each market."[26]

61. As explained more fully in its response to the questions posed by the United States, Korea does not believe that the US interpretation of the phrase "conditions and terms of sale" is correct.[27] However, even under the definition proposed by the United States, the actual non-payment by the customer is not a "condition" of sale.

62. As mentioned, the United States has proposed that the phrase "conditions and terms of sale" be interpreted to include "the mode or circumstances under which the sales *are made* in each market." Under this interpretation, it may be appropriate to include market conditions under which "the sales are made." But the actual non-payment by a customer is not a market condition when "the sales are made," because the seller does not know at that time that the customer actually will not pay. The seller can only find out that the customer will not pay *after* the sale has been made. Thus, even under the US interpretation, it is not proper to make an adjustment for actual non-payment.

(b) The United States Has Conceded that an Adjustment under Article 2.4 Is Appropriate Only for Differences in the "Risk" of Non-Payment, and the United States Did Not Make Such an Adjustment

63. In its prepared statement during the Panel's first meeting, the United States modified its position with respect to the permissible adjustments for non-payment. The United States did not contend that an adjustment for actual non-payment was appropriate. Instead, it argued only that an adjustment was permissible for "the *risk* of non-payment as a condition of sale."[28]

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[24] In its First Submission and Oral Statement, the United States did not dispute Korea's arguments that the cost of non-payment could not be an "other difference[] ... demonstrated to affect price comparability." Nor could it. For the reasons set forth in paragraphs 4.17 to 4.23 of Korea's First Submission, there simply is no basis for any claim that the actual cost of non-payment was an "other difference[] ... demonstrated to affect price comparability."

[25] US First Submission, para. 83.

[26] *Id.*

[27] As noted in Korea's response to the US questions, the phrase "conditions and terms of sale" must be interpreted as a single phrase, and not through a tortured construction of the individual words. Moreover, if a separate definition of the word "condition" is required, that word should be interpreted in accordance with its normal meaning in the context of sales agreements. In such contexts, the word "condition" is generally understood to refer to a prerequisite that must be met before a contingent contractual provision comes into force.

[28] As the United States explained,

> It is equally true, however, that payment terms are part of the contract and can influence the purchaser's decision. Therefore, a seller's agreement to sell on credit is no different from an agreement to provide a warranty. In one case, the seller agrees to provide a warranty and accepts the *risk* of having to repair or replace the merchandise under that warranty. In the other case, rather than demanding payment on delivery, the seller agrees

64. This revised interpretation does not, however, provide a basis for affirming the adjustment the United States made for the unpaid sales. Quite simply, the United States did not make an adjustment for the *risk* of non-payment. It made an adjustment for the actual costs of the actual non-payment — which is a very different thing.

65. In the SSPC and SSSS cases, the United States did not identify any evidence indicating that sales to US customers were inherently more risky than sales to home-market customers. The United States did not request or examine data concerning POSCO's historical bad debt experience in the two markets, from which an analysis of the risk of non-payment might be discerned.[29] Instead, the United States simply made an adjustment for the "actual" costs of non-payment by the ABC Company.

66. The evidence on the record of these investigations indicated that prior to the unpaid sales to the ABC Company, POSAM had never experienced *any* non-payments on any sales in the United States.[30] The record evidence also showed that POSCO did not have any non-payments on subject merchandise during the investigation periods for sales through channels other than POSAM. Nor was there any evidence that POSCO had ever experienced any non-payments in the United States through any channel.[31]

> to sell on credit – for example, agreeing to accept payment in 30 days – and the seller accepts a credit expense, including the *risk* of non-payment. In the case of both selling under warranty and selling on credit, the seller accepts the *risk* of incurring the expense as part of the bargain.
>
> Also, Korea makes a point of saying that bad debt is outside the exporter's control and, therefore, is not a proper adjustment under Article 2.4. Bad debt expense is not entirely outside the seller's control. The seller can decline to sell on credit and establish sound credit practices. This is analogous to the seller's control over what, if any, warranty is offered and establishing sound quality control measures to minimize warranty claims. In both cases – selling on credit and selling under warranty – there is some control, and some inherent *risk*. This type of contingency expense is routinely accounted for in company books and records – including bad debt expense.
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> * * *
>
> POSCO agreed to sell to its US customer on credit and in doing so accepted *the risk of non-payment as a condition of sale*. As I stated previously, that in itself is sufficient to warrant including bad debt in an Article 2.4 adjustment.

US Oral Statement, paras. 16-19 (emphasis added).

[29] If the United States had intended to make an adjustment for the differences in the costs of credit insurance (or for some other measure of the differences in risk of non-payment) in the two markets, it was required by the last sentence of Article 2.4 of the Anti-Dumping Agreement to "indicate to the parties in question what information [was] required." The record of the SSPC and SSS cases does not contain any request from the DOC for information regarding either the differences in the costs of credit insurance or any other measures of the differences in the risks of non-payment in the two markets.

[30] See POSAM Verification Report (SSSS), at 7 (ROK Ex. 61) ("We also examined the accounts where other such negative invoices would have been recorded for both 1997 and 1998, and found no indication that POSAM had negated other sales invoices or recorded bad debt in these accounts. We also spoke with the accounting staff and reviewed the accounts on POSAM's computer system. We found no indication of the existence of a bad debt account, and no discrepancies with POSAM's response."). Korea provides as ROK Ex. 62 (SSPC) and ROK Ex. 63 (SSSS) copies of the exhibits to POSCO's responses and supplemental responses to Section B of the DOC's questionnaire in which POSCO provided information about the Korean-market bad debt expenses for POSCO and POSTEEL.

[31] During the Panel's first meeting, the United States asserted that POSCO's affiliate POSTEEL had recorded bad debt expenses on US sales prior to the sale to the ABC Company. *See* US Oral Statement, para. 17. That assertion is, however, flatly incorrect. It is true that POSTEEL had reported general bad debt

67. The United States apparently assumed that the mere fact that the ABC Company's failure to pay imposed large costs on POSCO demonstrated that the *risk* of non-payment was higher in the United States than in Korea.[32] Such an assumption is, however, plainly absurd. In simple terms, the adjustment made by the United States confused the small risk of being hit with lightning with the large damage that is caused if one happens to be one of the few people so hit. As a statistical matter, risk cannot be measured by a single occurrence — because there is no way to tell whether a single occurrence is part of a common pattern or is a one-in-a-million long-shot that just happens to come in.[33]

68. In any event, it is clear that the DOC's determinations made no effort to quantify the *risk* of non-payment in the United States or Korea prior to the sale to the ABC Company. Those determinations are, therefore, plainly inadequate to support the adjustment that the United States now claims to have made for the *risk* of non-payment.

(iii) Although the United States Has Contended that Non-Payment Is Like Warranty, It Did Not Calculate the Adjustment for the Costs of Non-Payment in the Manner Used to Calculate the Adjustment for Warranty Costs

69. As mentioned, the United States has argued to this Panel that the risk of non-payment is analogous to the risk of warranty expenses — since a seller clearly can predict that there is a risk of incurring such expenses in the future, but cannot accurately predict the amounts that will be incurred on individual sales at the time the sales terms are fixed. But this analogy to warranty illustrates the precise flaw in the US approach to the costs of non-payment in this case.

70. Under its normal practice, the DOC does not simply allocate current warranty expenses over current sales to determine the amount of the warranty adjustment for the sales under investigation. Instead, the DOC has explained that:

> The Department's normal practice in computing warranty expenses is to use historical data over a four- or five-year period preceding the filing of the petition to estimate the likely warranty expenses on POI [*i.e.*, period of investigation] sales.[34]

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expenses in its questionnaire responses as "common" indirect selling expenses which could not be segregated by market. However, there was no indication that these reported POSTEEL bad debt expenses reflected actual or expected US expenses (rather than expenses on other export sales to other markets, or a "reserve" determined based on the overall level of POSTEEL's sales in all markets).

Finally, it is important to note that the US determinations did not rely on, or even mention, the existence of prior bad debt on US sales to justify its adjustment. The US suggestion that POSTEEL actually had bad debt expenses is therefore, a *post-hoc* rationalization that cannot provide a basis for upholding the US determinations.

[32] This assumption is implicit in the fact that the United States made the "bad debt" adjustment by allocating the actual "bad debt" expenses to *all* US sales during the period.

[33] It is fundamental to the field of statistics that one cannot accurately judge probabilities without a sufficiently large sample. *See, e.g.*, David Freedman, et al., *Statistics* at 355; Robert E. Megill, *An Introduction to Risk Analysis*, at (2d ed.) (ROK Ex. 64).

[34] *Large Newspaper Printing Presses from Germany*, 61 Fed. Reg. 38166, 38185 (July 23, 1996) (ROK Ex. 65). *See also Koenig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d 834, 855 (Ct. Int'l Trade 1998) ("Commerce's normal practice in computing warranty expenses is to use historical data from a four- or five-year period preceding the filing of the petition to estimate the probable warranty expenses on POI sales.") (ROK Ex. 66).

The DOC has also explained that, if the warranty expenses incurred during the investigation period do not correspond to historical experience, the DOC will rely on historical experience to calculate the warranty adjustment.[35]

71. In short, the DOC's methodology for calculating the warranty adjustment includes safeguards to ensure that the adjustment reflects the exporter's historical experience, and not just the aberrant data for a single year. Such safeguards are essential to the calculation of an adjustment for the *risk* of warranty expenses that the seller accepted when it agreed to the warranty terms of the sale.

72. The DOC failed to employ such safeguards, however, when calculating the adjustment for non-payment costs in the SSPC and SSSS cases. As a result, the United States cannot argue that those adjustments provided a proper measure of the *risk* of non-payment in the US and Korean markets.

(iv) The Decision by the US Court of International Trade in the Daewoo *Case Does Not Justify the US Treatment of the Costs of Non-Payment in the SSPC and SSSS Cases*

73. In its final determinations in the SSPC and SSSS cases, and in its Submission and Oral Statement to this Panel, the United States has asserted that its treatment of "bad debt" as a direct selling expense was required by US domestic judicial decisions — in particular, the decision by the US Court of International Trade in *Daewoo v. United States*.[36] That decision is, however, irrelevant to the proceedings before this Panel — and, if it were relevant, it does not support the US position.

74. To begin with, *Daewoo* is an interpretation of US domestic law made by a US domestic judicial authority. It did not purport to decide whether an adjustment for bad debt was permissible under Article 2.4 of the Anti-Dumping Agreement. And, even if it had, its decision would not be binding on this Panel.

75. Moreover, contrary to the US suggestion, the issue in *Daewoo* was not whether bad debt must always be treated as a direct expense. Instead, the issue in *Daewoo* concerned the DOC's practice of treating the *estimated* future bad debt relating to the sales during the review period differently than the *actual* bad debt already experienced on those sales. The Court of International Trade held in *Daewoo* that it was unlawful for the DOC to refuse to treat the estimated future bad debt and the actual bad debt on current sales in the same manner.[37] *Daewoo* did not hold that bad debt was a direct selling

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[35] *See Bicycles from the People's Republic of China*, 61 Fed. Reg. 19026, 19042 (Apr. 30, 1996) ("Our examination of Motiv's historical warranty costs indicate that the reported POI warranty costs may not be reflective of what Motiv's true warranty expenses will be on its POI sales. Accordingly, we have used the historical warranty expenses.") (ROK Ex. 67); *Television Receivers from Japan*, 56 Fed. Reg. 38417, 38421 (Aug. 13, 1991) ("Although we generally use warranty expenses incurred during the period of the review, the Department will consider longer historical periods to provide a more accurate estimate of the eventual warranty expenses for the merchandise under review.") (ROK Ex. 68).

[36] *See* SSPC Final Determination at 15448-49 (ROK Ex. 11); SSSS Final Determination at 30674 (ROK Ex. 24); US First Submission, para. 58 n. 58; US Oral Statement, para. 25.

[37] Prior to *Daewoo*, the DOC would classify bad debt expenses as direct or indirect selling expenses depending on the timing of the bad debt write-off. If the bad debt written off during the relevant period related to sales during the relevant period, the DOC would treat the bad debt expense as a direct expense. If the bad debt written off during the period related to prior sales, the DOC would classify the bad debt expense as an indirect selling expense. The DOC at that time made no attempt to estimate the bad debt that might be written off in the future on the sales during the review period. *Daewoo Electronics Co., Ltd. v. United States*, 712 F. Supp. 931, 938-40 (Ct. Int'l Trade 1989) (US Ex. 11).

The Court of International Trade held in *Daewoo* that it was improper for the DOC to refuse to treat the future bad debt on current sales as a direct expense, when it had conceded that the current bad debt on current sales was direct. In this regard, the Court explained that:

expense in all cases — because that issue was never before the Court in *Daewoo*. This conclusion is confirmed by several subsequent decisions by the US courts, which have observed that "*Daewoo* does not completely foreclose the ITA from treating bad debt expenses as indirect."[38]

76. Finally, a review of the DOC's practice since *Daewoo* reveals that the DOC has continued to classify bad debt expenses as *indirect* expenses in numerous cases — including a case decided as recently as November of last year.[39] At a minimum, then, one must question the accuracy of the US statement to this Panel that "it is now standard practice to include US and home market bad debt in the circumstance of sale adjustment."[40]

(v) The US Interpretation of the "Fair Comparison" Requirement Would Improperly Render the Relevant Provision "Inutile," and Would Frustrate the Clearly Expressed Intent of the Anti-Dumping Agreement

77. As discussed above, Korea has contended throughout this proceeding that the adjustment for the costs of non-payment was inconsistent with the "fair comparison" requirement of Article 2.4, because the adjustment would result in a finding of dumping based on an event beyond POSCO's control.

Commerce does not dispute that bad debt losses do qualify as selling expenses, arguing only that bad debt losses, as opposed to warranty expenses, are not *direct* selling expenses, unless they are incurred with regard to the sales under review. Absent any reasonable indication as to why the estimation of bad debt expenses based on past experience is any less reliable than the use of past experience for warranty expenses, this distinction between them is not proper.

The Court finds that the ITA administrative practice disregarding the selling expenses for bad debt losses, while granting adjustments for warranty expenses which are not incurred with regard to the sales under review, is arbitrary and is likely to result in distorted calculations of FMV.

Id. at 940.

[38] See Zenith Electronics Corp. v. United States, 18 C.I.T. 882, 888 (1994) (ROK Ex. 69); Samsung Electronics Co., Ltd. v. United States, 18 C.I.T. 891, 894 (1994) (ROK Ex. 70).

[39] *See, e.g., Porcelain-on-Steel Cookware from Mexico*, 64 Fed. Reg. 60417, 60419 (Nov. 5, 1999) ("We recalculated CIC's indirect selling expenses to include bad debt and depreciation expenses.") (ROK Ex. 71); *Stainless Steel Wire Rod from Korea*, 63 Fed. Reg. 40404, 40406 (July 29, 1998) ("We increased Changwon's reported indirect selling expense by the unreported recognized bad debt expenses.") (ROK Ex. 72); *Extruded Rubber Thread from Malaysia*, 61 Fed. Reg. 54767, 54767 (Oct. 22, 1996) ("We disregarded sales to the United States and third countries which were written off as bad debt because bad debt was accounted for in respondent's reported indirect selling expenses.") (ROK Ex. 73); *Bicycles from the People's Republic of China*, at 19041 ("We have classified bad debt as an indirect selling expense and have treated it as such for purposes of the final determination.") (ROK Ex. 67); *Cut to Length Carbon Steel Plate from Germany*, 61 Fed. Reg. 13834, 13836 (Mar. 28, 1996) ("Write-off's of receivables are bad debt expenses. The Department considers these to be ordinary operating expenses because they are by their very nature indirect selling expenses, since under Generally Accepted Accounting Principles bad debt is recovered by future price increases.") (ROK Ex. 74); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 60 Fed. Reg. 42511, 42513 (Aug. 16, 1995) ("We made deductions from ESP for... US indirect selling expenses such as technical services, inventory carrying costs, warehousing expenses, and bad debt.") (ROK Ex. 75); *Fresh Cut Roses from Columbia*, at 7014 ("We consider bad debt, by its very nature, to be an indirect selling expense since under Generally Accepted Accounting Principles, bad debt is recovered over time by future price increases. ") (ROK Ex. 52); *Gray Portland Cement and Clinker from Japan*, 59 Fed. Reg. 6614, 6614 (Feb. 11, 1994) ("We also deducted *indirect* selling expenses, where appropriate, which included Onada's reported indirect selling expenses plus technical services, advertising, bad debt..." (ROK Ex. 76).

[40] *See* US Oral Statement, para. 25.

78. In its First Submission, the United States conceded that the actual non-payment by the ABC Company was beyond POSCO's control.[41] In its Oral Statement, however, the United States suggested that the *risk* of non-payment was actually within POSCO's control, because POSCO could have avoided that risk by refusing to sell on credit.

79. This revised argument misses the point. As discussed above, the United States did not make an adjustment for the *risk* of non-payment that POSCO assumed when it made its sales on credit. Instead, it made an adjustment for POSCO's bad luck in having one major US customer fail to pay during the relevant period. Because the United States tied the adjustment not to the *risk* of non-payment, but to the fortuity that one customer failed to pay, it unfairly penalized POSCO for a factor beyond POSCO's control. The US adjustment cannot, therefore, be reconciled with the "fair comparison" requirement of Article 2.4.

80. Faced with this difficulty, the United States has attempted to read the "fair comparison" requirement out of the Anti-Dumping Agreement altogether. Thus, it accuses Korea of attempting to use the "fair comparison" requirement to "add to or diminish the rights and obligations provided in the [Anti-Dumping] agreement[]."[42] In other words, the United States apparently objects to any interpretation of the "fair comparison" requirement that would impose additional disciplines on investigating authorities beyond those elsewhere specified in the Anti-Dumping Agreement.

81. This argument is absurd on its face. Korea is not attempting to "add to or diminish" the rights and obligations created by the Anti-Dumping Agreement. Instead, it is seeking to enforce the rights and obligations that are expressly created by the first sentence of Article 2.4, which states unequivocally that "[a] fair comparison shall be made between the export price and the normal value."

82. In this regard, a comparison of the current "fair comparison" language with the predecessor provision in the Tokyo Round Anti-Dumping Code is striking. The Tokyo Round Code did not contain a separate sentence commanding that "[a] fair comparison shall be made between the export price and the normal value," as the current Anti-Dumping Agreement provides. Instead, the Tokyo Round Code explicitly tied the "fair comparison" requirement to the requirements that the comparison be made between sales at the same level of trade and at the same time.[43] The conditional language of the Tokyo Round Code led to the conclusion that, prior to the Uruguay Round negotiations, a comparison that complied with the other aspects of the predecessor provision of Article 2.4 was deemed to be "fair."[44]

83. As a result of the Uruguay Round negotiations, however, the "fair comparison" requirement of the current Anti-Dumping has been elevated to a separate sentence that is independent of the other requirements of Article 2.4. It follows, then, that the "fair comparison" requirement of the first sentence of Article 2.4 must be construed as imposing disciplines other than those required by the other provisions of Article 2.4. Any other interpretation would render the first sentence of Article 2.4

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[41] *See* US First Submission, para. 86 ("Many selling expenses, in addition to bad debt, are not within the exporter's control and the amount of the associated expense is not known at the time of sale.").

[42] *See* US First Submission, para. 62.

[43] The Tokyo Round Code provided that,

> In order to effect a fair comparison ... the two prices shall be compared at the same level of trade ... and in respect of sales made at as nearly as possible the same time.
>
> Tokyo Round Anti-Dumping Code, Article 2:6.

[44] *See EC — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Report of the Panel, ADP/137, adopted on 30 Oct. 1995, para. 492 ("the wording of Article 2:6 [of the Tokyo Round Code] "in order to effect a fair comparison" made clear that if the requirements of that Article were met, any comparison thus undertaken was deemed to be 'fair.'").

"inutile," and would frustrate the purpose inherent in the Uruguay Round's modification of the conditional language found in the Tokyo Round Code.

2. The Inclusion of the Unpaid Sales in the Calculation of the Dumping Margins Was Inconsistent with Established US Practice and the "Fair Comparison" Requirements of Article 2.4

84. As a general matter, Article 2.4.2 of the Anti-Dumping Agreement provides that "all comparable export transactions" must be included in the calculation of the dumping margins. However, that provision is expressly subject to the fair comparison requirement — which is set forth in the introductory clause to the first sentence of Article 2.4.2 and in the first sentence of the *chapeau* of Article 2.4 as well. Thus, the Anti-Dumping Agreement does not permit atypical export sales to be included when inclusion would distort the results and lead to an unfair comparison.

85. The United States does not dispute that it has the authority to disregard "atypical" US sales. However, it contends that the unpaid sales were not "atypical" — because non-payment is a common fact of life in everyday business, and because the prices and other terms for the unpaid sales did not differ from the prices and terms of paid sales.[45] In addition, the United States also argues that these sales did not meet the criteria for exclusion under US law, because its normal practice is to exclude "atypical" sales from its analysis only when those sales are so small that their inclusion would have an insignificant effect on the margin.[46]

86. Korea concedes that, if the unpaid sales had been paid, their prices and other terms would not have been atypical. The fundamental point, however, is that the unpaid sales were not paid. The failure of the customer to pay was clearly not "typical" of POSCO's business practices — as the DOC itself conceded in its preliminary determinations. To the extent that the non-payment affected the DOC's calculations (through the bad-debt adjustment or through other means), then the inclusion of the unpaid sales did distort the results, and the sales should have been excluded.

87. Finally, the description offered by the United States of its normal practice concerning atypical sales is misleading. There is no question that US law permits atypical US sales to be included in the analysis if the inclusion of the sales would not distort the results. But it is equally clear that the DOC is not permitted to include atypical US sales when inclusion would distort the results. In such cases, the DOC must either make an adjustment to eliminate the distortion or exclude the sales.[47]

88. In the SSPC and SSSS cases, the DOC did precisely the opposite of what both US law and the "fair comparison" provision of Article 2.4 require: The DOC did not make an adjustment to eliminate the distortion caused by the atypical unpaid sales, and it did not exclude those sales from its analysis. Instead, it included the sales in its analysis, and it made an adjustment that created precisely the distortion it was supposed to try to avoid. Its methodology was, therefore, unfair and inconsistent with the "fair comparison" requirement of Article 2.4.

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[45] US First Submission, para. 71.

[46] US First Submission, para. 71.

[47] As one of the cases cited by the United States explains:

> ... whether sales are in or out of the ordinary course of trade is not the determinative factor on the US sales side of the equation. *Fairness, distortion representativeness are the issues to be examined.* The goal is to include the sales but *to utilize whatever methodology is needed to ensure a fair comparison.*

American Permac, Inc. v. United States, 783 F. Supp. 1421, 1423-24 (Ct. Int'l Trade 1992) (emphasis added) (US Ex. 15).

B. MULTIPLE AVERAGING

1. The Multiple-Averaging Methodology Is Inconsistent with Article 2.4.2 of the Anti-Dumping Agreement

89. As explained in Korea's First Submission, Article 2.4.2 of the Anti-Dumping Agreement requires that dumping margins be calculated "on the basis of a comparison of *a weighted average* normal value with *a weighted average* of prices of *all* comparable export transactions or by a comparison of normal value and export prices on a transaction-by-transaction basis." Article 2.4.2 repeatedly uses the distinctly singular phrase "*a* weighted average." Moreover, it also refers to "a weighted average of *all* comparable export transactions." Consequently, the text of Article 2.4.2 clearly requires that the dumping margins be calculated by comparing a single average including all comparable transactions.[48]

90. It is undisputed that the United States did not compare a single average of all comparable transactions, as Article 2.4.2 requires. Instead, the United States divided the investigation periods in both the SSPC and SSSS cases into separate sub-periods, and calculated separate dumping margins for each sub-period (based on the average normal values and export prices for the sub-period). It then determined the overall dumping margin by combining the separate dumping margins for each sub-period.

91. As a practical matter, this multiple-averaging methodology would not have had a significant effect on the dumping margins if the United States had combined the separate dumping margins for each sub-period in a manner that fully offset any negative margins for one sub-period against positive dumping margins for the other. However, the United States did not permit such offsets. Instead, employing the process known as "zeroing," the United States treated any negative dumping margins as if they were zero margins, and then calculated the overall dumping margin by averaging these "zero" margins with any positive margins found. As a result, the US methodology resulted in significantly higher dumping margins than the methodology prescribed by Article 2.4.2. The US methodology cannot, therefore, be reconciled with the requirements of Article 2.4.2.

2. The Multiple-Averaging Methodology Is Inconsistent with Article 2.4.1 of the Anti-Dumping Agreement

92. The United States claimed that its departure from the requirements of Article 2.4.2 was necessary to account for the depreciation of the Korean won during the investigation periods. However, as explained in Korea's First Submission, this modification of the comparison methodology to account for an exchange rate movement was inconsistent with Article 2.4.1 of the Anti-Dumping Agreement.[49]

93. Article 2.4.1 is the only provision of the Anti-Dumping Agreement that addresses exchange rates or the permissible modifications to the dumping calculation methodology to account for exchange rate movements. Significantly, Article 2.4.1 sets forth special rules that apply to situations in which the exporting country's currency has been *appreciating*. However, Article 2.4.1 does not permit any adjustment to the dumping calculations to account for a *depreciation* of the exporting country's currency.

94. Consequently, because the multiple-averaging methodology was adopted to account for the depreciation of the Korean won, it was inconsistent with the requirement of Article 2.4.1 that the price comparisons not be modified to account for depreciation in the exporting country's currency.

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[48] Korea's First Submission, paras. 4.45 - 4.48.
[49] Korea's First Submission, paras. 4.49 - 4.53.

3. The Multiple-Averaging Methodology Deprived POSCO of the "Fair Comparison" Required by Article 2.4 of the Anti-Dumping Agreement

95. Because the multiple-averaging methodology does not comply with the requirements of Articles 2.4.1 and 2.4.2, it is always inappropriate. In the circumstances of the SSPC and SSSS cases, however, it was particularly unfair.

96. As explained in Korea's First Submission, the US industry's claims for relief in the SSPC and SSSS cases were predicated on the claim that anti-dumping orders were needed to protect the US industry from an increase in imports after the devaluation of the Korean won.[50] Because these cases were predicated on the effects of the devaluation, a fair analysis of whether POSCO was truly engaged in dumping necessarily should have focused on pricing data after the devaluation. Yet, it was precisely that data that the multiple-averaging methodology effectively "walled off" from the DOC's price comparisons.

97. The result was a dumping determination based solely on pre-devaluation data in a case that was predicated on post-devaluation imports. Such a result is plainly unfair. Consequently, the US multiple-averaging methodology cannot be reconciled with the "fair comparison" requirement of Article 2.4.

4. The Arguments Presented by the United States Do Not Justify Its Departure from the Methodology Required by the Anti-Dumping Agreement

98. The United States does not deny that it created the multiple-averaging methodology specifically to increase the dumping margins found. Rather, it contends that this results-oriented methodology not only was permitted under Articles 2.4.2 and 2.4.1, but also was necessary to prevent dumping margins from being "disguised" by the won's depreciation.[51]

99. As discussed more fully below, the arguments presented by the United States under Articles 2.4.2 and 2.4.1 do not comport with the actual provisions or the purpose of the Anti-Dumping Agreement. To the contrary, the US arguments are inherently circular: Having decided unilaterally that the multiple-averaging methodology was appropriate to prevent "disguised" dumping, the United States now argues that the methodology prescribed by the Anti-Dumping Agreement had to be modified simply because it would have resulted in lower dumping margins.

(a) Although Article 2.4.2 Requires the Investigating Authorities to Limit Averages to "Comparable Transactions," A Currency Depreciation Does Not Make Transactions Non-Comparable

100. The United States appears to concede Korea's argument that Article 2.4.2 requires the calculation and comparison of a single average normal value and a single average export price for comparable transactions. It argues, however, that its multiple-averaging methodology is consistent with this interpretation, because the prices before the devaluation of the Korean won were not "comparable" with the prices after the devaluation of the Korean won.[52]

101. As discussed more fully below, this interpretation does not withstand scrutiny. Because a currency depreciation does not preclude the comparison of home-market and export sales under the rules established by the Anti-Dumping Agreement, there is no basis for considering the pre-

[50] *See* Korea's First Submission, para. 3.48 and 4.61.
[51] *See, e.g.*, US First Submission, para. 137.
[52] *See, e.g.*, US First Submission, para. 145.

depreciation sales to be non-comparable to the post devaluation sales. Article 2.4.2 therefore required that the pre- and post-depreciation sales be included in the calculation of the single weighted-average normal value and export price.

(i) The Meaning of the Term "Comparable Transactions" Must Be Understood in Light of the Rules Concerning "Comparisons" Established by the Anti-Dumping Agreement

102. The word "comparable" means, in essence, "capable of being compared."[53] Under this definition, sales are "comparable" if they can be compared, and non-comparable if they cannot.

103. Ordinarily, of course, any two prices can be "compared" — in the sense that one can examine the two prices and determine whether one is higher than the other. However, such a comparison does not provide a basis for a determination of dumping, unless the comparison complies with the requirements of the Anti-Dumping Agreement. To give a simple example, one can compare the prices of apples and oranges. If the price of apples is $1 per fruit and the price of oranges is $1.50 per fruit, one can examine the prices and determine that the price of apples per fruit is lower than the price of oranges. But one cannot use that comparison to determine that apples have been "dumped" unless the comparison conforms to the Anti-Dumping Agreement's requirements. Transactions that can be compared under the provisions of the Anti-Dumping Agreement are "comparable" transactions. Transactions that cannot be compared under the provisions of the Anti-Dumping Agreement are not "comparable" transactions.

104. There are, of course, a number of substantive limitations on the transactions that may be compared under the Anti-Dumping Agreement:

> *First*, Article 2.1 of the Anti-Dumping Agreement only permits comparisons of products with identical (or, in the absence of identical, the most similar) physical characteristics.[54] Sales of products with less similar physical characteristics are, therefore, not "comparable transactions."
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> *Second*, the second sentence of the *chapeau* of Article 2.4 only permits comparisons at the same level of trade. This means that sales at different levels of trade are not "comparable transactions."
>
> *Third*, the second sentence of the *chapeau* of Article 2.4 also requires that comparisons be made "in respect of sales at as nearly as possibly the same time." This may mean that when the transaction-to-transaction methodology is used, sales in different parts of the investigation period may not be "comparable transactions." Similarly, when the average-to-average methodology is used, the sales in each market should, *on average*, have been made at the same time in order to be considered "comparable transactions."

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[53] The dictionary defines "comparable" as:

> **1:** capable of being compared: **a:** having enough like characteristics or qualities to make comparison appropriate — *usu.* used with ... **b:** permitting or inviting comparison often in or two salient points only — *usu.* used with *to* ... **2:** suitable for matching, coordinating or contrasting **:** EQUIVALENT, SIMILAR ....

Webster's Third New International Dictionary, 461.

[54] Article 2.1 provides that "a product is to be considered as being dumped . . . if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the *like product* when destined for consumption in the exporting country." As the United States has recognized in its implementation of this provision, the phrase "like product when destined for consumption in the exporting country" means the product that is identical (or, in the absence of an identical product, most similar) in physical characteristics to the exported product. *See* Tariff Act of 1930, as amended, § 771(16), 19 USC. § 1677(16) (definition of "foreign like product.") (ROK Ex. 1).

> *Fourth*, the first sentence of the *chapeau* of Article 2.4 — which requires that a "fair comparison" be made — only permits comparisons of transactions that may fairly be compared. This mean that transactions whose comparison would lead to unfair results are not "comparable transactions."

These substantive limitations define the transactions that are "comparable" within the meaning of the Anti-Dumping Agreement. If transactions may be included in the comparisons under these rules, then they are "comparable" (*i.e.*, "capable of being compared") under the Agreement.

105. Under the Anti-Dumping Agreement, then, the sales prior to the depreciation of the Korean won would not be "comparable transactions" to sales after the won's depreciation only if there were some provision of the Agreement that would prohibit the comparison of such transactions. In the absence of a prohibition on comparison, the transactions are "comparable" within the meaning of the Agreement, and it would be plain error to exclude the transactions from the calculations of the weighted-average normal value and export price that must be compared.

(ii) A Currency Depreciation Does Not Make Transactions "Non-Comparable" under the Anti-Dumping Agreement

106. In this regard, there are no provisions in the Anti-Dumping Agreement that limit the transactions that may be included in comparisons due to movements in exchange rates. Article 2.4.1 is the only provision of the Anti-Dumping Agreement addressing exchange rates. The first sentence of Article 2.4.1 sets forth the basic rule — which is that the exchange rate on the date of sale should normally be used. The second sentence of Article 2.4.1 then addresses situations in which exchange rates have "fluctuated" or have been the subject of a "sustained movement."

107. Significantly, these provisions do not in any way limit the ability of the investigating authority to compare transactions before and after the currency fluctuation or sustained movement. They do not indicate that sales before the fluctuation or sustained movement cannot be compared to sales during or after the fluctuation or sustained movement. As the *Cotton Yarn* panel observed, "The exchange rate in itself is not a difference affecting price comparability."[55] Indeed, the United States has specifically recognized this fact. In its First Submission, it specifically rejected the argument that Article 2.4.1 "establishes a limit on which transactions may be considered 'comparable' within the meaning of ... Article 2.4.2."[56] Consequently, the United States cannot now contend that the provisions of Article 2.4.1 make "non-comparable" any transactions made when different exchange rates were in effect.

(iii) The Provision in the Chapeau of Article 2.4 Requiring that Comparisons Be Made "At As Near As Possible the Same Time" Does Not Justify a Multiple-Averaging Methodology to Account for Currency Movements

108. In the absence of any provision that explicitly authorizes the use of a multiple-averaging methodology to account for currency movements, the United States has suggested that such a methodology might be justified under the second sentence of the *chapeau* of Article 2.4, which requires, *inter alia*, that comparisons be made "in respect of sales at as nearly as possibly the same time."[57] This argument is, however, without merit.

109. The timing requirement of the second sentence of Article 2.4 applies equally to all cases, whether or not there has been a currency depreciation. And, in all cases, a single period average

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[55] *Cotton Yarn*, para. 494 (construing the Tokyo Round Code's predecessor provision of Article 2.4).
[56] US First Submission, para. 142.
[57] *See* US Oral Statement, para. 29.

necessarily includes sales that are made at opposite ends of the period and thus are not "at as nearly as possibly the same time." Consequently, a comparison of an average normal value with an average export price in all cases necessarily encompasses individual home-market and export sales transactions that were not made at the same time.

110. Nevertheless, the timing requirement of the second sentence of Article 2.4 does not prevent a single period average. The reason derives from the nature of an average: When a series of sales spread throughout the investigation period is combined to make an average, the result is an average sale that was made, *on average*, at the mid-point of the investigation period. Consequently, when the average export price is compared to the average normal value, the comparison is between average sales made, on average, at the mid-point of the investigation period. The comparison is, therefore, made in respect to average sales that are made, on average, at the same time, in accordance with the requirements of the second sentence of Article 2.4.

111. Significantly, this effect is precisely the same whether or not there has been a currency depreciation. As long as the sales are spread evenly throughout the period, the averaging process results in an average sale that was made, on average, at the mid-point of the investigation period. Thus, currency depreciation does not provide a basis for finding that the single period averages are failing to compare sales at as near as possible the same time.

(b) Article 2.4.1 Describes the Permissible Modifications to the Dumping Calculations for Exchange Rate Movements; It Is Not Limited to Defining the Appropriate Exchange Rates to Be Used in Dumping Calculations

112. As mentioned, Korea's First Submission argued that the multiple-averaging methodology is inconsistent with Article 2.4.1, because Article 2.4.1 does not permit modifications to the dumping calculations to account for a depreciation in the exporting country's currency, while the multiple-averaging methodology was explicitly intended to account for the depreciation of the Korean won.

113. In response, the United States argues that the scope of Article 2.4.1 is extremely narrow. According to the United States, Article 2.4.1 simply describes the methods that are to be used to select exchange rates in investigations. In the US view, Article 2.4.1 does not otherwise describe permissible modifications to the normal dumping calculation methodology.

114. The US argument cannot, however, be reconciled with the actual language of Article 2.4.1. It is true that the first sentence of Article 2.4.1 specifically describes the methods that are to be used to select exchange rates in investigations. However, the second sentence of Article 2.4.1 — which addresses situations in which exchange rates have "fluctuated" or been the subject of a "sustained movement" — does not describe any method for selecting exchange rates in such situations. Instead, it prescribes specific *results* that the investigating authorities must achieve: When there has been a currency "fluctuation," Article 2.4.1 directs the investigating authority to ignore the fluctuation. When there has been a "sustained movement," Article 2.4.1 directs the investigating authority to "allow exporters at least 60 days to have adjusted their export prices to reflect [the] sustained movements."

115. The United States has apparently confused its own implementation of Article 2.4.1 with the actual requirements of that provision. It is undeniable that the United States has implemented the requirements of the second sentence of Article 2.4.1 by adopting a convoluted mechanism for selecting exchange rates.[58] However, the fact that the United States has implemented the

[58] See 19 USC. § 1677b-1 (ROK Ex. 1); DOC Notice: Change in Policy regarding Currency Conversions (ROK Ex. 49).

requirements of the second sentence of Article 2.4.1 with a mechanism for selecting exchange rates does not mean that the second sentence of Article 2.4.1 only addresses the selection of exchange rates.

116. In short, the US attempt to reduce Article 2.4.1 to a set of rules for choosing exchange rates reflects only the US implementation of that provision, and not the actual language of the Agreement. The language of Article 2.4.1 is broader than the US admits. And, contrary to the US arguments, Article 2.4.1 does specifically require modifications to the normal dumping calculation methodologies when there has been an *appreciation* in the exporting country's currency, but it does not permit such modifications when the exporting country's currency has *depreciated*. The adoption of a special methodology by the United States to account for the Korean won's depreciation was, therefore, inconsistent with the provisions of Article 2.4.1.

(c) A Comparison of a Single Average Normal Value to a Single Average Export Price Does Not "Disguise" Dumping Margins

117. In the end, the arguments put forth by the United States boil down to a simple proposition: The United States believes that the use of a single-averaging methodology would have "disguised" dumping margins, because it would offset the positive dumping margins before the depreciation with the negative dumping margins after the depreciation. This notion does not, however, withstand scrutiny.

(i) The Notion of "Disguised" Dumping Margins Is Inherently Circular and Fundamentally Contrary to the Bargain Reflected in the Anti-Dumping Agreement

118. As an initial matter, it should be noted that the notion of "disguised" dumping margins is inherently circular. Dumping margins are "disguised" by a single average methodology only if one assumes that the "correct" dumping margins are those calculated using multiple sub-period averages. If, by contrast, one assumes that the Anti-Dumping Agreement requires a comparison of single averages, then the results of the single average calculation are correct (not "disguised"), and the multiple-averaging methodology "inflates" the dumping margins. In short, whether a particular methodology "disguises" or "inflates" the dumping margins depends on one's assumption regarding the "correct" methodology.

119. In this regard, it should be noted that the provisions of Article 2.4.2 represent a carefully negotiated bargain among the WTO Members concerning the methodology that is to be used to calculate dumping margins. For example, prior to the negotiation of the current Anti-Dumping Agreement, a number of major users of anti-dumping laws (including the United States) regularly calculated dumping margins by comparing an average normal value to the export prices for individual transactions and then "zeroing" any negative margins found. This methodology was challenged under the Tokyo Round Anti-Dumping Code, and a number of WTO Members sought to prohibit this methodology in the Uruguay Round negotiations.[59]

120. The result of these efforts was a compromise. The average-to-transaction methodology was not entirely prohibited by the Article 2.4.2; however, it was restricted to exceptional situations in which export prices differ significantly among purchasers, regions or time periods.[60] At the same time, the general rule was established that, for non-exceptional cases, dumping margins should be calculated based on the comparison of "an average" normal value to "an average" export price (unless the transaction-to-transaction methodology was used).

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[59] Terence P. Stewart, ed., II *The GATT Uruguay Round: A Negotiating History, 1986-1992*, at 1537-43 (1993) (ROK Ex. 77).

[60] In such exceptional circumstances, Article 2.4.2 permits investigating authorities to calculate dumping margins by comparing an average normal value to the prices for individual export transactions.

121. By arguing that the single-average methodology "disguises" dumping margins, the United States is essentially asking the Panel to undo the bargain reflected in Article 2.4.2. In other words, the United States is asking the Panel to ignore the language of Article 2.4.2 (which requires a comparison of single averages) and instead affirmatively determine that "zeroing" is permitted even in non-exceptional cases, when there is no claim that export prices differed significantly among purchasers, regions or time periods. The Panel plainly should not accept that invitation.

(ii) The Multiple-Averaging Methodology Improperly Assumes that an Over-Valued Exchange Rate Is More Correct than an Under-Valued Exchange Rate

122. The notion of "disguised" dumping margins also ignores the nature of exchange rates. As noted in Korea's Oral Statement, exchange rates are not conditions of sale; they are tools for converting amounts from one currency to another.[61] Moreover, they are necessarily volatile and imperfect tools.

123. In hindsight, one might say that the Korean won was over-valued (at roughly 900 won per dollar) throughout much of 1997, until it "crashed" in November. The won then overshot the proper exchange rate and remained under-valued (at a rate as high as 1960 won per dollar in December 1997), until it finally rebounded to a mid-point of around 1400 won per dollar at the end of March 1998.

124. Throughout all of these exchange rate shifts, the prices for POSCO's Korean and US sales changed little.[62] However, the results of a comparison of those prices using the shifting exchange rates changed dramatically. Prior to November 1997, when the won was apparently over-valued, the Korean prices seemed higher than the US prices. In November and December 1997, when the won was apparently under-valued, the Korean prices seemed lower than the US prices.

125. The US arguments regarding "disguised" dumping margins implicitly assume that the dumping margins calculated when the won was over-valued are more probative than the dumping margins calculated when the won was under-valued. The multiple-averaging methodology also reflects the same bias: It calculates one dumping margin for the period when the won was over-valued and a separate margin for the period when the won was under-valued — and then effectively ignores the latter through "zeroing."

126. A fair comparison would not allow such a bias. It would not base a finding of dumping solely on an analysis of a period in which the won was over-valued, just as it would not base a finding of no dumping based solely on an analysis of a period in which the won was under-valued. Instead, a fair analysis would have given both periods equal weight, to avoid the distortions inherent in an analysis that examined only a period in which the exchange rate was biased in one direction.

127. In short, the distortions caused by these exchange rate movements could have been minimized by the use of an averaging period that included both the period of over-valuation and the period of under-valuation. By contrast, the multiple averaging period effectively included only the period of over-valuation. It thus allowed the imperfections in the exchange rate movements to cause the distorted results that it claimed that it was trying to avoid.

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[61] *See Cotton Yarn*, para. 494 (an exchange rate "is a mere instrument for translating into a common currency prices that have previously been rendered comparable in accordance with the second sentence of [Tokyo Round Code] Article 2:6," the predecessor of Article 2.4 of the Anti-Dumping Agreement).

[62] *See* POSCO Rebuttal Brief (SSPC), at 20-21 (ROK Ex. 9); POSCO Case Brief (SSSS), at 21-22 (ROK Ex. 20).

C. DOUBLE-CONVERSION OF LOCAL SALES

128. The facts concerning POSCO's "local sales" were as follows: The orders for these sales were placed in dollars (not won). The invoices for these sales set forth both the original order price in dollars and an amount in won calculated by applying the exchange rate on the date of invoice to the dollar price. The payments for these sales were made in won, with the payment amount calculated by applying the exchange rate on the date of payment to the agreed-upon dollar price. When the exchange rates on the dates of invoice and payment were not the same, the won amount of the payment did not match the won amount on the invoice (and the resulting exchange gain or loss was recorded in POSCO's accounting records). All of these facts were verified by the DOC. Based on those facts, the DOC's verification report concluded that "local sales are dollar denominated."[63]

129. The issue in this case concerns the methodology used by the United States to include these "local" sales in the calculation of normal value. As described in Korea's First Submission, the United States decided to base its calculations on the won amounts shown on the invoices for these sales (which were calculated by applying the exchange rate on the date of the *home-market* invoice to the agreed-upon dollar price). These won amounts were then included in the calculation of an average normal value in won. The average normal value in won was then converted into dollars using the exchange rate on the date of the *US* sales.

130. In essence, then, the dollar prices for these sales were converted into won at one rate (the rate on the date of the *home-market* invoice) and then converted back into dollars at another rate (the rate on the date of the *US* sale). Not surprisingly, this methodology resulted in substantial distortions. Indeed, Korea's First Submission identified one instance where this methodology inflated normal value by more than 70 percent.[64]

131. The issue before the Panel is whether, given the undisputed facts, the US methodology and the justifications given for adopting it were consistent with the requirements of the Anti-Dumping Agreement.

1. The Double-Conversion of the Dollar Prices for the "Local Sales" Violated Article 2.4.1 of the Anti-Dumping Agreement, Which Permits Currency Conversions Only When Such Conversions Are "Required

132. As explained in Korea's First Submission, the methodology for converting currencies in anti-dumping investigations is governed by Article 2.4.1 of the Anti-Dumping Agreement. That provision is, however, by its terms applicable only "[w]hen the price comparison under this paragraph [*i.e.*, Article 2.4] *requires* a conversion of currencies." The provisions of Article 2.4.1 do not apply, therefore, when a conversion of currencies is not "required."[65]

133. In the circumstances of the SSPC and SSSS cases, it was clear that the conversion of the dollar-denominated prices for the local sales was not required. The United States could have included those sales in its normal value calculations based on the dollar prices, without using the converted won amounts. And, if the United States had used the dollar-denominated prices, then there would have been no need for the second conversion from won back to dollars. Thus, neither leg of the double-conversion was "required." The US methodology cannot, therefore, be reconciled with the requirements of Article 2.4.1.

[63] SSSS Sales Verification Report, at 14 (ROK Ex. 19).
[64] *See* Korea's First Submission, para. 3.58.
[65] *See* Korea's First Submission, paras. 4.66 - 4.69.

2. The Double-Conversion Methodology Employed by the United States Was Inconsistent with the Fair Comparison Requirement of Article 2.4

134. The double-conversion methodology employed by the United States suffered from a further problem: Because the United States used the exchange rate at the time of the *home-market* invoice to convert the dollar prices into won, while using the exchange on the date of the comparable *US* sales to convert the won amounts back into dollars, it penalized POSCO for any changes in exchange rates between those two dates. This effect was not merely theoretical. In fact, as demonstrated in Korea's First Submission, the use of the inconsistent exchange rates actually increased normal value by more than 70 percent for one product comparison.[66]

135. The changes in the exchange rate between the date of the home-market invoice and the date of the comparable US sales was not within POSCO's control. Consequently, the use of a methodology that penalized POSCO for these changes was patently unfair. The double-conversion methodology was, therefore, inconsistent with the "fair comparison" requirement of Article 2.4.

3. The Justifications Offered by the DOC for Adopting the Double-Conversion Methodology Were Unreasonable, Unfair and Otherwise Inconsistent with the Requirements of the Anti-Dumping Agreement

136. As mentioned, the DOC's determinations indicated that the double-conversion methodology was adopted for three reasons: (1) the payments for the sales were made in won, (2) the sales were recorded in POSCO's accounting ledgers in won, and (3) the exchange rates used to convert the dollar amounts into the won amounts reflected on the invoices did not correspond to the exchange rates normally used by the DOC.[67] Of these, the United States regards the exchange rate differences as the "primary basis" for its decision.[68]

137. Significantly, none of these rationales explains why the double-conversion was "required." Thus, they do not provide a basis for finding that the double-conversion was consistent with Article 2.4.1 of the Anti-Dumping Agreement, which permits currency conversions only when "required."

138. Moreover, the rationales offered by the DOC are irrelevant to the critical issue in this case. In its preliminary oral responses to the Panel's questions, the United States has conceded that, if the sales in question had been denominated in dollars, its double-conversion methodology would have been inappropriate. Thus, the DOC's decision to apply the double-conversion methodology could only be justified by evidence establishing that the sales in question were not dollar-denominated. But the three justifications offered by the United States do not address that issue.

139. *First*, the fact that the payments were actually made in won does not contradict the fact that the basic terms of the sales were fixed in dollars, not won. As discussed above, the verified facts demonstrated that the purchase orders showed only a dollar price and that this agreed-upon dollar price was used to determine first the won amount set forth on the invoice (in addition to the dollar price) and later the different won amount of the customer's payment. It is also undisputed that the won amounts set forth on the invoice were not used to determine the won amount of the customer's payment.

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[66] *See* Korea's First Submission, para. 3.58.

[67] SSPC Final Determination, at 15456 (ROK Ex. 11); SSSS Final Determination, at 30678 ("the local sales were paid in won and recorded in POSCO's accounting records in won, and the exchange rates used by POSCO were dissimilar from those used by the Department") (ROK Ex. 24).

[68] US First Submission, para. 173.

140. In this regard, the DOC's reliance on the fact that the payments were actually made in won is somewhat ironic. The DOC did not use the amount in won that the customer actually paid as the price for these sales. Instead, the DOC used the amount in won shown on the invoice as the price for these sales — despite the fact that the won amounts shown on the invoice did not correspond to the customer's payments. In short, the DOC justified its use of one won amount as the price for these sales based on the fact that the customer paid a different won amount. That result is plainly illogical. The only rational conclusion to be drawn from the verified facts is that "local sales are dollar denominated," which is precisely what the DOC's own Verification Report stated.[69]

141. *Second*, the fact that local sales are recorded in won in POSCO's accounting ledgers is *apropos* of nothing. In accordance with generally accepted accounting principles, POSCO keeps its accounting ledgers in a single currency, the won. Thus, *all* of POSCO's sales — regardless of the currency in which they are denominated — are recorded in won. Indeed, POSCO's export sales to the United States — which the United States accepted as being denominated in dollars — are recorded in POSCO's accounting records in won.[70]

142. *Third*, the differences between official US and Korean exchange rates had no bearing on the question whether the sales prices were fixed in dollars. The fundamental point is that the won amounts shown on the invoices and the won amounts paid were calculated based on the agreed-upon dollar prices, and were not based on some agreed-upon won amount.

143. Finally, it should be noted that the reliance by the United States on the differences between US and Korean exchange rates was fundamentally unfair. In effect, the United States penalized POSCO by applying the distortive double-conversion methodology simply because the US Federal Reserve and the Korean Exchange Bank did not set the same exchange rates. The differences between the Federal Reserve and Korean Exchange Bank plainly were not within POSCO's control, and they could not be predicted by POSCO (since, among other things, the Federal Reserve rates each day were set long after the close of business in Korea). By penalizing POSCO for events beyond its control, the United States failed to make the "fair comparison" required by Article 2.4.

4. The US Arguments Before this Panel Concede that the Double-Conversion Methodology Was Flawed

144. In the proceedings before this Panel, the United States has offered a number of alternate justifications for the double-conversion methodology. As discussed below, those additional justifications are without merit. Before turning to those justifications, however, it is worth noting a somewhat separate point: A close examination of the US arguments before this Panel reveals that the United States has, in fact, conceded that its double-conversion methodology was flawed.

(a) The United States Has Conceded that Its Decision to Adopt the Double-Conversion Methodology Was Based on a Factual Error

145. As mentioned, the DOC claimed that the use of the Korean won amounts recorded in POSCO's accounting system was justified because the exchange rates used to calculate those amounts (which were based on official Korean Exchange Bank rates) differed significantly from the Federal Reserve exchange rates normally used by the DOC for its currency calculations. The exchange rate comparison presented by the DOC as evidence of this difference was, however, deeply flawed. The comparisons of POSCO's exchange rates to the Federal Reserve rates that were actually relied by the DOC showed differences of less than 1 percent in all cases. The only comparisons where the DOC identified a difference of more than 1 percent involved situations where the DOC mistakenly

[69] SSSS Sales Verification Report, at 14 (ROK Ex. 19).
[70] *See* Korea's First Submission, paras. 3.49 - 3.54.

compared POSCO's exchange rates to modified exchange rates calculated by the DOC, and not to the actual Federal Reserve exchange rates.[71]

146. In its First Submission, the United States concedes that the DOC made this error. Footnote 161 of its Submission admits that "Korea is correct that the Department mistakenly used adjusted exchange rates in the *SSPC* case." It is clear, then, that the DOC's determination was based on a factual error and, as a result, it cannot be sustained.

147. The United States argues that the factual error in the SSPC case was harmless, because its *post hoc* comparison of exchange rates also identifies four dates in November for which there were differences of more than 1 percent between the Federal Reserve rate and the rates used by POSCO. But this *post hoc* argument does not cure the defect in the DOC's determination. The DOC based *its* argument on the fact that the exchange rates actually used by POSCO to convert specific local sales differed from the Federal Reserve rates. By contrast, the United States has not pointed to any evidence that the exchange rates on the four dates it has identified were actually used by POSCO to convert local sales prices. For example, if there were no local sales on those dates, the comparisons presented by the United States in its brief would have no bearing on the manner in which the sales under investigation were actually recorded in POSCO's accounting records.

148. Finally, it should be noted that the comparisons offered by the United States in its First Submission are flawed, because they ignore the significant time differences between the United States and Korea. The Federal Reserve rates are based on a survey of New York banks at 12:00 noon on each date. But 12:00 noon in New York on any given day is 2:00 in the morning the next day in Korea. Or, to put it the other way, 12:00 noon in Korea on any date is 10:00 at night the previous day in New York. Thus, a comparison that matches exchange rates on the "same" date actually compares exchange rates determined 14 hours apart.[72]

149. When exchange rates are shifting rapidly, as they were in November 1997, this 14-hour difference can be critical. Indeed, if one compares the exchange rates at the same time (rather than the same date), the differences identified in the US brief simply disappear. The following table illustrates this point:

Date of Sale In Korea	Date in New York at Time of Sale in Korea	Korean Exchange Bank Rate on Date of Sale	Federal Reserve Bank Rate at Time of Sale in Korea	Percentage Difference
10 Nov. 1997	9 Nov. 1997	975.5	985	0.97%
18 Nov. 1997	17 Nov. 1997	986.7	992	0.54%
20 Nov. 1997	19 Nov. 1997	1031.4	1040	0.83%
21 Nov. 1997	20 Nov. 1997	1134.5	1139	0.40%

In short, the differences in exchange rates identified in the US First Submission are the function of the time zone between New York and Korea, and not a reflection of any "inaccuracy" in the Korean rates.

[71] *See* Korea's First Submission, para. 3.60.

[72] As noted in Korea's First Submission, the 14-hour time difference between Korea and New York means that the Federal Reserve rates determined at 12:00 noon in New York are not announced until nine hours after the close of business (5:00 p.m.) in Korea.

(b) The United States Has Conceded that the First Conversion from Dollars to Won Did Not Comply with the Requirements of Article 2.4.1

150. In its First Submission, the United States also conceded that the first step in the double conversion — that is, the initial conversion from dollars to won — was made using a methodology that did not comply with the requirements of the Anti-Dumping Agreement. Thus, it contended that:

> Korea argues, in effect, that the United States acted inconsistently with Article 2.4.1 when it converted these won-sales into dollars using the exchange rates determined under the requirements of Article 2.4.1 because POSCO had already made the conversions. However, the conversion formula used by POSCO does not satisfy the rules set forth in Article 2.4.1. For example, POSCO's formula does not account for fluctuations.[73]

Of course, the United States blames POSCO for failing to follow the requirements of Article 2.4.1 in the initial conversion from dollars to won. But POSCO was making that conversion solely for its internal accounting purposes, and not for purposes of calculating dumping margins under the Anti-Dumping Agreement. It was the United States that adopted POSCO's internal conversion from dollars to won as the starting point for the dumping margin calculations.

151. In any event, whatever flaws there may have been in POSCO's internal conversion cannot possibly justify the US decision to reject the actual dollar prices for the local sales — because the actual dollar prices were not affected by POSCO's internal conversion. In this regard, it must be remembered that the only conversions made by POSCO converted the dollar-prices shown on the purchase orders for the local sales *into won*. POSCO never converted from won into dollars. Indeed, the fact that POSCO's conversions were made from dollars into won was explicitly conceded by the DOC's verification report.[74]

152. Thus, when the United States complains about the flaws in *POSCO's* currency conversions, it is, in fact, complaining about the conversions that were used to determine the won amounts shown on the invoices. The won amounts shown on the invoices were, of course, the amounts the United States used as the starting point for its calculation of normal value. Consequently, the United States has conceded that the won amounts it used for the starting point of its calculations were determined in a manner that is inconsistent with the requirements of Article 2.4.1 of the Anti-Dumping Agreement. The violation of the Anti-Dumping Agreement is, therefore, manifest.

5. The Other Defences Offered by the United States Do Not Provide a Basis for Upholding the Double-Conversion Methodology

153. The United States has offered four basic responses to the arguments presented by Korea on the double-conversion methodology: *First*, it asserts that these arguments raise factual issues on which the Panel should defer to the DOC's determinations. *Second*, it claims that it complied with the requirements of Article 2.4.1 by making the currency conversions for the local sales using the exchange rates on the "date of sale."[75] *Third*, it contends that, while Article 2.4.1 "presupposes" that a conversion will be required, it does not prevent investigating authorities from making conversions when no conversion is required.[76] And, *fourth*, it suggests that there was no double-conversion by the DOC, because the first conversion from dollars into won was made by POSCO for internal accounting purposes and merely adopted by the DOC. As discussed below, none of these arguments provides a basis for upholding the double-conversion methodology.

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[73] US First Submission, para. 178.
[74] *See* SSSS Sales Verification Report, at 14 (ROK Ex. 19).
[75] *See, e.g.*, US First Submission, para. 175.
[76] *See* US First Submission, para. 177.

(a) The Facts Concerning the Local Sales Were Never in Dispute, and the Decision by the United States to Apply the Double-Conversion Methodology to the Local Sales Was Not a Factual Finding that Is Entitled to Special Deference

154. The United States has attempted to shield its decision to double-convert the dollar amounts for the local sales by claiming that its decision is entitled to special deference because it is a "factual determination."[77] That argument is, however, misplaced.

155. The facts concerning the "local sales" are not in dispute. The undisputed facts demonstrate that:

- The orders from the customers were denominated in dollars (and not won).[78]
- The invoices showed the agreed-upon dollar prices (as well as a won amount calculated by applying the exchange rate on the date of invoice to the dollar price).[79]
- The shipping lists sent to the customer listed the agreed-upon dollar prices (but not any won amounts, except for a separate charge for freight in won).[80]
- The customer paid the agreed-upon dollar price (as converted into won by applying the exchange rate on the date of payment).[81]
- The won amounts were not fixed in the initial agreement with the customer, and they were not consistent from invoice to payment.[82]
- The only amount that was consistent from order to invoice to payment was the dollar amount.

One might argue about the effect these undisputed facts should have on the dumping calculations. But the facts themselves are not, and never have been, in dispute.[83]

156. The US decision to apply the double-conversion methodology was, of course, based on an assessment of the facts of the case. It was not, however, based on a factual findings that differed from those advanced by POSCO. For example, the DOC did not dispute that the orders for the local sales were denominated solely in dollars (and not in won). It did not dispute that the won amounts on the invoices for the local sales did not correspond to the won amounts actually paid. And it did not dispute that the won amounts in all cases were calculated by applying exchange rates fixed by the official Korean Exchange Bank to the dollar-denominated prices for the local sales. Indeed, it would

[77] *See* US First Submission, para. 180.

[78] Provided as ROK Exhibit 78 is a sample order sheet from a verified local sale. In the order sheet, one can see clearly that the transaction is denominated in dollars because there is a "D" for dollars in the currency box (Number 10). Also provided is a guide to reading the order sheet from the DOC Verification Report.

[79] Provided as ROK Exhibit 79 is a sample invoice from a verified local sale.

[80] Provided as ROK Exhibit 80 is a sample shipping list from a verified local sale.

[81] SSSS Sales Verification Report, at 14 (ROK Ex. 19).

[82] Id.

[83] The United States has belatedly made in its Oral Statement the argument that POSCO did not provide sufficient, timely evidence to the DOC demonstrating that the economic value of the "local sales" was fixed in US dollars and not in won. US Oral Statement, paras. 35-40. For the reasons provided in Korea's response to the Panel's Question No. 3 regarding double-conversion, Korea believes that this US argument is untimely and meritless.

have been plain error for the DOC to dispute these facts, because there was absolutely no evidence on the record refuting them.

157. Given these undisputed facts, the question before the DOC was whether, in its calculation of normal value, it was appropriate to use the actual dollar prices for these sales, or to use won amounts that (the undisputed facts showed) were calculated by multiplying the agreed-upon dollar prices by the official exchange rates for the date of invoice. The DOC made the decision that the appropriate methodology was to use the converted won amounts. According to the DOC's determinations, this decision was based on three considerations: (1) the payments for the sales were made in won, (2) the sales are recorded in POSCO's accounting ledgers in won, and (3) the exchange rates used to convert the dollar amounts into the won amounts reflected on the invoices did not correspond to the exchange rates normally used by the DOC.[84]

158. The question before the Panel is whether the three grounds identified by the DOC are sufficient to justify the methodology the DOC adopted. This is not a factual issue, and it does not require the Panel to resolve any factual questions.

(b) The Issue Is Not Whether the DOC Used Exchange Rates on the Date of Some Sale

159. As mentioned, the United States has repeatedly claimed that it complied with the requirements of Article 2.4.1 by making the currency conversions for the local sales using the exchange rates on the "date of sale."[85] This argument is, however, utterly irrelevant.

160. The problem in this case is not that the United States selected the wrong exchange rate. Rather, the problem is that the United States used a double conversion, applying different exchange rates to convert the same sale in an inconsistent manner. The inconsistency arose because the United States made the final conversion from won to dollar using the exchange rate on the date of the US sale, while the initial conversion from dollars to won had been made using the exchange rate on the date of the home-market invoice. Because the exchange rate on the date of the US sale could (and did) differ dramatically from the exchange rate on the date of the home-market invoice, the double-conversion created significant distortions.

(c) The Anti-Dumping Agreement Only Permits Currency Conversion under the Situations Described in Article 2.4.1

161. As mentioned, the United States also claims that, while Article 2.4.1 "presupposes" that a conversion will be required, it does not prevent investigating authorities from making conversions when no conversion is required.[86] This interpretation is without merit.

162. Article 2.4.1 is the only provision in the entire Anti-Dumping Agreement that addresses currency conversion issues. If that provision does not apply to a particular currency conversion, then there are no rules in the Agreement governing the conversion.

163. Article 2.4.1 by its terms does not apply when the conversion is not "required." Consequently, if the Anti-Dumping Agreement does permit conversions when a conversion is *not* required (as the US contends), then those non-required conversions would not be subject to the disciplines of Article 2.4.1. Moreover, since there are no other provisions of the Agreement

[84] SSPC Final Determination, at 15456 (ROK Ex. 11); SSSS Final Determination, at 30678 ("the local sales were paid in won and recorded in POSCO's accounting records in won, and the exchange rates used by POSCO were dissimilar from those used by the Department") (ROK Ex. 24).

[85] *See, e.g.*, US First Submission, para. 175.

[86] *See* US First Submission, para. 177.

addressing currency conversions, these non-required conversions would not be subject to any disciplines at all. Thus, the US argument leads inevitably to the conclusion that (while *required* conversions are closely regulated by the Agreement) the Agreement grants the investigating authorities unfettered discretion to make *non-required* conversions and to use any conversion methodology at all when they do so. Such a result is plainly absurd.

164. In short, it is apparent that the Anti-Dumping Agreement permits currency conversions only when such conversions are "required."

165. The United States cannot meet that test in this case. As explained in Korea's First Submission, POSCO had submitted the dollar-denominated prices for the local sales to the DOC. The DOC was able to verify that the reported dollar prices matched the dollar amounts on the order sheets and invoices, and it was also able to verify that the customers' actual payments in won were calculated by multiplying the dollar prices by the official exchange rate for the date of payment. Accordingly, there was no reason the DOC could not have used the dollar-denominated prices. Consequently, the use of the converted won amounts was not "required" — and thus was not permitted under Article 2.4.1 of the Anti-Dumping Agreement.

(d) The DOC's Adoption of the Won Amounts that Had Been Calculated by POSCO for Internal Accounting Purposes Constitutes an Improper Double-Conversion

166. The United States has also suggested that Article 2.4.1 does not apply to its double-conversion methodology, because the initial conversion from dollars to won was actually made in the first instance by POSCO for internal accounting purposes.[87] It appears that the United States believes that, because it did not itself actively convert the dollar prices into won, it is not "guilty" of a double-conversion. That position is, however, untenable.

167. In the SSPC and SSSS investigations, the United States chose to use the converted won amounts (which were calculated figures that did not represent the fixed prices for the sales) rather than the actual dollar amounts (which were the fixed prices for the sales). The United States then chose to convert those won amounts back into dollars using the exchange rate on the date of the US sale — which was not the same as the exchange rate that had been used previously to convert the dollar amounts into won. The overall methodology therefore involved a double-conversion of the dollar amounts using inconsistent exchange rates. This double-conversion methodology is improper — regardless of whether the initial conversion was "made" by the United States or simply adopted by the United States from the figures in POSCO's accounting records.

(e) The United States Cannot Justify the Unfair Results Caused by the Double-Conversion Methodology

168. As demonstrated in Korea's First Submission, the "double-conversion" methodology distorted the results of the DOC's comparisons — inflating the dumping margins for one comparison by more than 70 percent. This distortion occurred because the exchange rates on the dates of the home-market invoices (which were used to convert the dollar prices into won) could differ significantly from the exchange rates on the dates of the US sales (which was used to convert the won amounts back into dollars).

169. The inflation of the dumping margins in this manner was plainly unfair. It penalized POSCO for changes in the exchange rates that were beyond its control.[88] Consequently, as Korea explained in

[87] *See* US First Submission, para. 183.

[88] Moreover, because the adoption of the double-conversion methodology was predicated on the differences between the official Federal Reserve and Korean Exchange Bank rates, POSCO was unfairly

its First Submission, the double-conversion methodology violated the "fair comparison" requirements of Article 2.4.

170. The United States has not even attempted to respond to these points, because there is simply no justification for the unfair results caused by its double-conversion methodology. Its silence on this point is striking confirmation of Korea's claims.

D. PROCEDURAL ERRORS IN THE US DETERMINATIONS

1. The United States Failed to Administer Its Laws in a "Uniform" and "Reasonable" Manner, As Required by Article X:3(a) of GATT 1994

(a) Article X:3(a) Requires Investigating Authorities to Implement Domestic Law Consistently, in a Uniform and Reasonable Manner

171. As demonstrated in Korea's First Submission, numerous aspects of the DOC's actions in the SSPC and SSSS cases reflected a failure to administer the anti-dumping laws and regulations "in a uniform, impartial and reasonable manner," as required by Article X:3(a) of GATT 1994. In particular, Korea demonstrated that the SSPC and SSSS decisions departed from previous decisions of the DOC and the US courts without a sound rationale — factors that clearly go to the "uniformity" and "reasonableness" of the DOC's administration of the anti-dumping laws and regulations.

172. As a general matter, the United States (with support from the EC) has offered several arguments suggesting that Article X:3(a) does not require an investigating authority to follow its precedents. As discussed below, however, these arguments are without merit, and the failure of the United States to administer US law uniformly from case to case is a violation of Article X:3(a).

173 *First*, the United States argued that this claim belongs in a US court and not before a Panel, going so far as to imply that the claim is not based on a "covered agreement" under the Dispute Settlement Understanding ("DSU").[89] That argument is demonstrably false. It is undeniable that GATT 1994 (including Article X:3(a) thereof) is a "covered agreement."[90]

174. *Second*, the United States, relying on the *Bananas* case, argued that "Article X:3 does not address the consistency of particular administrative rulings, but rather the administration of such rulings."[91] That argument misses the point. *Bananas* addressed a claim about the administration of "rulings." Korea's claim is based on a different aspect of Article X:3(a). It is undeniable that, in conducting the SSPC and SSSS investigations, the DOC was engaged in the "administration" of US anti-dumping "laws [and] regulations."

175. *Third*, the United States argues that "reasonable" administration of the anti-dumping laws requires changes from past practice "where facts properly established and objectively assessed reveal flaws or gaps in prior practice."[92] This argument actually supports Korea's position. Korea agrees that it is reasonable for an investigating authority to depart from its prior practice in a particular case when there is a sound rationale for doing so. However, when the reasons proffered in a final

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penalized for the existence of those differences and for the fact that it used the official Korean Exchange Bank rates in the normal course of business.

[89] *See, e.g.*, US First Submission, paras. 42, 51; US Oral Statement, para. 48.

[90] *See* DSU, art. 1, Appendix 1 (identifying among the "covered agreements" the "Multilateral Agreements on Trade in Goods" in Annex 1A to the Marrakesh Agreement Establishing the WTO, which in turn expressly includes GATT 1994).

[91] US First Submission, para. 43.

[92] US First Submission, para. 48.

determination for the departure from precedent are nonsensical, irrelevant, and internally inconsistent, as happened here, then the departure plainly evidences "unreasonable" and "non-uniform" administration of the anti-dumping laws and regulations.

176. *Finally*, the United States argues, again based on *Bananas*, that "where a measure is found to be reasonable under the Antidumping Agreement, the panel should find it to be reasonable also for purposes of Article X:3."[93] This argument is a fiction. If the Anti-Dumping Agreement had a provision, like Article X:3(a), which required reasonable administration of the anti-dumping laws, then of course one would expect panels to construe such a provision consistently with Article X:3(a). But there is no such provision in the Anti-Dumping Agreement.

177. Thus, the condition precedent for the US argument can never be met. Instead, the WTO regime leaves it to GATT Article X:3(a) to fill in this gap in the Anti-Dumping Agreement. Contrary to the US argument, the Appellate Body's decision in *Bananas* supports this supplemental role for Article X:3(a). When confronted with the question whether the procedural requirements of a specific WTO Agreement should be considered before or instead of Article X:3(a), the Appellate Body held "before."[94] It is ironic that the United States, which prevailed on this point in *Bananas*, has now conveniently changed its view.

(b) The Unjustified US Departures from Established Practice Violated the Requirements of Article X:3(a)

(i) The Failure to Exclude Unpaid Sales from the Dumping Analysis Was Inconsistent with the DOC's Established Practice

178. As demonstrated in Korea's First Submission, the DOC's failure to exclude POSCO's "atypical" unpaid sales from the dumping analysis was inconsistent with its established practice. The DOC itself initially recognized the "atypical" nature of these unpaid sales. The reasons given for the departure are inherently inconsistent: In Plate, the DOC deemed it significant that the unpaid sales as a percentage of total US sales were too "large" to "be dismissed as abnormalities." But in Sheet the DOC found POSCO's arguments about the small percentage of unpaid sales to be "inapposite."[95]

179. Confronted with this glaring lack of uniformity in the DOC's administration of the anti-dumping laws, the United States now seeks to divert the Panel's attention by arguing that other factors were more important to its analysis.[96] But that attempt should not be allowed to succeed. The DOC's own words clearly demonstrate its inconsistency.

(ii) The Multiple-Averaging Methodology Was Inconsistent with the DOC's Established Practice

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[93] US Oral Statement, para. 47.

[94] *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, AB-1997-3, at paras. 203-04 ("We agree, therefore, with the Panel that *both* the *Licensing Agreement* and the relevant provisions of the GATT 1994, in particular, Article X:3(a), apply to the EC import licensing procedures. . . . [T]he Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures.") (emphasis in original). Having established this sequential approach to consideration of Article X:3(a), and in light of its separate finding that the language of Article X:3(a) is "interchangeable" with the language of the relevant provision of the Licensing Agreement, the Appellate Body also stated that in those particular circumstances "there would have been no need for [the Panel] to address the alleged inconsistency with Article X:3(a). . . ." Id. at para. 204.

[95] *See* Korea's First Submission, paras. 3.35 - 3.36, 4.38 - 3.42.

[96] *See* US First Submission, para. 105.

180. The DOC has an established practice of using single-averaging, even in cases where the exporter's home currency depreciates against the dollar during the investigation period. The DOC initially adhered to that practice in the SSPC and SSSS cases, calling the petitioners' request for multiple-averaging "unwarranted" and rejecting as inapplicable "the one case cited by petitioners in support of averaging multiple periods." The DOC maintained that consistent policy in the *Preserved Mushrooms from Indonesia* case, saying "we have declined to alter our methodology in this case."[97]

181. In the SSPC and SSSS cases, of course, the DOC did depart from its previous practice by adopting the multiple-averaging methodology. Moreover, the DOC failed to even articulate a reason for its departure from its then three-month-old precedent in *Preserved Mushrooms*, when the similarities between the depreciations of the won and the Indonesian rupiah clearly demanded the same treatment.[98] That departure from established practice, especially when combined with the failure to provide an explanation, clearly evidences "unreasonable" and "non-uniform" administration of the anti-dumping laws.

182. The United States now claims that the depreciation of the won was "unprecedented" and raised a "novel set of issues." It seeks to distinguish the depreciation of the won from the roughly contemporaneous depreciation of the rupiah on the grounds that the depreciation of the won was somewhat steeper and less deep than the depreciation of the rupiah. It also denies that the DOC has an established practice regarding the use of single-averaging methodology, claiming that *Preserved Mushrooms* is only one case, which in the US view is insufficient to create an established practice.[99] That argument must fail.

183. *First*, the argument is *post hoc*. As mentioned, the DOC final determinations made no attempt to articulate a difference between the facts of the SSPC and SSSS cases from the facts of *Preserved Mushrooms*. Indeed, far from having regarded the depreciation of the won and of the rupiah as being significantly different, the DOC previously referred to them as raising the same issue.[100] In any event, if the DOC considered it significant that the won's depreciation had somewhat different contours than the rupiah's depreciation, then it was required to have said so in its determinations. Not having articulated these supposed differences at the time, the United States is precluded from raising them now.

184. *Second*, there is no question that the DOC has confronted the issue of currency depreciations many times before. Such depreciations seem to have become a regular feature of the international economic landscape. In recent years, the rupiah, baht, peso, real, and other currencies have all experienced sharp declines against the dollar. (Indeed, even so-called "stable" currencies like the yen and the euro have at times declined markedly against the dollar.) When the DOC was faced with those other depreciations, it consistently used the single-average methodology. Yet, the DOC applied multiple-averaging for the first time in the SSPC and SSSS cases. In this context, the belated claim that the won's depreciation was "unprecedented" is unpersuasive. While the precise facts of the won's decline may have differed somewhat from the precise facts of previous depreciations, that does not make the won's depreciation "unprecedented" in any meaningful sense. Moreover, factual details aside, the United States has failed to provide (either in the final determinations or in its First Submission) any basis for believing that the won's depreciation raised a "novel set of *issues*." To the contrary, as mentioned, DOC itself regarded the SSPC and SSSS cases as raising the same issue as *Preserved Mushrooms*.

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[97] *See* Korea's First Submission, paras. 3.43 - 3.44.
[98] *See* Korea's First Submission, paras. 4.54 - 4.58.
[99] *See* US First Submission, paras. 107, 113, 155, 164 & n. 150.
[100] SSSS Preliminary Determination, at 145 (ROK Ex. 16).

185. *Third*, there is no merit to the claim that *Preserved Mushrooms* is insufficient to establish a practice. Even leaving aside the value of "one case" as precedent under US law, there are actually many cases that establish the relevant practice. Indeed, single-averaging has been the standard US methodology since the US implementation of the Uruguay Round amendments. Any departure from single-averaging should be tested against *that* standard practice.

186. The United States also claims that *Preserved Mushrooms* is different from the SSPC and SSSS cases, because multiple-averaging would have had little effect on the calculation of the dumping margins in *Mushrooms* while it had a significant effect in SSPC and SSSS.[101] This is not a justification for multiple-averaging; it is the precise reason why the DOC should not have used multiple-averaging in the cases at issue. Indeed, in the context of the Anti-Dumping Agreement, the role of Article X:3(a) is to prevent investigating authorities from administering their domestic laws inconsistently from case to case for the sole purpose of achieving the highest possible dumping margin.

187. Therefore, the DOC's departure from its established single-average methodology was "unreasonable" and the United States has even now failed to provide a justification for it.

(iii) The Double-Conversion of Local Sales Was Inconsistent with the DOC's Established Practice

188. As discussed in Korea's First Submission, the double-conversion of POSCO's local sales from dollars to won and back to dollars at a different exchange rate was an unprecedented departure from the established DOC policy of "accept[ing] charges in the currency in which the charges are made." Neither the petitioners in the SSPC and SSSS investigations nor the DOC final determinations cited a single case before these two at issue where the DOC treated a home-market sale priced in dollars as if it had been priced in the local currency. By contrast, there are several cases (most notably, *Fresh Cut Roses from Colombia*) where the United States has accepted home-market sales as being priced in dollars. The reasons given by the DOC to depart from that practice for SSPC and SSSS are unreasonable, and they effectively amount to a decision to hold POSCO responsible for differences between the exchange rates announced by the Korean Exchange Bank and the New York Federal Reserve.[102] Therefore, the decision to depart from established policy without providing an adequate reason was inconsistent with the requirement that anti-dumping laws must be administered in a "reasonable" and "uniform" manner.

189. In response, the United States describes its view of the issue raised by double-conversion as follows:

> the fundamental issue for the Panel in these cases is not a question of which source for exchange rates is more accurate. Rather, it is a question of whether the exchange rates used by the United States in these cases satisfy the requirements of Article 2.4.1.[103]

That description is, however, inaccurate. Neither of the DOC's statements reflects the true problem with the DOC's double-conversion. As discussed above, the substantive issue is whether or not the double-conversion was "required." The procedural issue is whether the double-conversion, as an inadequately explained departure from established DOC practice, evidences "unreasonable" and "non-uniform" administration of the anti-dumping laws.

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[101] *See* US First Submission, para. 163.
[102] *See* Korea's First Submission, paras. 4.72 - 4.82.
[103] *See* US First Submission, para. 190.

190. The United States also contends that *Roses from Colombia* is irrelevant because it "pre-dates the Uruguay Round Agreements Act of the United States in which the new Article 2.4.1 was first implemented" and so "none of the requirements of Article 2.4.1 were considered in the context of that case."[104] This argument is misleading. It implies that Korea is relying on *Roses from Colombia* to support Korea's substantive claim under Article 2.4.1. That, of course, is not the case.

191. Korea is properly relying on *Roses from Colombia* as representative of the established practice from which the DOC unreasonably deviated in the cases at issue. The relevant practice is not the DOC's exchange rate policy, which had to be and was changed in response to Article 2.4.1. Instead, the relevant practice is "accept[ing] charges in the currency in which the charges are made," which was not required to be and was not changed in response to Article 2.4.1. Moreover, nothing in the DOC final determinations cited Article 2.4.1 as the basis for the departure from *Roses from Colombia.* This is yet another *post hoc* and ultimately baseless argument by the United States.

192. The United States also makes the unsupported and unexplained assertion that "*Roses* represented an exception to the United States' practice, not the rule."[105] This statement could not possibly be correct. If *Roses from Colombia* were the "exception," then the "rule" would be that the DOC *does not accept* charges in the currency in which they are made. But, in fact, the DOC's questionnaire specifically instructs respondents to "report the sale price, discounts, rebates and all other revenues and expenses in the currency in which they were earned or incurred."[106]

193. Korea's First Submission described in great detail the arguments made by the DOC to distinguish *Roses from Colombia* and the inadequacies of those arguments.[107] The US response is simply non-responsive. The United States does not attempt to reconcile its rulings in SSPC and SSSS with *Roses from Colombia*, but merely to demonstrate the technical accuracy of its statements in SSPC and SSSS.[108] In other words, the United States has still failed to show the *relevance* of the DOC's statements in SSPC and SSSS to the question whether it was reasonable to depart from *Roses from Colombia* in the cases at issue.

194. Since the United States has confused the picture by raising various irrelevant arguments, it may be clarifying to present here in full the relevant passage from *Roses from Colombia*:

> During respondent's verification, we established that respondent invoiced its home market customers in US dollars and received the equivalent value in pesos at the date of payment. We were able to trace the payments to the company's records and establish that the payments made to the company in pesos reflected the prevailing exchange rates at the time of payment.
>
> It is the Department's practice to accept charges in the currency in which the charges are made. In this instance, the home market prices were charged in dollars. Therefore, the Department found it appropriate that respondent's home market sales were reported in dollar value since the dollar value was the currency in which the sales transactions were made. Furthermore, since home market sales were transacted in dollars and the payments made, although in pesos, were based on constant dollar

[104] *See* US First Submission, para. 191.
[105] *See* US First Submission, para. 192.
[106] *Stainless Steel Sheet and Strip in Coils from Taiwan*, 64 Fed. Reg. 30592, 30614 (June 8, 1999) (ROK Ex. 81).
[107] *See* Korea's First Submission, paras. 4.72 - 4.76.
[108] *See* US First Submission, para. 192.

> value, there is no distortion. Using respondent's dollar borrowing rate in the calculation of the home market imputed credit, is, therefore, appropriate.[109]

From this passage, it is apparent that there were two — and only two — factors that were relevant to determining whether the home-market sales were "charged in dollars" or pesos. First, they were invoiced in dollars. Second, they were paid in pesos "at the prevailing exchange rates at the time of payment." These two factors alone showed that the home-market prices were at a "constant dollar value" and thus were "charged" in dollars and should be accepted in dollars.

195. The final determinations indicated three reasons why the DOC treated POSCO's local sales as won-denominated, notwithstanding that they were invoiced in dollars and that payment was made in won at the prevailing exchange rates at the time of payment: (1) POSCO was paid in won; (2) POSCO's accounting records are kept in won; and (3) the Korean Exchange Bank rate used to determine the amount of won due differed from the New York Federal Reserve rate.[110] As discussed further above, it is apparent that none of these three reasons can serve to differentiate SSPC and SSSS from *Roses from Colombia*. In *Roses*, the respondent was also paid in the local currency. There is no mention of accounting records or exchange rate differences in *Roses from Colombia*, precisely because those factors were alien to the decision. Moreover, it is exceedingly likely that if one were to consider the unstated facts of *Roses from Colombia*, one would find that Colombian producers maintain their accounting ledgers in the local currency (which is in keeping with Generally Accepted Accounting Principles) and that there were differences between the peso-dollar exchange rates in Bogota and in New York (which is a fact of life, even without significant time differences).

196. Therefore, the double-conversion reflects unreasonable and non-uniform administration of the anti-dumping laws, in violation of GATT Article X:3(a).

2. The Incorrect and Incoherent Explanations Offered by the United States Were Inconsistent with the Requirements Set Forth in Article 12.2 of the Anti-Dumping Agreement

197. Article 12.2 of the Anti-Dumping Agreement requires, *inter alia*, that a final determination "shall set forth . . . in sufficient detail the findings and conclusions reached on *all issues of fact and law* considered material by the investigating authorities." It further specifies that a final affirmative determination:

> shall contain . . . all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures . . . . In particular, the notice . . . shall contain ["a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2"] as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers. . . .[111]

198. The final determinations regarding SSPC and SSSS fail to comply with this standard. On the unpaid sales issue, DOC failed to provide in the final determinations an internally consistent explanation regarding the relevance of the percentage of US sales that are unpaid to whether unpaid

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[109] *Roses from Colombia*, at 7006 (ROK Ex. 52).

[110] SSPC Final Determination, at 15456 (ROK Ex. 11); SSSS Final Determination, at 30678 (ROK Ex. 24). Of these, the United States refers to the differences in exchange rates as "the primary basis" for the DOC's decision to double-convert. *See* US First Submission, para. 173.

[111] Anti-Dumping Agreement, art. 12.2.2, incorporating 12.2.1(iii) by reference.

sales are "atypical."[112] On the multiple-averaging issue, the DOC failed to explain the departure from the three-month-old decision in *Preserved Mushrooms* in several key respects. Finally, on the double-conversion issue, the DOC failed to provide in the final determinations a reasonable justification for departing from the established practice (embodied in *Roses from Colombia*) of accepting charges in the currency in which they are made.

199. As a result of these failures, the final determinations do not "contain . . . all relevant information on the matters of fact and law," "all reasons which have led to the imposition of final measures," "a full explanation of the reasons for the methodology used" and "a full explanation of the . . . reasons for the acceptance or rejection of relevant arguments." Consequently, they are not consistent with the requirements of Article 12.2.

200. Perhaps as a result of the fact that these arguments are not concentrated in one place in Korea's First Submission, the United States seems to have largely avoided responding to them. While references to Article 12.2 are sprinkled generously around the US Submission, there does not appear to be much substance to the remarks. The only concrete argument that Korea can identify (other than general procedural arguments discussed with respect to Article X:3(a)) is a defense of the inconsistency on "atypical" sales between the determinations in SSPC and SSSS. The United States argues essentially that Article 12.2 allows the DOC to be as inconsistent as it would like to be without any need for coherent explanations of those inconsistencies.[113] Korea submits that the US position cannot be a correct interpretation of the Anti-Dumping Agreement. For the requirement of providing explanations to have any meaning, the explanations provided must be coherent.

3. The Sharp and Unwarranted Reversals in US Methodology on These Issues Between the Preliminary and Final Determinations Effectively Deprived POSCO of the "Full" and "Ample" Opportunity to Defend Its Interests Required by Article 6 of the Anti-Dumping Agreement

201. Article 6 of the Anti-Dumping Agreement contains various rules that are intended to ensure that respondents in an anti-dumping investigation know all of the elements of the case against them and have a full and ample opportunity to respond thereto. Korea has argued that the United States violated Article 6 by not announcing several key aspects of the case against POSCO until the final determination, when it was too late for POSCO to defend itself.

202. In response, the United States agrees (as it must) that "under Articles 6.1, 6.2, and 6.9 parties should be afforded a full and ample opportunity to defend their interests." Nevertheless, the United States argues that POSCO was afforded that opportunity in the investigations at issue, because it was permitted to submit and receive information and to make written and oral arguments and because it received a preliminary determination.[114]

203. The United States proposes an overly mechanical view of Article 6. Contrary to the US claim, it is not enough simply to go through the motions of observing all of the procedural formalities. Rather, whether a respondent was afforded the full and ample opportunity that Article 6 requires must be judged by the Panel in light of all the facts and the totality of the circumstances.

204. As the history of the SSPC and SSSS cases reveals, this is a case where a respondent submitted information that showed it was not dumping under the prevailing law, where the petitioner

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[112] *See Polyacetal Resins*, paras. 222-24 (finding that the investigating authority did not provide an "adequate statement of reasons" under Article 8:5 of the Tokyo Round Anti-Dumping Code, which is the predecessor provision of Article 12.2, where its statement was *"internally contradictory*.").

[113] *See* US First Submission, para. 100.

[114] *See* US First Submission, para. 161.

made meritless legal arguments to attempt to distort the dumping calculation (and the respondent submitted a written response to those arguments), where the investigating authorities issued a preliminary determinations indicating agreement with the respondent on all key legal issues, where verification confirmed the accuracy of the information submitted by the respondent, where the petitioner failed to submit any significant new information or argument after the preliminary determination, and where the investigating authority then issued a final affirmative determination reversing the preliminary determination and departing from established practice in several key respects. In such a case, while the procedural formalities may have been respected, the respondent was nevertheless denied the full and fair opportunity to defend its interests in the proceeding required by Article 6.

205. In its First Submission, the United States has argued that Korea's reading of Article 6 would require investigating authorities to publish preliminary determination after preliminary determination over and over again until all the factual and legal issues in a case were resolved.[115] That characterization of Korea's position is plainly not correct. Article 6 does not require investigating authorities to revise their preliminary determinations each time they change a factual or legal conclusion. But it does require them to ensure that the opportunities the parties are given to comment on the issues are meaningful. The arbitrary decisions made by the DOC in the SSPC and SSSS cases indicate that the DOC simply did not conform to that standard. As a practical matter, the DOC failed to provide POSCO a full and ample opportunity to defend its interests in the cases at issue, in violation of Articles 6.1, 6.2, and 6.9 of the Anti-Dumping Agreement.

III. REMEDY

206. Korea concluded its First Submission by asking the Panel (1) to "recommend that the United States bring its anti-dumping measures against SSPC and SSSS from Korea into conformity with the WTO Anti-Dumping Agreement and GATT 1994" and (2) to "suggest that the United States revoke the anti-dumping duty orders concerning SSPC and SSSS from Korea."[116]

207. This request was consistent with the provisions of Article 19.1 of the DSU, which states that:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

208. The United States appears to accept Korea's first request for a "recommendation." However, the United States objects to Korea's second request for a "suggestion." This objection is curious, because Korea's request for a "suggestion" by the Panel is clearly authorized by the plain text of the second sentence of Article 19.1.

209. In any event, there is no basis for the United States to oppose Korea's request for a suggestion. Although the heading of the US argument baldly asserts that "the panel suggestion sought by Korea is inconsistent with established panel practice and the DSU,"[117] the United States has failed to provide any panel practice or DSU text to support that naked assertion. And, in fact, there are ample precedents in which panels have suggested revocation of an anti-dumping order.[118]

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[115] US First Submission, para. 166.

[116] Korea's First Submission, para. 5.9.

[117] US First Submission, heading III.G.

[118] *See New Zealand - Imports of Electrical Transformers from Finland*, Report of the Panel, adopted on 18 July 1985, L/5814 - 32S/55, para. 4.11 ("The Panel proposes to the Council that it addresses to New

210. A suggestion that the anti-dumping measures be revoked is particularly appropriate in light of Article 1 of the Anti-Dumping Agreement. The first sentence of that Article provides, "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." If the Panel finds that the anti-dumping investigations on SSPC and SSSS were not "conducted in accordance with the provisions of [the Anti-Dumping] Agreement," then the United States would lack the authority to maintain the measures and revocation would be the only appropriate means of bringing itself into conformity with Article 1.

211. In other words, if Article 1 did not exist and the United States violated a provision of the Anti-Dumping Agreement, it might be possible to bring the anti-dumping measures into conformity without revocation. But Article 1 precludes that possibility. An anti-dumping measure applied pursuant to an investigation that was not "conducted in accordance with the provisions of [the Anti-Dumping] Agreement" must be revoked. Thus, a suggestion of revocation is entirely appropriate here.

CONCLUSION

212. As discussed above, there actually are very few, if any, facts in dispute. To be precise,

- On unpaid sales, there is no dispute that there were unpaid sales, that the DOC included the unpaid sales in its analysis, and that the DOC also made an adjustment for the cost of non-payment in its analysis of all US sales (including the direct sales made by POSCO and the indirect sales through POSAM).

- On multiple-averaging, there is no dispute that the Korean won depreciated significantly against the US dollar late in 1997, that the DOC split the investigation periods into sub-periods, that the DOC calculated separate averages for each sub-period, and that for those sub-periods with "negative margins" the DOC "zeroed" those "negative margins" when calculating the overall margin.

- On double-conversion, there is no dispute that the orders for the "local sales" were placed in US dollars (and not in won), that the invoices showed both the agreed-upon dollar price and an amount in won calculated by applying the Korean Exchange Bank’s exchange rate in Seoul on the date of invoice, that the won amount on the invoice was recorded in POSCO’s accounting records, that the customer paid in won by converting the dollar price using the Korean Exchange Bank’s exchange rate in Seoul on the date of payment, that the won amount of the payment did not correspond to the won amount on the invoice, that the DOC chose to calculate normal value based on the won amounts recorded in POSCO’s accounting records instead of the actual dollar prices of the sales and to convert that amount back into dollars at a different exchange rate announced by a different bank (the New York Federal Reserve) on a

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Zealand a recommendation to revoke the anti-dumping determination and to reimburse the anti-dumping duty paid."); *United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, Report of the Panel, ADP/82, 7 Sept. 19992, unadopted, para. 6.2 ("The Panel recommends that the Committee request the United States to revoke the anti-dumping duty order on grey portland cement and cement clinker from Mexico and to reimburse any anti-dumping duties paid or deposited under this order.").*Guatemala — Anti-Dumping Investigation regarding Portland Cement from Mexico*, Report of the Panel, WT/DS60/R, adopted 25 Nov. 1998, as modified by the Appellate Body on other grounds, para. 8.6. ("Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation.").

different date (the date of the *US sale*), and that the double conversion in fact caused distortions in calculation of the normal value.

For none of the substantive issues, therefore, are there any key facts in dispute. There are only legal questions concerning the propriety, fairness, and reasonableness of the US methodology.

213. Moreover, with respect to those legal questions, the proceedings before this Panel have narrowed the issues considerably. The United States has retreated significantly from the positions it had taken previously, and has conceded virtually all of the critical points of Korea's case. For example, on the "unpaid sales" issue, the United States has conceded that the adjustment for the costs of non-payment could only be justified if it was based on differences in the risk of non-payment in the two markets (when the adjustment the United States actually made undeniably did not measure differences in that risk). On the "multiple-averaging" issue, the United States has effectively conceded that there is no basis under the Anti-Dumping Agreement for treating pre- and post-devaluation sales as non-comparable transactions (under the provisions of Article 2.4.2 that require the calculation of a single average for all "comparable" transactions), since it has admitted that the exchange-rate provisions of the Anti-Dumping Agreement do not "establish a limit on which sales may be considered 'comparable' within the meaning of Article 2.4.2." And, finally, on the "double-conversion" issue, the United States has effectively conceded that the rationales offered by the DOC were irrelevant, since they manifestly had no bearing on the issue that the United States now admits was critical — that is, whether the sales prices were in fact fixed in US dollars. Given these concessions, the US determinations in the SSPC and SSSS cases cannot be sustained.

214. In any event, a review of the facts and the relevant legal principles confirms that the US anti-dumping measures are inconsistent with numerous provisions of the Anti-Dumping Agreement and GATT 1994. Korea therefore requests that the Panel find that: (i) the United States has nullified or impaired a benefit accruing to Korea, directly or indirectly, under the WTO Agreements; and (ii) the United States is impeding the achievement of the objectives of the WTO Agreements.

215. Korea therefore requests that the Panel recommend that the United States bring its anti-dumping measures against SSPC and SSSS from Korea into conformity with the Anti-Dumping Agreement and GATT 1994. Specifically, Korea requests that the Panel suggest that the United States revoke the anti-dumping orders concerning SSPC and SSSS from Korea.

ANNEX 1-6

ORAL STATEMENT OF KOREA

SECOND MEETING OF THE PANEL

(12-13 July 2000)

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1. I have the honour to present the Republic of Korea's response to the arguments that have been made in the United States' oral and written submissions. I should start with the usual caveats: I will not address today every issue in the case, but will instead rely on the written submissions for a more comprehensive presentation of Korea's views. I also reserve the right to make further comments as necessary.

2. As with Korea's previous oral statement, I shall divide my presentation by the three main subjects that gave rise to the US errors at issue: unpaid sales, multiple averaging, and double conversion. Before turning to the substantive issues before the Panel, however, I would like to make a few introductory observations.

3. I have always thought that the issues in this case are fairly straightforward. I would like to use my time today to cut through all of the distractions and try as much as possible to crystallize the points that are really in dispute.

4. Unfortunately, this task is more difficult than I had hoped, because the US arguments in this case have been a constantly moving target. In our initial submission, we addressed the reasoning actually relied upon by the US Department of Commerce in its final determinations and in the underlying record of the Plate and Sheet investigations. Then, in reading the first US submission, I found that the United States had more or less abandoned the DOC's reasoning, and was offering entirely new justifications for the DOC's actions. When I received the second round of submissions, I found that the US had shifted ground once again. Their new arguments in many instances contradict their earlier assertions and the reasoning originally offered by the DOC. By this point, I am quite confused as to what the United States really is arguing.

5. I hope that the Panel does not share this confusion. But, in the end, whatever confusion there may be in the US arguments is irrelevant. The issue before this Panel is not whether the United States can now come up with creative new explanations for the DOC's actions. Those explanations are nothing more than *post hoc* justifications that should be ignored. In keeping with the standard of review applied by Panels in past anti-dumping cases such as *Corn Syrup* and *Polyacetal Resins*, the Panel should base its analysis of the issues in this case on the reasons announced in the DOC's final determinations.[1] I will do my best, therefore, to focus my attention on the DOC's final determinations, and not on the subsequent rationalizations the US has offered.

6. In the same vein, I would offer another introductory observation. Throughout the final round of US submissions, there is a suggestion that POSCO is somehow to blame for the unfair actions taken by the DOC. The United States seems to imply that, if POSCO had only been a little more forthcoming in providing certain critical information, the DOC's determinations might well have been different. This is an improper argument to make *post hoc*, when it is too late for POSCO to do anything about it. It would have been a very different thing if the DOC had informed POSCO during the investigation of these alleged deficiencies in its information. The truth is that POSCO itself identified the key issues in this case to the DOC. It told the DOC what the issues were and how it thought the issues should be resolved. It provided to the DOC all of the information that the DOC had deemed relevant in addressing similar situations in past cases.

7. The final sentence of Article 2.4 of the Anti-Dumping Agreement specifically provides that "The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."[2] Having failed

[1] *See* Responses of the Republic of Korea to the Questions Posed by the Panel at the First Meeting, at 1-2 ("Korea's Responses to Panel Questions").

[2] *See also* Anti-Dumping Agreement, art. 6.1 ("[a]ll interested parties in an antidumping investigation shall be given notice of the information which the authorities require....").

to do so, the United States cannot now argue at the very final stages of a Panel proceeding that it was the respondent that did not submit sufficient information.

8. Let me turn now to the substantive issues in the case.

A. UNPAID SALES

9. I will begin with the US treatment of POSAM's unpaid sales to the "ABC Company." To begin with, it should be noted that there are no facts in dispute with regard to this issue. It is undisputed that POSAM made sales to the ABC Company, that POSAM was not paid for some of those sales, and that the Commerce Department accounted for these unpaid sales by either reducing POSCO's export price or increasing POSCO's normal value — which have exactly the same effect on the dumping analysis — for all of POSCO's US sales.

10. The Commerce Department's treatment of the unpaid sales was flawed in numerous respects. Of these, I shall focus on two. *First*, as we have shown previously, the US treatment of the unpaid sales was inconsistent with the rules governing allowances for differences affecting price comparability. And, *second*, the US treatment of the unpaid sales was inconsistent with the "fair comparison" requirement of the Anti-Dumping Agreement.

1. Permissible Allowances for Differences Affecting Price Comparability under the Third Sentence of Article 2.4

11. In its final determinations in the Plate and Sheet cases, the DOC classified the cost of the non-payment for the unpaid sales as a "direct selling expense." Under US law, this meant that the expenses would be included in the "circumstance-of-sale adjustment." (And, I would note here that the United States has since told this Panel that a "circumstance-of-sale adjustment" is the US law equivalent of an allowance for "differences affecting price comparability" under the third sentence of Article 2.4.) The DOC explained that its treatment of the cost of non-payment as a "direct" expense was appropriate because "but for the sale made to the bankrupt customer, the bad debt expense would not have been incurred."[3] Significantly, the DOC did not indicate that the so-called "bad debt" was a consequence of any of the "conditions and terms" of the sale.

12. Korea's first submission addressed the permissibility of the adjustment for the cost of non-payment under the third sentence of Article 2.4, because that is the provision logically connected to the DOC's final determinations. By calling the cost of non-payment a "direct" selling expense, the DOC implicitly invoked that provision. And, because the DOC's final determination had not identified any differences between the home-market sales and the US unpaid sales in the "conditions and terms of sale, taxation, levels of trade, quantities, [or] physical characteristics," Korea specifically addressed the applicability of the final phrase of the third sentence of Article 2.4 — which permits adjustments for "any other differences which are also demonstrated to affect price comparability."

13. In its first submission, Korea demonstrated that the adjustment for the cost of the unpaid sales was not permissible under that standard for two reasons: *First*, as a procedural matter, the cost of the unpaid sales had not been *demonstrated* to affect price comparability. *Second*, as a substantive matter, it was simply not possible for such a demonstration to be made. Because the prices for the sales were fixed before POSCO knew that the customer would not pay, the cost of the unpaid sales could not have affected the prices or price comparability of the sales under consideration.[4] As I mentioned at the outset, these are straightforward issues.

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[3] *SSSS Final Determination*, at 30674 (ROK Ex. 24); *see also SSPC Final Determination*, at 15448-49 (ROK Ex. 11).

[4] *See* Korea's First Submission, paras. 4.17 - 4.19.

14. The United States did not choose to defend the DOC's determination on the grounds actually stated by the DOC. Instead, it has raised a variety of *post hoc* arguments. Let me try to summarize them:

- *First*, in its first submission and in its first oral statement, the US argued that the adjustment for the cost of non-payment was not an adjustment for a direct selling expense as a "circumstance of sale adjustment," but was instead an adjustment made to construct an export price under Article 2.3 of the Anti-Dumping Agreement. In response to Korea's questions, however, the United States belatedly admitted that it had made the same adjustment for the direct sales to unaffiliated US customers. With that admission, the US argument simply falls apart.

- *Second*, the United States also argued in its first submission that, if the adjustment for the cost of non-payment had to be analyzed under the third sentence of Article 2.4, it could be justified as an adjustment for a difference in the conditions and terms of sale in the two markets. In its oral statement, the United States revised its position and argued that, although the actual non-payment was not a condition or term of sale, the *risk* of non-payment was a direct consequence of the decision to grant sales terms that allowed the customer to delay its payment. This position was modified yet again in the most recent US submissions, where the United States argued that the actual current cost of unpaid sales was the only practical measure of the risk of non-payment — and that, in any event, POSCO was to blame if the record of the Plate and Sheet investigations did not contain any further information on the risk of non-payment in the two markets.

- *Third*, in its first oral statement, the United States argued that the adjustment for the cost of unpaid sales was analogous to the adjustments normally made for warranty expenses.[5] However, after we pointed out in our questions that the DOC normally makes the adjustment for warranty expenses based on historical experience, the analogy to warranty expenses disappeared from the US second submission.

15. I will address each of these issues in turn as briefly as possible. In the end, however, I would hope that the complications of these arguments will not distract the Panel from the fundamental point: No matter how convoluted the US arguments may be, they are ultimately irrelevant. They do not address the fundamental issues — that is, whether the DOC's determinations and the rationales given *by the DOC* for those determinations are consistent with the requirements of the Anti-Dumping Agreement.

(a) Article 2.3

16. I will start with the contention that the adjustment for the cost of non-payment was justified as an adjustment to "construct" an export price under Article 2.3 of the Anti-Dumping Agreement.

17. Let me begin by recapping the key undisputed facts. In both the Plate and Sheet cases, POSCO made some "indirect" sales to US customers through its affiliated US importer POSAM. It also made some "direct" sales that were sold directly to unrelated US customers without the involvement of POSAM. The adjustment for the cost of unpaid sales was made for comparisons involving both categories of sales: The adjustment was deducted from the final US sales price for comparisons involving the sales through POSAM. For comparisons involving the direct sales, the adjustment was not deducted from the US price, but was instead added to normal value. *The amount of the adjustment was in both cases calculated in precisely the same manner*. And, because a

[5] US First Oral Statement at paras. 14-15.

deduction from US price has the same effect on the dumping margins as an addition to normal value, the net effect of both adjustments was the same.

18. I know I keep returning to the fact that the US made the same adjustment for the cost of non-payment to both the direct export price sales and the indirect constructed export price sales. I apologize for the repetition. But the point is fundamentally important.

19. To begin with, at the absolute minimum, the fact that the DOC made the adjustment for the cost of non-payment to the direct sales means that the Article 2.3 defense is at best incomplete. The adjustment made to the direct export price sales cannot possibly be justified under Article 2.3, because Article 2.3 *only* applies to indirect sales through an affiliated importer, and *it does not apply to* direct sales. The adjustment made to the direct sales must, therefore, be justified, if at all, under the provisions of the third sentence of Article 2.4 addressing "allowances for differences affecting price comparability."

20. Moreover, the fact that the adjustment was made to the direct sales also eliminates the viability of the Article 2.3 defense for the adjustment made to the *indirect* sales as well.

21. In this regard, three important points should be noted:

- *First*, the third sentence of Article 2.4 (which describes the allowances for "differences affecting price comparability") does not distinguish between direct and indirect export sales. Instead, the third sentence applies equally to all export transactions.

- *Second*, the fourth sentence of Article 2.4 (which provides concrete guidance on the adjustments permitted when constructing an export price under Article 2.3) is not independent of the third sentence. It does not describe an entirely separate scheme for making adjustments. Instead, it describes adjustments that should "also" be made to construct an export price for sales through an affiliated importer. The use of the word "also" in this sentence is highly significant. It means that the adjustments for differences affecting price comparability under the third sentence of Article 2.4 are to be made to all export sales, including both the direct sales and the indirect sales. Only after those adjustments have been made, should the additional adjustments to construct the export price "also" be made.

- *Third*, the fourth sentence of Article 2.4 does not permit adjustments for *all* costs incurred by the affiliated importer. Instead, it permits an adjustment only for costs incurred *between* importation and resale. The cost of non-payment does not occur *between* importation and resale. As both a temporal and functional matter, payment (or non-payment) cannot occur until *after* the resale has been made. I certainly am not aware of any definition of the term "between" that would encompass events that occur *after* resale.

Thus, a careful review of the text of the Agreement reveals that the cost of non-payment cannot be an appropriate adjustment to construct the export price under the fourth sentence of Article 2.4.

22. It should also be noted that the US defense cannot be reconciled with the objective and purpose of Article 2.3. As explained in Korea's second submission, where the exporter sells to an affiliated importer, Article 2.3 permits the investigating authorities to construct what an arm's-length price would be from the exporter to a hypothetical importer standing in the same point in the transaction as the actual affiliated importer. (A diagram illustrating this idea was provided at paragraph 57 of Korea's second submission.)

23. The purpose of the Article 2.3 adjustments, then, is to use the affiliated importer's resale price as the basis for constructing this hypothetical arm's-length price to a hypothetical unaffiliated importer. (In the diagram, the concept is to construct price A from the known price B.) Only costs that the hypothetical unaffiliated importer could have passed back to the exporter should be included in this calculation. If the hypothetical unaffiliated importer would have had to "eat" the costs, then it is not consistent with the purpose of Article 2.3 to deduct those costs from the resale price to construct the export price.

24. The actual non-payment by the resale customer is the type of cost that the hypothetical unaffiliated importer would have to "eat." The cost of the non-payment would not affect the price that the exporter charged this hypothetical importer, because that price would have been fixed before the non-payment could ever have occurred. Since the export price from the exporter to the hypothetical unaffiliated importer would not have been affected by the final customer's ultimate non-payment, there is no basis for deducting the cost of non-payment by the final customer when constructing the export price.

(b) Allowances for Differences in Conditions and Terms of Sale and Other Differences Affecting Price Comparability

25. As mentioned, the United States' second *post hoc* argument is that the adjustment for the cost of non-payment was permissible as an allowance for differences in the "conditions and terms of sale." In particular, the first US initial submission asserted that the non-payment itself was the relevant "condition or term of sale."[6] That argument was plainly absurd: No contract contains terms authorizing a customer to go bankrupt and refuse to pay. To the contrary, contracts require payment in accordance with specified terms and conditions. Non-payment is a *breach* of the sales contract.

26. In its first oral statement, the United States retreated from this ludicrous position. Its revised position was that, by agreeing to extend credit to the customer, POSCO accepted a *risk* of non-payment. The US asserted that, because this *risk* was a direct consequence of the contractual terms that allowed the customer to delay payment, the *risk* could be included in the allowance for the delayed payment terms of the sale.

27. This fallback position is also flawed. Even if one assumes that the *risk* of non-payment is part of the "conditions and terms of sale," this new US argument faces an insuperable obstacle: The Commerce Department did not make an adjustment for differences in *risk* of non-payment. Instead, the Commerce Department adjusted for the full costs of the actual non-payments by the ABC Company — which is a very different thing.[7]

28. So, how does the United States attempt to reconcile its legal argument with the adjustment it actually made? In its very latest round of submissions, the United States now contends, in essence, that the difference in "actual bad debt expenses" is a proxy for differences in risk. It even claims that adjusting for actual non-payments is "the only practical means of making due allowance for any difference in bad debt risk."[8] This latest argument by the United States does not withstand scrutiny.

- To begin with, this latest US argument is entirely a *post hoc* rationalization. The DOC did not make any finding that the risk of non-payment was higher in the United States than in Korea. Instead, its decision to treat the cost of non-payment as a direct selling expense was based solely on the fact that the non-payment in the United States was a direct consequence of the

[6] *See* US First Submission, para. 82 ("The United States interprets differences in 'conditions and terms of sale' as including differences in selling expenses such as *bad debt*.") (emphasis added).

[7] *See* US Responses, para. 78; Korea's Second Submission, paras. 60-68.

[8] *See* US Responses, paras. 78, 80.

fact that POSCO sold to the ABC Company. As I noted at the outset, the Panel should not allow the United States now to substitute new reasoning for that actually employed by the investigating authority.

- Moreover, this *post hoc* rationalization has absolutely no support in the record of the investigations. There was no evidence of any difference in the terms of the home-market and US sales that made it more likely that US customers would default. Furthermore, there was no evidence that, at the time POSCO set its prices during the investigation period, it had any reason to believe that its risk of non-payment was higher in the United States than in Korea.

- More generally, there is no reason to believe that the actual non-payments in a single market in a single year will correspond to the risk of non-payment. In any given year a large default by a single customer in one market could lead to a large difference in actual non-payments. A deduction for differences in "actual bad debt expenses" in a given year may grossly overstate the true differences in risk. Simply put, the adjustment made by the DOC confused the small risk of being hit by lightning with the large damage that is caused if one happens to be one of the few people hit. The United States essentially adjusted for differences in actual *ex-post* insurance claims for lightning damage during a single year, when it should have adjusted for differences in the premiums to buy a lightning insurance policy *ex-ante* for that year.

- The US confusion about actual occurrences and risks is well illustrated by the following US argument:

> "during the period of investigation, POSCO actually recognized greater bad debt expenses, as a proportion of sales, in the US market than in the Korean market. This evidence would indicate that POSCO should be charging higher prices in the US market due to the greater proportion of bad debt expenses."[9]

This argument plainly confuses the fact that an event actually happened with the question whether it was known beforehand to be likely to happen (or, in this case, relatively more likely to happen in the United States than in Korea). The United States assumed that because something happened, POSCO should have known that it was going to happen and raised its prices accordingly. In fact, however, as the United States concedes, "there was no evidence in either case that POSCO had any knowledge at the time of sale that ABC Company was in precarious financial condition."[10] This is simply a case of 20-20 hindsight.

- Finally, I note that the latest US submissions offer a new argument based on accounting principles to support its use of "actual bad debt expenses" as a proxy for risk of non-payment. The United States claims that:

> "[I]n accordance with GAAP, companies *normally* account for bad debt through a reserve accounting method that is based on the company's experience. Therefore, the bad debt expenses reflected in a company's accounting records for a particular market provides a reasonable measure of the price effect of the risk of bad debt in that market....

[9] *See* US Responses, para. 24.
[10] *See* US Responses, para. 12.

> "As discussed above, companies normally account for bad debt using a reserve accounting method that is based on *the company's historical experience*. Under a reserve accounting method, the bad debt expense recognized in a given period reflects that experience."[11]

This argument does not support the US case. It is true that many companies do use "bad debt reserves" — which are based on estimates in light of historical experience. But the United States has expressly conceded that "*POSAM did not use a bad debt reserve*"[12] and "POSAM's accounting methodology was not based on experience."[13] This was consistent with the fact that POSAM had never before had a non-payment in the United States.[14]

On the other hand, *POSCO* did use a bad debt reserve and it did calculate the amount of the reserve based on historical experience. Nevertheless, the DOC refused to make an adjustment for differences in terms and conditions of sale based on *POSCO's* records.[15] In other words, the accounting principles the United States now cites would have required the DOC to make an adjustment for POSCO's bad debt reserve but not for POSAM's actual costs. That is, of course, precisely the opposite of what the DOC did.

29. Thus, an adjustment for an actual non-payment cannot be accepted as a proxy for differences in the risk of non-payment.

(c) Bad Debt and Warranty

30. In its first oral statement, the United States also made the argument that the adjustment for the cost of unpaid sales was analogous to the adjustments normally made for warranty expenses.[16] However, after Korea pointed out that the DOC normally makes the adjustment for warranty expenses based on historical experience, the analogy to warranty expenses was very much down-played in the second US submission.

31. I must confess that I was very sorry to see this analogy withdrawn. To me, it describes precisely what was wrong with the US claim that its adjustment measured differences in the risk of non-payment in the two markets.

32. The United States has asserted that it used the cost of non-payment during the current year as a "slice of time" to determine the risk of non-payment.[17] It asserts that this approach is "the only practical means" of measuring risk.[18] And, it suggests that POSCO is to blame if more complete information was not available. But the analogy to warranty expenses demonstrates that these US assertions are simply false.

33. For your reference, I have handed you pages on which I have reproduced the instructions the DOC gave POSCO regarding the reporting of warranty expenses and bad debt expenses.[19] As you can see, the DOC explicitly asked POSCO to provide historical warranty expenses data for a three

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[11] *See* US Responses, para. 80-81 (emphasis added).
[12] *See* US Responses, para. 82.
[13] US Second Submission, para. 35.
[14] *See* Korea's Responses Panel Questions, at 9-10 (Response C.3).
[15] *See* US Second Submission, para. 37.
[16] US First Oral Statement, paras. 14-15.
[17] *See* US Second Submission, para. 34; US Responses, paras. 81-82.
[18] *See* US Responses, paras. 78, 80.
[19] These passages are taken directly from the DOC questionnaires to POSCO in the SSPC and SSSS cases, which were reproduced in POSCO's questionnaire responses. *See* SSPC Questionnaire Responses, at B-34, and C-38 to C-39 (ROK Ex. 87); SSSS Questionnaire Responses, at B-35 and C-38 (ROK Ex. 88).

year period. By contrast, the DOC simply did not ask POSCO to provide information on the risks of non-payment in the two markets. So, when the US states that it had no information to make a proper adjustment for the risk of non-payment in this case, it is only reflecting the fact that it gave POSCO absolutely no instructions on what information was required.

34. The United States implicitly seeks to reverse the applicable burden here, by asserting that POSCO never provided any historical data.[20] It is plain, however, that the burden was on the United States to ask for the data needed to determine what adjustments to make.[21] Since the United States did not ask for historical data on non-payments, it cannot now justify its use of actual non-payment as a proxy for risk of non-payment by claiming that the record was insufficient to allow it to measure the risk of non-payment in any other way.

2. The Fair Comparison Requirement

35. As explained in Korea's previous submissions, the "fair comparison" requirement of the first sentence of Article 2.4 establishes a separate and free-standing obligation. Moreover, while the precise contours of this "fairness" requirement may be difficult to draw in the abstract, two points at a minimum are undisputable: *First*, it is not fair to penalize an exporter by including "atypical" sales that distort the results in the analysis. *Second*, it also is not fair to penalize an exporter for an event that it could not have anticipated and that was beyond its control. Indeed, as noted in Korea's submissions, the US courts have defined the "fairness" required in the dumping analysis under US law in precisely this manner.

36. The DOC's treatment of the unpaid sales plainly was not consistent with these standards. It unfairly included in the analysis US sales that were, by the DOC's own admission, "atypical" and that distorted the calculations. Moreover, its adjustment for the cost of the unpaid sales unfairly penalized POSCO for an event that was beyond its control.

37. In response, the United States has attempted to read the "fair comparison" requirement out of the Anti-Dumping Agreement altogether. It argues that the fair comparison requirement of the first sentence of Article 2.4 must be deemed to be met whenever the methodologies described in the remaining sentences of that Article have been followed.

38. That argument is, however, without merit. The first sentence of Article 2.4 explicitly provides that "A fair comparison shall be made between the export price and the normal value." That sentence must have substance and meaning. Any other interpretation would improperly render that sentence "inutile."[22]

39. In the interests of time, I will not address the US arguments concerning the relationship between the Tokyo Round Code and the current version of Article 2.4 in detail. Let me just say that the argument presented by the United States is absurd on its face. To accept the US argument, one would have to believe that all of the provisions of Article 2:6 of the Tokyo Round Code were discretionary — including those requiring allowances for differences affecting price comparability.[23]

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[20] *See* US Responses, at para. 82.

[21] *See* Anti-Dumping Agreement, art. 2.4 (".... The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison...."); *Id.*, art. 6.1 ("All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require....").

[22] *See* Korea's Second Submission, paras. 77-83.

[23] *See* US Responses to Panel Questions, para. 3 ("One possible reading of this language was that the fair comparison was not required, but if a member wished to make one, it should do so as instructed in Article 2.6. *Thus, all of Article 2.6 could have been read as non-mandatory*." (emphasis added)).

Such an interpretation cannot be correct, because it contradicts the provisions of GATT Article VI, which made such allowances mandatory.

B. MULTIPLE AVERAGING

40. I shall turn now to the second of the three main subjects at issue: The US decision to split the period of investigation, calculate separate averages for each sub-period, "zero out" the averages for sub-periods with "negative margins," and then combine the multiple averages into a distorted overall average.

41. There are no facts in dispute with respect to this issue. It is undisputed that the United States engaged in "multiple averaging." It is also undisputed that this methodology led to a higher dumping margin than would have been calculated under a single-average methodology. Finally, it is undisputed that the United States adopted this methodology because it concluded that, without multiple-averaging, the depreciation of the Korean won during the period would have resulted in the calculation of dumping margins that were too low.

42. The only question is whether that methodology is permitted under the provisions of the Anti-Dumping Agreement. I believe, once more, that the issue is straightforward. For the reasons set forth in our previous submissions, this multiple-averaging methodology is directly contrary to the requirements of Article 2.4.2. It is also inconsistent with the provisions of Article 2.4.1. And, it violates the fair comparison requirement of Article 2.4.[24]

1. Article 2.4.2

43 Let me start with Article 2.4.2. As we have discussed previously, Article 2.4.2 of the Anti-Dumping Agreement requires that dumping margins be calculated "on the basis of a comparison of *a weighted average* normal value with *a weighted average* of prices of *all* comparable export transactions or by a comparison of normal value and export prices on a transaction-by-transaction basis." This language clearly indicates that only one average normal value and one average export price is contemplated for each comparison.

44. In its questions during the first meeting, the Panel asked us to explain how this interpretation of Article 2.4.2 can be reconciled with the common practice of calculating separate dumping margins for individual products or different levels of trade. While we have set forth our answer at length in our written submissions, let me try to summarize our position here: The key is in the phrase "comparable transactions." Article 2.4.2 does not require one average of every single home-market sale and another average of every single export sale. Rather, it requires a single average for all comparable transactions. Thus, to properly understand Article 2.4.2, it is necessary to analyze the factors that affect whether transactions are comparable.

45. As we have noted before, the word "comparable" means "capable of being compared." In the context of Article 2.4.2, this means that transactions that can be compared under the provisions of the Anti-Dumping Agreement are "comparable" transactions. Transactions that cannot be compared under the provisions of the Anti-Dumping Agreement are not "comparable" transactions.

46. There are, of course, a number of substantive limitations on the transactions that may be compared under the Anti-Dumping Agreement — which we have listed in our submissions. Significantly, there is no provision in the Anti-Dumping Agreement that says that sales made when the exchange rate is at one level cannot be compared to sales when the exchange rate was at another level. The only provision of the Agreement that addresses exchange rates is Article 2.4.1. And, the

[24] *See* Korea's First Submission, paras. 4.43 - 4.63.

United States has specifically recognized that Article 2.4.1 does not "establish[] a limit on which transactions may be considered 'comparable' within the meaning of ... Article 2.4.2."[25]

47. Korea's position is also consistent with the past Panel decision in the *Cotton Yarn* case. In that case, the Panel specifically concluded that "[t]he exchange rate in itself is not a difference affecting price comparability." That Panel reasoned that an exchange rate "is a mere instrument for translating into a common currency prices that have previously been rendered comparable" under other rules.[26] The Panel explained that determinations of price comparability occur at a different, earlier stage of a dumping analysis than do the actual comparisons of export price to normal value.[27] The *Cotton Yarn* Panel stated that the exchange rate's function arose "subsequently" to determinations of price comparability.[28]

2. Article 2.4.1

48. There is another problem with the multiple-averaging methodology adopted by the DOC: That methodology is inconsistent with the framework established by Article 2.4.1 of the Agreement for dealing with currency movements.

49. As mentioned, Article 2.4.1 is the only provision of the Anti-Dumping Agreement that addresses exchange rates or the permissible modifications to the dumping calculation methodology to account for exchange rate movements. Significantly, Article 2.4.1 sets forth special rules that apply to situations in which the exporting country's currency has been *appreciating*. However, Article 2.4.1 does not permit any adjustment to the dumping calculations to account for a *depreciation* of the exporting country's currency. Consequently, because the multiple-averaging methodology was adopted to account for the *depreciation* of the Korean won, it was inconsistent with the framework established by Article 2.4.1.

3. "Fair Comparison" Requirement of Article 2.4

50. Finally, as we have noted previously, the multiple-averaging methodology was particularly unfair in the unique circumstances of the SSPC and SSSS cases. The US industry's claims for relief in these cases were predicated on the claim that anti-dumping orders were needed to protect the US industry from an increase in imports after the devaluation of the Korean won.[29] Because these cases were predicated on the effects of the devaluation, a fair analysis of whether POSCO was truly engaged in dumping necessarily should have focused on pricing data after the devaluation. Yet, it was precisely that data that the multiple-averaging methodology effectively "walled off" from the DOC's price comparisons.

51. The result was a dumping determination based solely on pre-devaluation data in a case that was predicated on post-devaluation imports. Such a result is plainly unfair, and it therefore violates the "fair comparison" requirement of Article 2.4.

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[25] US First Submission, para. 142.

[26] *See EC — Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, Report of the Panel, ADP/137, adopted on 30 Oct. 1995, para. 494.

[27] *See Cotton Yarn*, para. 501; *accord United States — Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, Report of the Panel, ADP/87, adopted on 27 Apr. 1994, para. 480.

[28] *See Cotton Yarn*, para. 494.

[29] *See* Korea's First Submission, paras. 3.48 and 4.61.

4. The US Justifications

52. The United States agrees that Article 2.4.2 requires the calculation of a single average normal value and a single average export price for each "group of comparable transactions."[30] It also concedes that changes in exchange rates by themselves do not "establish[] a limit on which transactions may be considered 'comparable' within the meaning of ... Article 2.4.2."[31]

53. Instead, the United States offers four arguments to justify the adoption of the multiple-averaging methodology. *First*, it contends that the word "comparable" in Article 2.4.2 is so ambiguous that the investigating authorities are free to interpret it in essentially any manner they see fit. *Second*, it contends that the multiple-averaging methodology was properly adopted to ensure that the comparisons were made "in respect of sales at as nearly as possible the same time." *Third*, it argues that Korea's arguments about multiple averaging are an impermissible attack on the practice of "zeroing." And, *fourth*, it contends that the multiple averaging methodology was needed to prevent the exchange rate shifts from "disguising" dumping. Let me address each of these arguments in turn.

(a) Comparable Transactions

54. I will turn first to the US arguments regarding the meaning of "comparable transactions" in Article 2.4.2. The US argues that its interpretation of the word "comparable" is entitled to deference.[32] As we have noted previously, this claim for deference is inconsistent with the provisions of Article 17.6(ii) of the Anti-Dumping Agreement.[33]

55. In any event, the US claim for deference is particularly strained in this context: There is no US interpretation of the word "comparable" to which the Panel could defer. Korea has submitted that the word "comparable" means, in essence, "capable of being compared."[34] The United States has neither disputed that interpretation nor offered any interpretation of its own. The meaning of the word "comparable" is simply not in dispute.

(b) The Timing Requirement of Article 2.4

56. Let me turn now to the US arguments regarding the timing requirement of Article 2.4. In its first oral statement, the United States for the first time suggested that the multiple-averaging methodology was adopted to implement the requirement of Article 2.4 that sales be compared at "as nearly as possible the same time." In its second submission, this has become the principal US defense for its methodology. This *post hoc* defense is, however, without merit.

57. The multiple-averaging methodology in these cases did not purport to limit the comparisons to sales made at the same time. Indeed, that methodology did not take the amount of time between the sales into account at all. It did not say that the only sales that could be compared were the sales made within the same month or week or day. Instead, it said that *all* sales prior to October 31 could be included in one comparison and that *all* sales after November 1 could be included in another comparison. In the Plate case, for example, this meant that sales as much as ten months apart (from January 1 to October 31) might be included in the same comparison, but that sales one day apart (from October 31 to November 1) could not. Such a methodology might limit the comparisons to sales made under similar exchange rates. However, it simply does not limit the comparisons to sales at the

[30] *See* US Second Submission, para. 42.
[31] US First Submission, para. 142.
[32] *See* US Second Submission, paras. 44-45.
[33] *See* Korea's First Oral Statement, para. 77; Korea's Second Submission, paras. 15-18.
[34] *See* Korea's Responses to Panel Questions, at 4 (Response B.1) (quoting Webster's Third New International Dictionary).

same *time*. Consequently, the timing requirement of Article 2.4 cannot justify the multiple-averaging methodology.

58. Moreover, the US arguments regarding the timing requirement of Article 2.4 ignore the nature of a comparison that is based on an average normal value and export price. An average-to-average methodology does not compare the individual transactions that are included in the calculation of the average. Rather, the comparison is made only after the average has been calculated. When a series of home-market sales is averaged, the result is an average home-market sale made, on average, at the mid-point of the period. When a series of export sales is averaged, the result is an average export sale made, on average, at the mid-point of the period. As long as the sales in both markets are spread in a similar manner throughout the period, the averaging process will result in an average home-market sale and an average export sale made, on average, at the same time. Thus, the averaging process necessarily takes care of the timing requirement of Article 2.4 (unless the sales in the two markets are weighted disproportionately in different parts of the period).

(c) Zeroing and Multiple Averaging

59. The United States has also suggested that Korea's arguments about multiple averaging are a surreptitious attack on the practice of "zeroing" — which, the United States, contends, is explicitly permitted by the Anti-Dumping Agreement.[35] This argument is, however, off target.

60. It is true, of course, that a finding that the Anti-Dumping Agreement does not permit "zeroing" as a general matter would require that the DOC's multiple-averaging methodology be overturned — because "zeroing" was an essential part of that methodology. Korea has, therefore, challenged the practice of zeroing as applied through the multiple-averaging methodology in this case. Moreover, as described in Korea's previous submissions, it was the zeroing aspect of the multiple-averaging methodology that led to the inflation of the dumping margins and the unfair bias in the DOC calculations.

61. Of course, the issue of "zeroing" is not critical to Korea's position — because the provisions of Article 2.4.2 requiring a comparison of single averages are independent of any zeroing issues. Nevertheless, we note for the record that Korea does not believe that zeroing is permitted as a general matter in dumping calculations under the Anti-Dumping Agreement.

(d) "Disguised" Dumping

62. Finally, let me turn to the real basis for the US decision — which was the DOC's sense that the depreciation of the Korean won would "disguise" dumping margins unless a multiple-averaging methodology were adopted.

63. As an initial matter, I would note that the negotiating history underlying the averaging provisions suggests that the Panel should be wary about accepting notions of "disguised" margins to overrule the actual language of the provisions. As noted in our second submission, the provisions of Article 2.4.2 represent a carefully negotiated bargain among the WTO Members on issues that were highly contentious during the Uruguay Round negotiations.[36] By arguing that the single-average methodology which is required by those provisions should be disregarded because it "disguises" dumping margins, the United States is essentially asking the Panel to undo the careful bargain reflected in Article 2.4.2. The Panel plainly should not accept that invitation.

[35] *See* US Responses, para. 97.

[36] *See* Korea's Second Submission, paras. 119-21, *citing* Terence P. Stewart, ed., II *The GATT Uruguay Round: A Negotiating History, 1986-1992*, at 1537-43 (1993) (ROK Ex. 77).

64. Moreover, the idea of "disguised" dumping margins in the Plate and Sheet cases is highly biased — because it overemphasizes the higher dumping margins that result from an over-valued currency, and ignores the lower dumping margins that result from an under-valued currency. Throughout all of the exchange rate shifts in these cases, the prices for POSCO's Korean and US sales changed little.[37] However, the results of a comparison of those prices using the shifting exchange rates changed dramatically. Prior to November 1997, when the won in hindsight was over-valued, the Korean prices seemed higher than the US prices. By contrast, in November and December 1997, when the won was apparently under-valued, the Korean prices seemed lower than the US prices.

65. The multiple-averaging methodology is biased, therefore, because it calculates one dumping margin for the period when the won was over-valued and a separate margin for the period when the won was under-valued — and then effectively ignores the latter through "zeroing." A fair comparison would not allow such a bias. Instead, a fair analysis would have given both periods equal weight, to avoid the distortions inherent in an analysis that examined only a period in which the exchange rate was biased in one direction.

C. DOUBLE-CONVERSION

66. I shall now turn to the third and final subject giving rise to the US errors in dispute: The double-conversion of local sales from dollars to won and back to dollars at a different exchange rate announced by a different bank on a different date.

1. Article 2.4.1

67. POSCO made certain sales in Korea which are known as "local sales." The orders for these sales were fixed in dollars. In fact, the order sheets for these sales showed only a dollar amount and not a Korean won amount. The invoices for these sales also showed a dollar amount. This dollar amount was the same as the dollar amount shown on the order sheet. It is also true that the invoices showed a Korean-won equivalent of the dollar price as an accounting convenience (since the amounts had to be recorded in the Korean accounting records of both POSCO and the customer in Korean won). This Korean-won equivalent shown on the invoices was determined by converting the dollar price from the order sheet into won using the official Korean Exchange Bank rate on the date of the invoice.

68. In its final determinations, the DOC chose to ignore the dollar prices that were reported by POSCO. Instead, it chose to begin with POSCO's converted won data — which had been calculated by POSCO by applying the Korean Exchange Bank's exchange rate on the date of invoice to the dollar price. The DOC then converted those amounts back to dollars using a different exchange rate on a different date — specifically, the DOC's official exchange rate based on the New York Federal Reserve's exchange rate for the date of the *US sale*. This methodology was virtually guaranteed to distort the normal value of the local sales. In fact, Korea has provided an example where there was a distortion of *more than 70%*.[38]

69. As Korea has argued throughout this proceeding, Article 2.4.1 of the Anti-Dumping Agreement only permits currency conversions to be made when they are "required."[39] And, although the United States objected to that argument at first, it now appears to concede the point.[40] Thus, the only question for the Panel is whether the second conversion from won to dollars was "required." If

[37] *See* POSCO Rebuttal Brief (SSPC), at 20-21 (ROK Ex. 9); POSCO Case Brief (SSSS), at 21-22 (ROK Ex. 20).

[38] *See* Korea's First Submission, para. 3.58.

[39] *See* Korea's First Submission, paras. 4.66 - 4.69; Korea's Second Submission, paras. 161-65.

[40] *See* US Responses, paras. 63, 102.

this conversion was not "required," then the US treatment of POSCO's local sales must be found inconsistent with WTO disciplines.

70. This is another straightforward issue: POSCO reported US dollar prices. There is no dispute that the reported US dollar prices matched the amounts shown on the order sheets and the invoices to the customers. There is no dispute that the payment was based on those US dollar prices. Consequently, a currency conversion was not "required." The DOC's decision to base its calculations on converted-won amounts and then convert them back to US dollars using a different exchange rate violated Article 2.4.1.

2. The Fair Comparison Requirement of Article 2.4

71. As we have noted previously, the DOC's methodology was also unfair. It penalized POSCO by inflating the normal value and hence the dumping margins for comparisons involving local sales. And, it did so simply because the exchange rates on the date of the home-market sales (which had been used to convert the dollar prices for these sales into won) were different from the exchange rates on the date of the US sales (which the DOC subsequently used to convert the converted-won amounts back into dollars).

72 As I mentioned previously, the "fair comparison" requirement of the first sentence of Article 2.4 requires, at a minimum, that exporters not be punished for events beyond their control. The DOC's methodology plainly does not meet that standard, because it punished POSCO for a change in exchange rates that was obviously beyond POSCO's control. Again, the issue here is very straightforward.

3. The DOC's Justifications

73. The United States has offered a number of explanations for the DOC's decision to use the converted won amounts, and not the reported dollar prices, as the starting point for its calculations. However, as I noted at the outset, the issue is not whether the United States can now come up with creative *post hoc* explanations to justify the DOC's decision. In order to assess the validity of the DOC's methodology, it is necessary to examine the reasons *the DOC* gave for ignoring the reported dollar prices.

74. In the final determination in Plate, the DOC gave three reasons for using the converted won amounts: (1) POSCO recorded the sales in its accounting system in won, (2) the exchange rate used by POSCO to convert the dollar prices into the won amount recorded in its accounting system differed from the exchange rate used by the DOC, and (3) POSCO was paid in won.[41] In fact, however, none of these factors explains why the double-conversion was "required." They fail, therefore, to provide any basis for the Panel to find the double-conversion consistent with Article 2.4.1.

75. Let us start first with the purported difference in exchange rates. To begin with, the differences were much smaller than the DOC suggested. As demonstrated in Korea's submissions, the supposed differences result principally from the fact (which the United States admits) that the DOC mistakenly based its comparison on the wrong exchange rate. Under a proper comparison, the

[41] *See* SSPC Final Determination (ROK Ex. 11) at 15456. In Sheet, the final determination also mentioned two other factors, but they are clearly irrelevant and the United States has not raised them as justifications before this Panel. *See* SSSS Final Determination, at 30678 (ROK Ex. 24) ("local sales are the only sales made in the home market that are expressly linked to a dollar value" and "the vast majority of the costs incurred for home market and US sales are denominated and paid by POSCO in won").

supposed differences essentially vanish.[42] Thus, the factual underpinnings for the DOC's justification have no merit.

76. But even if the DOC had been correct, what difference would it have made? The exchange rate POSCO used to record won amounts in its accounting system had no bearing on the accuracy of the reported US dollar prices — and it did not prevent the DOC from using the reported dollar prices and avoiding the currency conversions altogether. Moreover, there was no basis for concluding that POSCO had manipulated the won amounts recorded in its accounting system for any purpose. After all, POSCO did not just make up the exchange rates it used. Instead, it used official exchange rates set by the Korean Exchange Bank. In the end, the DOC's decision reduces to a kind of economic chauvinism, which penalized POSCO because it used official Korean rates that differed slightly from rates published by the New York Federal Reserve. That result is patently unfair, and it cannot possibly be reconciled with the requirements of the Anti-Dumping Agreement.

77. The second justification offered by the DOC was that the sales were recorded in POSCO's accounting system in won. That justification is, however, equally irrelevant. It is a basic accounting principle that *all* of POSCO's sales and costs worldwide, whatever currency they are denominated in, must be recorded in POSCO's books in the same currency.[43] For example, POSCO's *US sales* were recorded in its accounting system in won. Yet, the DOC did not use those converted won amounts to determine the export price. Why, then, should it matter that the local sales were also recorded in POSCO's accounting records in won? Indeed, even the United States has now backed away from any reliance on this factor: It now says that "The United States did not base its factual determination on whether a currency conversion was made for 'accounting purposes.'"[44]

78. This brings us to the DOC's third and final justification — the fact that the sales were paid in Korean won. Again, this factor has no rational nexus to the DOC's decision to base its calculations on the won amounts shown on POSCO's invoices. Most fundamentally, the won amounts of the payments did not match the won amounts on the invoices. It is plainly absurd to use one won amount as the price for the sale, simply because the customer paid a different won amount — and especially where both won amounts simply reflected the fixed dollar price converted using official exchange rates.

79. Therefore, none of the three reasons given in the final determinations provide any rational basis to conclude that the reported won amounts for the local sales had to be used as the basis for the DOC's calculations and that the subsequent re-conversion of those won amounts into dollars was "required."

4. Revised US Justifications

80. The United States has once more attempted to muddy the waters by invoking a whole series of alternative justifications for the DOC's determinations. I could simply dismiss them all as irrelevant *post hoc* rationalizations. However, I feel constrained at least briefly to explain why these justifications are wrong as well as irrelevant.

81. *First*, the United States claims that the DOC's decision to choose the converted won data over the actual dollar prices was a "factual determination" entitled to extreme deference.[45] That assertion is plainly wrong, because there were no facts in dispute. Please allow me a moment to review the key, undisputed facts:

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[42] *See* Korea's First Submission, paras. 3.60, 4.77 - 4.88; Korea's Second Submission, paras. 145-49.
[43] *See* Korea's First Submission, paras. 3.49 - 3.54.
[44] *See* US Responses, para. 108.
[45] *See* US First Submission, para. 175.

- The orders for these sales were placed in dollars, and not in won.

- The invoices set forth the order price in dollars.

- The invoices also showed an amount in won, which was calculated by applying the exchange rate on the date of invoice to the dollar price.

- Payment was made in won. The amount due was calculated by applying the exchange rate on the date of payment to the dollar price.

- When the exchange rate on the date of invoice differed from the exchange rate on the date of payment, the won amount of the payment did not match the won amount of the invoice. In such circumstances, a resulting exchange gain or loss was recorded in POSCO's accounting records to balance the two.

All of these facts were verified by the DOC. Based on those facts, the DOC's verification report in *Sheet* concluded that "local sales are dollar denominated."[46] At no point in any of its determinations did the DOC point to any factual disputes between it and POSCO on this issue.

82. *Second*, the United States argues that the DOC could not have used the dollar prices of the local sales, because POSCO did not use the methodology for currency conversions specified in Article 2.4.1.[47] This argument is, frankly, backwards. The dollar price was the price that was actually fixed by the sales agreement between POSCO and the customer. POSCO did not make any currency conversions to produce the dollar price. Rather, the only currency conversions made by POSCO converted the actual dollar prices into won. The DOC then used that converted won amount as the basis for its calculations and effectively adopted POSCO's exchange-rate conversions. The only way the DOC could have avoided using POSCO's conversions would have been to use the original unconverted dollar prices. Thus, this new US argument does not justify the decision to use converted won data instead of the original dollar prices. To the contrary, it shows why the DOC should have used the dollar prices.

83. *Third*, the United States now argues that "the customer is charged (invoiced) in won."[48] This argument directly contradicts the final determinations themselves. The final determinations clearly and repeatedly stated that the local sales were invoiced in *dollars*. They noted that the shipping invoice for *some* of the local sales (*i.e.*, those sold through POSTEEL in "Home-Market Channel 2") "*also* shows the won price," but the use of the word "also" reinforces that the won amount was secondary to the dollar price on the invoices.[49] In any event, the mere appearance of converted won amounts on invoices does not justify the DOC's choice to use the won amounts instead of the dollar prices — since the dollar prices were on the invoices as well.

84. *Fourth*, the United States now alleges that POSCO failed to provide it enough information quickly enough to demonstrate that the local sales were denominated in dollars, particularly in the

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[46] *See* SSSS Sales Verification Report, at 14 (ROK Ex. 19); Korea's Responses to Panel Questions, at 21-23 (Responses D.2 - D.3).

[47] *See* US First Submission, para. 178; US Second Submission, para. 65.

[48] *See* US Second Submission, para. 64.

[49] *See* SSPC Final Determination, at 15456 (ROK Ex. 11) (emphasis added). Although the DOC noted the won information on the invoices, it did not rely on that in its reasoning. *See* id.; *see also* SSSS Final Determination, at 30678 (ROK Ex. 24) (citing only the three factors mentioned above as the basis of the decision in Plate).

Plate case.[50] Again, this is another of the *post hoc* rationalizations that is noticeably absent from the final determinations. The DOC itself did not determine that POSCO's factual submissions on this issue were insufficient. And it is clear from the undisputed facts that such a claim would have been baseless:

- In both cases, POSCO told the DOC that the local sales were denominated in dollars.[51]

- In both cases, POSCO showed the DOC order sheets for local sales proving that the orders were placed in dollars only.[52]

- In both cases, the DOC verified that the won amounts shown on POSCO's invoices and sales ledgers were converted from the dollar price using the exchange rate on the date of invoice.[53]

- In Sheet, POSCO informed the DOC more than one month before the *preliminary* determination that POSCO's accounting for payments of local sales reflected "the difference in the exchange rate on the date of sale and the date of payment."[54] The DOC later verified that the won amounts paid were not the won amounts shown on the invoice, but were instead the won equivalents of the dollar price. It further verified that differences due to exchange rate movements were recorded as exchange gains or losses. The Verification Report concluded that "local sales are dollar denominated."[55]

POSCO's factual submissions plainly put the DOC on notice that the prices for these sales were fixed in dollars and not in won. If the DOC had further factual questions, it could have requested additional information from POSCO *during the investigation* — and, indeed, it was required to do so by Articles 2.4, 6.1, and 6.9 of the Anti-Dumping Agreement. Having failed to seek information it claims to have needed, the United States cannot blame POSCO for the alleged deficiencies in the record.

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[50] *See* US Responses, paras. 35-59.

[51] *See* US Responses, paras. 48, 58 (admitting that, in both cases, POSCO told the DOC that the amounts due in won were "based on the US dollar invoiced price").

[52] *See* Korea's Responses to Panel Questions, at 20-21, 22-23 (Responses D.1, D.3) (and ROK Exhibits cited therein).

[53] *See* SSPC Sales Verification Report, at Ex. 6 (ROK Ex. 6), Ex. 23-24 (ROK Ex. 84); SSSS Sales Verification Report, at Ex. 17, 20 (ROK Ex. 46, 86).

[54] *See* US Responses, para. 55 (admitting that POSCO so informed the DOC on November 23, 1998).

[55] *See* SSSS Sales Verification Report, at 14 (ROK Ex. 19); Korea's Responses to Panel Questions, at 21-23 (Responses D.2 - D.3).

ANNEX 1-7

RESPONSES OF KOREA TO QUESTIONS POSED BY THE PANEL

SECOND MEETING OF THE PANEL

(28 July 2000)

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NOTE: In this submission, including the exhibits, Korea has placed information which POSCO has previously designated as business proprietary information in brackets ("{ }"). This information has been omitted and the brackets left in the text."{ }"

I. CURRENCY CONVERSION

1. As an initial matter, Korea notes that the Panel has asked several questions concerning the state of the record regarding the local sales issue. Korea respectfully submits that it is not necessary for the Panel to examine the record in the manner suggested by the Panel's questions. As mentioned at the Second Meeting, "for a panel to review a determination by reference to considerations not actually reflected in a public statement of reasons accompanying such determination would also be inconsistent with the requirements of an orderly and efficient conduct of the dispute settlement process...."[1]

2. The DOC's final determinations provided three reasons for the decision to ignore the dollar prices provided by POSCO: (1) POSCO was paid in won; (2) POSCO recorded the local sales in its ledgers in won; and (3) there were differences between the exchange rates used by POSCO and those used by the United States.[2] No other factors were relied upon in the final determinations. Thus, the question before the Panel is whether a determination based on those factors — and those factors alone — was consistent with the requirements of the Anti-Dumping Agreement.

3. Significantly, the DOC did not rely on any failure by POSCO to provide relevant information in a timely manner. (If the DOC had relied on such a claim, it would have been required by the last sentence of Article 2.4 and the provisions of Article 6.1 to indicate to POSCO what additional information was required.) Moreover, the DOC also did not rely on the fact that the invoices for the local sales showed prices in Korean won. (To the contrary, the final determinations specifically stated that all local-sales invoices showed the prices in U.S. dollars, while only some of the local-sales invoices "also" showed prices in Korean won.) Thus, the effort by the United States to inject those issues into the Panel's consideration is improper, because those issues were not relied upon by the DOC when it made its determination.

4. In addition, as mentioned at the Second Meeting, Korea respectfully submits that it is possible for the Panel to resolve the local sales issue without deciding whether the local sales were denominated in dollars or won. The question for the Panel is whether or not the currency conversion made by the DOC was "required."[3] The DOC ignored the dollar prices provided by POSCO, and instead converted the converted won amounts into dollars. That conversion was not required. There is no reason to believe that the dollar prices provided by POSCO were unreliable or that the DOC *had to* ignore them for some reason, such as to eliminate or reduce some type of distortion. The conversion was, therefore, inconsistent with Article 2.4.1 of the Anti-Dumping Agreement. Significantly, nothing in the DOC's final determinations (or even in the U.S. arguments before the Panel) explains why that conversion was *required*. That should be the end-point of the Panel's review.

5. The answers provided to the individual questions below are without prejudice to Korea's position that the Panel should limit its review of U.S. treatment of POSCO's local sales to the reasons provided in the DOC's final determinations.

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[1] *Korea — Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, Report of the Panel, ADP/92, adopted on 27 Apr. 1993, para. 210; *see also Mexico — Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Report of the Panel, WT/DS132/R, adopted 24 Feb. 2000, paras, 7.104, 7.192.

[2] SSPC Final Determination, at 15456 (ROK Ex. 11); SSSS Final Determination, at 30678 (ROK Ex. 24).

[3] Korea notes that, in both the SSPC and SSSS investigations, POSCO expressly argued the local sales issue in terms of whether or not the double-conversion was "required." *See* POSCO's SSPC Case Brief, at 5 (ROK Ex. 7); POSCO's SSSS Case Brief, at 4 (ROK Ex. 20).

Q.1. For the United States. In the Plate case, did you verify any "dollar-denominated" sales local sales? If so, did you verify the amount actually paid in respect of those sales?

6. The DOC verified three dollar-denominated local sales in the Plate case. This is evident from Exhibits 6, 23, and 24 of the SSPC Sales Verification Report.[4] Because the Plate customers paid on a rolling basis, the DOC did not verify the amount actually paid in respect of particular local sales. The DOC did, however, verify other information sufficient to demonstrate that the local sales are denominated in dollars, including the fact that the order sheets are denominated solely in dollars and the fact that the won amount shown on the invoice was calculated from the dollar price.[5] The DOC also verified POSCO's accounting system, which includes an account for exchange gains and losses.[6]

Q.2. For Korea. It is the understanding of the Panel that the initial questionnaire responses in both the Plate and Sheet cases reported the "local dollar-denominated sales" at issue at the invoiced price in won, rather than the amount of won actually paid. In the Plate case, the Panel is unaware that POSCO at any point informed the USDOC that the amount paid in won differed from the amount invoiced in won, nor that any evidence in the record so indicates. If Korea considers that the Panel's understanding is incorrect, please provide relevant evidence from the record in support of Korea's view.

7. Korea agrees that POSCO initially reported the converted won amounts shown on the invoices for the local sales. In its supplemental responses, however, POSCO corrected that mistake and reported the actual dollar prices. POSCO explained that the local sales were denominated in dollars, and argued that the United States should use the dollar price.[7]

8. Korea is unaware of any evidence in the record of the Plate case that indicates that POSCO specifically informed the DOC that the amount paid in won differed from the converted won amounts shown on the invoice. However, as discussed in response to the previous question, Korea believes that there is considerable evidence showing that the local sales were denominated in dollars. From that evidence, it follows that the amount of won actually paid would not be the same as the converted won amount shown on the invoice — unless it so happened that the exchange rate on the date of invoice was exactly the same as the exchange rate on the date of payment.

9. Furthermore, the United States should not be allowed to defend its anti-dumping measures on the ground (not mentioned in the final determinations) that POSCO should have provided additional proof that the local sales are denominated in dollars, when the Anti-Dumping Agreement squarely places the burden on the DOC to ask for all necessary information.[8] POSCO informed the DOC that the local sales were denominated in dollars and provided proof in support of that fact and the DOC did not ask POSCO for any additional proof during the proceedings at issue. In these circumstances, it would be unfair to allow the United States to contend now that POSCO should have submitted more information when it is too late for POSCO to do so.

Q.3. For Korea. Please identify where, in the course of your argumentation in the Plate and Sheet investigations regarding whether "dollar denominated" local sales were in fact dollar or won sales, you drew the attention of the USDOC to the fact that the order sheets indicated "D" for dollar sales.

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[4] *See* ROK Ex. 6, Ex. 84.

[5] *See* id. Note in particular the hand-written calculations based on the exchange rate for the date of invoice, which was provided in the exchange rate chart on the last page of SSPC Sales Verification Exhibit 6 (ROK Ex. 6).

[6] *See* SSPC Sales Verification Report, at 3-4 (ROK Ex. 6).

[7] *See* Korea's Responses to Panel Questions at the First Meeting, at 22-22 (Response D.3).

[8] *See* Anti-Dumping Agreement, art. 2.4 (*chapeau*, last sentence); id., art. 6.1.

10. At the verifications in both the Plate and Sheet investigations, POSCO drew the attention of the DOC to the fact that the order sheets indicated "D" for dollar sales. This is evident from the Exhibits to the Sales Verification Reports that concern the local sales. Each Exhibit contains not only the order sheet itself, but also the "translation key" which explained in considerable detail how to read the order sheet. Indeed, the Sales Verification Reports in both investigations expressly noted that the DOC's examination of the local sales began with POSCO's order sheet.[9]

11. POSCO then argued in its case briefs in SSPC that the DOC should accept the dollar prices of local sales because, *inter alia*, POSCO "*negotiates* prices and invoices its customers in US dollars." POSCO cited Exhibit 6 of the SSPC Sales Verification Report as "demonstrating that the sales price was *negotiated* in US dollars and invoiced in US dollars."[10] Likewise, POSCO argued in its SSSS Case Brief that, for local sales, "it *negotiates* prices and invoices its customers in .US dollars."[11] The references to the negotiations in dollars are references to the verified fact that POSCO's order sheets indicated that the price was set in dollars. (The order sheets are the only evidence of the sales negotiations in the verification reports. Consequently, the references to sales negotiations are necessarily references to the order sheets.)

II. UNPAID SALES

Q.1. For Korea. Korea characterizes the United States' "constructed export price defense" as a post hoc argument. The United States has however indicated places in the record that it considers to indicate that, in respect of sales through POSAM, the United States deducted an allocated portion of the US bad debt expenses as part of the construction of the export price (US answer to question 4 from the Panel regarding unpaid sales). The portions of the record cited by the United States seem to suggest that the adjustments in respect of POSAM sales were conducted under a legal provision applicable only to adjustments relating to a constructed export price and using a different methodology than is used for circumstance of sale adjustments. If you disagree, please explain, citing to the relevant portions of the record.

12. The final determination in Plate gives the following explanation for the DOC's decision to make adjustments to POSCO's prices for the unpaid sales (omitting the intertwined discussion of the decision to include POSCO's atypical sales in the dumping analysis):

> It is the Department's practice to . . . treat the bad debt as a direct selling expense when the expense is incurred on sales of subject merchandise. *See Color Televisions* at 4412. As stated above, at verification, the Department found that POSAM reversed the sales in its books at year-end by issuing negative invoices to the customer for the unpaid merchandise in question. Thus, although POSAM does not maintain separate bad debt accounts, these sales have been effectively classified as a type of bad debt. . . . However, these sales led to a bad debt expense which is directly related to sales of the subject merchandise. *See, AOC International v. US*, 712 F. Supp. 931 (CIT 1989). For calculation, *see Analysis Memorandum*.[12]

[9] *See* SSPC Sales Verification Report, at 4 (ROK Ex. 6); SSSS Sales Verification Report, at 14 (ROK Ex. 19).

[10] *See* POSCO's SSPC Case Brief, at 4 (ROK Ex. 7) (emphasis added).

[11] *See* POSCO's SSSS Case Brief, at 4 (ROK Ex. 20) (emphasis added).

[12] SSPC Final Determination, at 15448-49 (ROK Ex. 11).

Likewise, the final determination in Sheet gives essentially the same explanation, although the discussion is somewhat longer (as it addresses various related issues that do not affect the fundamental rationale for the decision). Indeed, Sheet expressly follows Plate in this respect.[13]

13. It is apparent, therefore, that the DOC gave only one reason for its decision to adjust POSCO's prices to account for the unpaid sales: The non-payment gave rise to a "bad debt expense" which is a "direct selling expense" for which adjustments are made under US practice. No other explanation was provided in the final determinations. Specifically, no mention is made in the final determinations that the adjustment was necessary to construct export price for sales through POSAM (while simultaneously making effectively the same adjustment for sales made directly by POSCO). Thus, the US argument to that effect before this Panel is *post hoc* and should be ignored.

14. In support of its *post hoc* argument, and in response to the Panel's Question Number 4 at the First Meeting, the United States has argued (or, at least, implied) that the codes at the end of the DOC's Final Analysis Memoranda show that the adjustments were made in the calculation of the "constructed export price." That argument is misleading in several respects:

- *First*, what matters to this Panel's review is the reasons given for the DOC's actions in the DOC's final determinations. The question for the Panel is whether the decisions actually made by the investigating authority conform with WTO rules, and not whether the defending party's lawyers can now assemble a new rationale from the facts on the record that may or may not conform with WTO rules. Since the final determinations show that concerns about the construction of the CEP did not form any part of the basis of the DOC's decision to make adjustments for the unpaid sales to both CEP and non-CEP (*i.e.*, EP) sales,[14] the fact that the United States can now point to other information about calculating CEP not mentioned in the final determinations is irrelevant.

- *Second*, the codes do not accurately reflect the DOC's actual methodology. For example, while the codes show that the DOC reduced POSCO's export price only for CEP sales (and not for EP sales), they do not show that the DOC increased POSCO's normal value for EP sales.[15]

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[13] *See* SSSS Final Determination, at 30674 (ROK Ex. 24).

[14] Indeed, Korea submits that it is not logically possible for concerns about the construction of the CEP to form part of the basis of the DOC's decision to make adjustments to POSCO's EP sales, because by definition concerns about construction of CEP are irrelevant to EP sales. It follows that concerns about the construction of the CEP could only form part of the basis for the decision to make adjustments to CEP sales, if there were a decision to make the adjustment for CEP sales that was separate from the decision to make the adjustment for EP sales. There is, however, simply no basis in the final determinations for the view that the DOC made two separate decisions.

[15] For Plate, Page 8 of the Final Analysis Memorandum (ROK Ex. 12) shows that DOC increased DIREXPU (Direct Expenses — US) by { }, the "amount associated with unpaid bankrupt sales." Page 9 shows that DOC subtracted DIREXPU from NETPRIU (Net Price — US) for CEP sales, but not for EP sales. By contrast, Page 13 shows only one method for calculating NETPRIH (Net Price — Home Market, or normal value). No distinction is made between calculating NETPRIH in one way for CEP sales and in another way for EP sales. Specifically, no indication is given that for EP sales DIREXPU is added to NETPRIH. Yet, by the United States' own admission, in fact the DOC did add DIREXPU (including the adjustment for unpaid sales) to NETPRIH for EP sales.

Likewise, for Sheet, Page 9 of the Final Analysis Memorandum (ROK Ex. 25) shows an increase of { } to DIREXPU. Page 10 differentiates between EP and CP sales in the calculation of NETPRIU, but Page 13 fails to make the same distinction in the calculation of NETPRIH — notwithstanding the US admission that it either reduced export price or increased normal value for all sales.

- *Third*, the US argument confuses the terminology used under US law with the requirements of the Anti-Dumping Agreement. In fact, an analysis of the relevant provisions demonstrates that US law uses the terms "constructed export price" and "normal value" in a different manner than the Anti-Dumping Agreement (and Article VI:1 of GATT 1994).

  - Under the Anti-Dumping Agreement (and Article VI:1 of GATT 1994), the terms export price (or constructed export price) and normal value refer to the *unadjusted* prices in the markets under consideration. The "allowances" made under the third sentence of Article 2.4 (for "differences affecting price comparability") and under the fourth sentence of Article 2.4 ("in the cases referred to in paragraph 3 of Article 2") are made as part of the *comparison* of export price and normal value, and not as part of the *determination* of export price and normal value.[16]

  - Under US law, by contrast, all adjustments and allowances are made in the calculation of the export price (or constructed export price) and normal value.[17] Once the export price (or constructed export price) and normal value have been calculated in this manner, no further adjustments are made in the comparison itself.

  This fundamental difference in the structure of the US law and the Anti-Dumping Agreement means that the calculation of CEP under US law (based on the price net of certain statutory adjustments) is not the equivalent of the "construction" of an export price under Article 2.3 of the Anti-Dumping Agreement (based on the price before the "allowances" made in the comparison).

- *Fourth*, the DOC's actual practice demonstrates that the adjustments made to calculate CEP under US law are not necessarily appropriate allowances to construct an export price within the meaning of the Anti-Dumping Agreement. The DOC does not, in practice, limit the adjustments made to calculate CEP to items that relate to the affiliated US importer's operations in the United States. Instead, the DOC deducts all "direct" selling expenses from the CEP, even if those selling expenses relate solely to the foreign producers'

[16] The relevant provisions under GATT 1994 are as follows: The second sentence of Article VI:1 of GATT 1994 provides that the existence of dumping is to be determined by comparing the "price of the product exported from one country to another" to the normal value — where normal value is essentially defined to be the domestic price (or, "in the absence of such domestic price," third-country prices or constructed value). The third sentence of Article VI:1 then provides that "due allowances shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability." Significantly, Article VI:1 does not describe these allowances as adjustments made in calculating the export price or normal value. To the contrary, the allowances are described only after the export price and normal value have been defined. *See* GATT 1994, Art. VI:1.

The Anti-Dumping Agreement adopts a similar structure. Article 2.1 provides, again, that the dumping margins are to be calculated based on a comparison of the export price to the domestic price. Article 2.2 sets forth detailed rules for determining normal value. Article 2.3 provides that, when the merchandise is exported to an affiliated importer, a constructed export price based on the importer's resale price may be used in lieu of the export price. Finally, Article 2.4 describes the manner in which the price comparison is to be made, and specifies certain "due allowances" and other adjustments that are required for the comparison. Once more, the allowances and adjustments do not affect the determination of export price or normal value under the Anti-Dumping Agreement. Instead, the allowances and adjustments are made as part of the comparison, after the export price and normal value have been determined.

[17] Thus, the US statute indicates that the "export price" or "constructed export price" mean "the price at which the subject merchandise is first sold ... as adjusted under" the applicable subsections of the US statute. *See* Tariff Act of 1930, as amended, § 772(a) and (b), 19 USC. § 1677a(a) and (b) (ROK Ex. 1). Similarly, the US statute defines normal value (in the first instance) as the price for home-market sales — and then indicates that this "price" is to be "increased," "reduced" or "increased or decreased" for various adjustments. *See* Tariff Act of 1930, as amended, § 773(a)(1)(B) and (a)(6), 19 USC. § 1677b(a)(1)(B) and (a)(6) (ROK Ex. 1).

> operations.[18] Expenses that relate solely to a foreign producers' operations plainly do not fall within any of the allowances permitted to construct an export price within the meaning of the Anti-Dumping Agreement. It follows, then, that the mere fact that expenses are deducted from CEP under US law does not, by itself, make them adjustments to "construct an export price" within the meaning of the Anti-Dumping Agreement.

15. In the end, however, it does not matter whether the United States believed that it was calculating a "constructed export price" under US law when it deducted the cost of non-payment from the US sales prices. The issue before this Panel is whether the United States acted in accordance with the requirements of the Anti-Dumping Agreement. As explained in Korea's previous submissions, an analysis of both the text of the fourth sentence of Article 2.4 and the objective and purpose of Article 2.3 demonstrate that the US adjustment for the cost of non-payment is not permitted under Article 2.3

16. Finally, Korea disagrees with the suggestion that the DOC used "a different methodology" to calculate the adjustment to CEP sales than it used to calculate the adjustment to EP sales. POSCO had one customer go bankrupt. That customer owed POSCO one amount for Plate sales and one amount for Sheet sales. In each case, DOC calculated one amount that was the cost of the unpaid sales. The DOC then divided that amount by POSCO's total exports (measured in metric tons). Thus, the DOC used one methodology to calculate one adjustment amount (for both direct EP and indirect CEP sales). It then simply subtracted that one amount from export price for the indirect CEP sales and added that one amount to normal value for the direct EP sales.

Q.2. For the United States. The United States argues that, "[b]ecause Korea has made no claim under Article 2.3, the United States' decision to construct export price and the methodology it employed to do so are not issues before this Panel." US rebuttal submission, para. 22. Article 2.4 provides that "[I]n the cases referred to in paragraph 3, allowances for costs incurred between importation and resale, and of profits occurring, should also be made." Thus, it could be argued that the guidelines governing the construction of an export price pursuant to Article 2.3 may be found in Article 2.4. Please comment.

17. Moreover, as explained during the Panel's Second Meeting, the fact that Article 2.4 specifically refers to Article 2.3 should be sufficient to bring Article 2.3 within the terms of reference for this proceeding. Indeed, the decision by the Appellate Body in the *Argentine Footwear* case indicates that the provisions of Article 2.3 could properly be considered by the Panel to the extent that they are relevant to Korea's claims.[19]

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[18] For example, where a foreign *producer* pays royalties on its sales of the merchandise, the DOC will deduct the amount of the royalties paid on exports from the constructed export price. *See, e.g., Certain Fresh Cut Flowers From Ecuador*, 64 Fed. Reg. 18878, 18882 (Apr. 16, 1999) (Preliminary Determination); *Stainless Steel Plate from Sweden*, 63 Fed. Reg. 36877 (July 18, 1998) (Preliminary Determination); *Dynamic Random Access Memory Semiconductors of one Megabit or Above from Korea*, 63 Fed. Reg. 11411, 11413 (Mar. 9, 1998) (Preliminary Determination); *Static Random Access Memory Semiconductors from Korea*, 63 Fed. Reg. 8934, 8935-36 (Feb. 23, 1998) (Final Determination). There clearly is no basis for claiming that royalties paid on production in the foreign country constitute an appropriate adjustment to "construct" an export price.

[19] In *Argentine Footwear*, the Appellate Body observed that:

> We note that the very terms of Article 4.2(c) of the *Agreement on Safeguards* expressly incorporate the provisions of Article 3. Thus, we find it difficult to see how a panel could examine whether a Member had complied with Article 4.2(c) without also referring to the provisions of Article 3 of the *Agreement on Safeguards*.... What is more, we fail to see how any panel could be expected to make an "objective assessment of the matter," as required by Article 11 of the DSU, if it could only refer in its reasoning to the specific provisions cited by the parties in their claims.

18. A proper analysis demonstrates, however, that Article 2.3 is not relevant to Korea's *claims*, because Korea has not claimed that Article 2.3 establishes a separate basis for finding that the U.S. actions violated the requirements of the Anti-Dumping Agreement. Instead, Korea has addressed Article 2.3 simply to refute a defense offered by the United States. The Panel plainly would be permitted to consider Korea's refutation of the US defence, in order to address the merits of Korea's claims under Article 2.4 — even if Article 2.3 were not within the terms of reference.[20]

19. Finally, to the extent that it is necessary to consider the relationship between Articles 2.3 and 2.4, Korea believes that the following points are relevant:

20. *First*, it is important to view Article 2.3 in context. Contrary to the US claims, Article 2.3 does not purport to address the permissible methodologies for "constructing an export price." Instead, Article 2.3 establishes only that, when exports are made to an affiliated importer, the investigating authorities may base their analysis on the importer's resale price.

21. In this regard, it should be recalled that the default rule under the Anti-Dumping Agreement is that the dumping calculations should be based on the "export price of the product exported from one

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Argentina — Safeguards Measures on Imports of Footwear, Report of the Appellate Body, AB-1999-7, adopted 12 Jan. 2000, para. 74.

[20] In this connection, it should be noted that the US argument that Article 2.3 is outside the terms of reference for this proceeding ignores the established distinction between "claims" (which must be specified in the request for establishment of a panel) and "arguments" (which do not have to be so specified). As the Appellate Body has explained,

> In *European Communities — Bananas*, we stated: "Article 6.2 of the DSU requires that the *claims*, and not the *arguments*, must all be specified sufficiently in the request for establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint.

Korea — Definitive Safeguards Measures on Imports of Certain Dairy Products, Report of the Appellate Body, AB-1999-8, para. 125 (footnote omitted). In this case, Korea's "claim" is that the US adjustment for the cost of non-payment is not permitted by Article 2.4. In support of that claim, Korea has provided "arguments" to demonstrate that the defences proposed by the United States are without merit. Under the Appellate Body's past decisions, such "arguments" do not have to be specified in the request for establishment of the panel.

As a separate matter, it should also should be noted that the US argument that Article 2.3 is not within the terms of reference is inconsistent with the actual language of the terms of reference in this proceeding. Contrary to the US view, the terms of reference actually instruct the Panel to consider all "relevant provisions" of the Anti-Dumping Agreement. In particular, the terms of reference for this Panel's review are defined as follows:

> To examine, *in the light of the relevant provisions of the covered agreements cited by Korea* in document WT/DS179/2, the matter referred to the DSB by Korea in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

See WT/DS179/3. A careful reading indicates that the phrase "cited by Korea" modifies the term "covered agreements." In other words, the Panel may only consider the covered agreements cited by Korea. However, once the Panel concludes that a particular agreement is one of the "covered agreements cited by Korea in document WT/DS179/2," then the Panel is permitted to consider "the relevant provisions" of that agreement. This interpretation of the terms of reference is also consistent with the terms of Korea's request for panel review, which provided a summary of its legal arguments and then specifically noted that:

> Th[is] ... summary is designed to briefly describe the legal basis of the complaint sufficient to present the problem clearly, *but is not to be taken as restricting the arguments that Korea may develop before the Panel*.

WT/DS179/2 (emphasis added).

country to another."[21] If this rule were applied in all cases without exception, then the dumping analysis for sales from an exporter to an affiliated importer would have to be based on the transfer price between them — because that transfer price is the "export price of the product exported from one country to another." Moreover, if there were no export price, it would not be possible to calculate dumping margins at all.

22. Article 2.3 of the Agreement establishes the permissible exceptions to this default rule. It provides that the default rule does not apply "where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association of a compensatory arrangement between the exporter and the importer or a third party." Instead, in such situations, Article 2.3 provides that "the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer." Significantly, that is all that Article 2.3 provides. The sole purpose of Article 2.3, then, is to authorize the investigating authorities to base their analysis on the resale price — and not on the "export price of the product exported from one country to another."

23. *Second*, as discussed in Korea's previous submissions, the rules governing the methodology used to construct an export price are found in the fourth sentence of Article 2.4 — and not in Article 2.3.[22] That sentence describes certain "allowances" that "should also be made" in "the cases referred to in paragraph 3 of Article 2" (*i.e.*, when there is no export price or the export price is unreliable because of association of compensatory arrangement between the exporter and the importer or a third party). There are no other provisions of the Agreement that describe the permissible allowances.

24. Moreover, the structure of the Anti-Dumping Agreement dictates that any provisions concerning the permissible adjustments would have to be found in Article 2.4. Put simply, Article 2.4 is the only provision of the Agreement that addresses the mechanics of the comparisons and the rules governing appropriate allowances. Consequently, it is logical that, when the rules governing adjustments to construct an export price were drafted, they were incorporated in Article 2.4. That Articles should, therefore, be interpreted as providing exclusive guidance on the adjustments that are permissible in the dumping comparisons — including the adjustments that are permitted to construct an export price in "the cases referred to in paragraph 3 of Article 2." Adjustments that do not conform with the requirements of Article 2.4 are not permissible in any circumstances.[23]

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[21] *See* Anti-Dumping Agreement, Art. 2.1.

[22] *See, e.g.*, Korea's Second Submission, para. 44.

[23] The United States has argued that the language of the fourth sentence of Article 2.4 is not, by its terms, exclusive. In other words, the United States contends that the language of the fourth sentence of Article 2.4 describes allowances that "should be made," but does not explicitly state that these are the only allowances that may be made to construct the export price.

In this regard, it should be noted that the same argument could be made about the third sentence of Article 2.4. That sentence explicitly requires that allowances for differences affecting price comparability "shall be made." However, like the fourth sentence, it does not specifically forbid the investigating authorities from making other allowances for other items that are not different or that do not affect price comparability. Under the US interpretation, then, investigating authorities are free to make whatever adjustments they desire for any reason at all — as long as they also make the specific allowances described in the third and fourth sentences of Article 2.4. Thus, if the US position were adopted, investigating authorities could, for example, make completely arbitrary adjustments to increase the dumping margin to a level they find appropriate, without any justification at all, as long as they also have taken care first to make the specific adjustments described in the third and fourth sentences of Article 2.4.

Such an interpretation cannot be correct. It plainly was the understanding of the WTO Members that the provisions of Article 2 of the Anti-Dumping Agreement would circumscribe the methodologies used to determine dumping margins — in order to ensure that anti-dumping measures are, as Article 1 requires, "applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to

Third, the arguments about the applicability of Article 2.3 should not obscure the obvious relevance of the first sentence of Article 2.4, which requires a "fair comparison" for all transactions — whether based on "export price" or "constructed export price." If the US treatment of the unpaid sales resulted in an unfair comparison, then that methodology was inconsistent with the "fair comparison" requirements of the first sentence of Article 2.4. Thus, even if the adjustment for the cost of non-payment had been made solely under Article 2.3 (and not under the third or fourth sentences of Article 2.4), the Panel would still have to consider whether the comparison that resulted was fair.

25. As discussed in detail in Korea's previous submissions, the US treatment of the unpaid sales was unfair — because it penalized POSCO for an event beyond its control, and created dumping margins due to the inclusion of atypical sales. Thus, the US methodology violated the "fair comparison" requirement of Article 2.4.

Q.3. For the United States. Is there anything in the record of the investigations indicating whether POSAM extended the credit in respect of the unpaid sales and thus bore the risk of non-payment, or whether, to the contrary, the risk of loss was borne by the exporter? Where in the record does the USDOC make such a determination in respect of its treatment of unpaid sales as a cost incurred by POSAM between importation and resale.

26. The risk of non-payment was borne by POSAM. The DOC verified that POSAM paid POSTEEL (which in turn paid POSCO) for the goods that were then re-sold to the ABC Company, and that POSAM was not subsequently reimbursed by POSTEEL or POSCO for the non-payment.[24]

27. Korea believes that the question of which entity bore the risk of non-payment was not relevant to the DOC's decision to make adjustments for the non-payments.

28. Moreover, the fact that POSAM bore the risk of non-payment does not mean that the risk constituted a cost incurred between importation and resale for which an adjustment was appropriate under the fourth sentence of Article 2.4. To begin with, the *risk* of non-payment is not a cost; it is a probability. Moreover, the risk exists only *after* there has been a resale — and not *between* importation and resale.

29. Finally, as discussed in Korea's previous submissions, the DOC did not make an adjustment for the *risk* of non-payment that existed at the time of resale. Instead, it made an adjustment for the actual cost of non-payment that occurred only after the resale. Thus, the DOC's adjustment cannot be justified as an adjustment for a cost incurred between importation and resale.

Q.4. For the United States. If unpaid sales were a cost incurred by POSAM between importation and resale in respect of those sales handled by POSAM, why did the USDOC consider that those sales should be allocated over all sales of the subject merchandise in the United States, irrespective of whether or not those sales were handled by POSAM?

30. As discussed in Korea's previous submissions, the allocation methodology chosen by the DOC was plainly arbitrary. An allocation of the actual costs of non-payment over all US sales would have been appropriate only if the evidence demonstrated that all US sales had the same risk of non-payment, and that no other sales in other markets had a similar risk. In these cases, however, there

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investigations ... conducted in accordance with the provisions of [the Anti-Dumping] Agreement." In order to give effect to Article 2, the provisions of Article 2.4 must be understood to be exclusive. In other words, no adjustments can be permitted other than those described in Article 2.4.

[24] *See* Korea's Responses to the Panel's Questions at the First Meeting, at 19 (Response C.12).

was no such evidence. As discussed in Korea's previous submissions, there was no evidence indicating that the risk of non-payment was different for US sales than for sales in other markets.

31. The error in the US methodology might be seen from the following example: Suppose that an automobile insurer covers ten cars — five of which are black and five of which are navy blue. Now suppose that one of the blue cars has an accident for which the insurer must pay. When analyzing the future risk of accidents, it plainly would be absurd for the insurer to assume that blue cars have a one-in-five risk of accidents, while black cars have a zero risk of accidents. Yet that is essentially what the DOC did in this case. It took the fact that one US customer did not pay as evidence that US customers had a high risk of non-payment, and that Korean customers had no risk of non-payment.

32. As explained in Korea's previous submissions, the only reasonable methodology for analyzing the risk of non-payment would have been to consider the historical experience of non-payment in the two markets. In the absence of such an analysis, there simply is no basis for concluding that the risk of non-payment in the United States was any different from the risk of non-payment in any other markets in which POSCO extended credit. And, to the extent that the non-payment was simply the result of a risk of non-payment that was the same in *all* markets, there was no basis for allocating the cost of the non-payment solely to sales in *one* market.

Q.5. For the United States. Without prejudice to your position that the construction of the export price is not within the Panel's terms of reference, please respond to Korea's argument in paragraphs 56-59 of Korea's rebuttal submission.

33. In Korea's view, this question is uniquely directed to the United States.

Q.6. For both parties. It is a generally accepted principle that certain costs are to be expensed while others are to be allocated over time or over product. See, e.g., ADP Agreement, Article 2.2.1.1. In respect of the treatment of unpaid sales, for example, the United States allocated the "cost" of unpaid sales incurred by POSAM over all subject merchandise. Assuming for the sake of argument that the unpaid sales were "costs . . . incurred between importation and resale," it could be argued that those costs should be allocated over a period of time longer than the POI. Please comment.

34. In Korea's view, an amortization of the actual costs of non-payment over an extended period of time would not constitute an acceptable substitute for a proper measurement of the risk of non-payment. As explained in Korea's previous submissions, a proper adjustment would have to reflect differences in the risk of non-payment that were known at the time the sale was made — and not the actual costs of non-payment that could not have been known until after the sale occurred.

35. In any event, even if an amortization methodology were acceptable, the amortization period would have to reflect the risk of the non-payment. If too short an amortization period were used, the result would be to inappropriately overstate the costs assigned to the initial years and understate the costs assigned to subsequent years.[25]

[25] Suppose, for example, that a proper risk analysis concluded that an event could be expected to occur only once every ten years. A proper methodology would then have to amortize the costs of that event (when it does occur) over a ten-year period. An amortization over a five-year period, for example, would overstate the costs of the first five years by a factor of 2, and then understate the costs in the remaining five years (by assigning no costs to them). Such a methodology would not be permissible.

III. MULTIPLE AVERAGING

Q.1. Korea acknowledges that "zeroing" per se is outside this Panel's terms of reference. It argues however that it does claim that the "multiple averaging" methodology used by the United States violates the AD Agreement, and that, to the extent that "zeroing" is an integral part of that methodology, it is properly within the Panel's terms of reference. Korea's request for establishment (WT/DS179/2), however, states that

> **"[I]n the final determinations of sales at less than fair value . . . the DOC divided the period of investigation into two sub-periods and calculated separate weighted average normal values for each sub-period. That methodology, however, is inconsistent with Article 2.4.2. . . ." (emphasis added).**

It could be argued that "zeroing" is not part of the "methodology" regarding which Korea complains in its request for establishment of a panel. Please comment.

36. As mentioned at the Second Meeting, Korea believes that it is possible for the Panel to decide the multiple-averaging issue without addressing zeroing. If the Panel finds that it was improper for the United States to split the investigation periods to account for the devaluation of the won during the periods, then zeroing simply disappears from this case. In other words, because splitting the periods was itself a violation of the Anti-Dumping Agreement and the zeroing at issue necessarily occurred after the periods were split, the DOC never should have been in the position to engage in the zeroing at issue in the first place. As stated by the Panel in the *Audio Tapes* case, "the issue of 'zeroing' would not arise in cases where the comparison made was between an average normal value and an average export price."[26]

37. That is not to say, however, that zeroing (as applied in the multiple-averaging methodology) is outside the Panel's terms of reference. To the contrary, Korea has brought the DOC's multiple-averaging methodology before the Panel and zeroing is an inherent part of that methodology.

38. The Panel has observed that it is arguable that zeroing is not part of the methodology described in the request for establishment of a Panel. Apparently, the argument would be that the "methodology" at issue stops after the period-splitting and the calculation of separate averages. In other words, under that view, the "methodology" at issue would not include anything after the calculation of separate averages, including the recombination of those separate averages into one overall average. Korea does not believe that would be a reasonable interpretation of the "methodology" at issue.

- *First*, splitting the period, calculating separate averages for the sub-periods, "zeroing out" the negative averages, and recombining the separate averages into an overall average were all part of a single methodology. It would not have been possible for the DOC to split the investigation period without later recombining the separate averages; they are simply two parts of a unitary whole. From the decision to split the period, all the rest followed. The US methodology should not be artificially divided into its component stages.

- *Second*, even the US arguments show the integral link between zeroing and the decision to engage in multiple-averaging (and all that entailed). The US argues that the key distinction between *Preserved Mushrooms from Indonesia* and the Plate and Sheet cases is that period-splitting would have had no effect in *Mushrooms* but it did have an effect in the cases at

[26] *EC- Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, Report of the Panel, ADP/136, 28 Apr. 1995, unadopted, para. 349.

issue.[27] That distinction can mean only one thing: In *Mushrooms*, neither potential sub-period had a negative margin to be zeroed, so there was no reason to split the investigation period. This shows that the DOC split the periods in Plate and Sheet precisely in order to engage in zeroing.[28] It would be artificial indeed to exclude zeroing from Panel consideration of the methodology of which it is not only an integral part, but was in fact the motivating force.

- *Third*, beyond being the motivating force for the DOC's decision to split the investigation period, zeroing is also the motivating force for Korea's decision to challenge the period-splitting before this Panel. But for zeroing, splitting the period would not have had a significant effect on the dumping margin. Splitting the period still would have been inconsistent with WTO rules, to be sure, but there would have been no practical reason to challenge it. It would be an odd interpretation of the Panel request indeed if it excluded consideration of the factor motivating a claim.

- *Finally*, Korea considers that it is important that the terms of reference should be understood in light of the entirety of Korea's request for the establishment of this Panel. After identifying in detail the measures at issue, Korea listed ten paragraphs of reasons why the US measures are inconsistent with WTO rules. Korea expressly stated at the outset that those ten paragraphs were "without limitation." Then, Korea reinforced the point as follows: "The above summary is designed to briefly describe the legal basis of the complaint sufficient to present the problem clearly, but is not to be taken as restricting the arguments that Korea may develop before the Panel."[29]

Q.2. For the United States. Do you agree that multiple averaging is permitted by Article 2.4.2 only to the extent it enhances the comparability of the normal value and export prices being compared?

39. In Korea's view, Article 2.4.2 does not permit multiple averaging to "enhance" the comparability of normal value and export price. Instead, Article 2.4.2 requires that a single average export price and a single average normal value be calculated for each set of comparable transactions (unless a transaction-to-transaction methodology is employed, or the exceptional circumstances authorizing the use of an average-to-transaction methodology exist). The determination whether transactions are "comparable" must be made before constructing the appropriate averages under Article 2.4.2.

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[27] *See* US First Submission, para. 163.

[28] This view is confirmed by the decision in *Extruded Rubber Thread from Indonesia*, which the United States discussed in its Second Submission. US Ex. 34, at 14693. *Extruded Rubber* concerned the exact same investigation period as *Mushrooms*. That meant that the facts of the rupiah's devaluation were exactly the same in both cases. Yet, the DOC split the period in *Extruded Rubber* when it had not done so in *Mushrooms*. The DOC's decision in *Extruded Rubber* makes plain that the key difference is that splitting the period affected (*i.e.*, raised) the dumping margins in *Extruded Rubber*, when it would not have done so in *Mushrooms*.

[29] WT/DS179/2, at 2, 4.

40. For these purposes, the "comparability" of transactions is to be determined based on the provisions of the Agreement governing permissible comparisons. Since movements in exchange rates do not provide a basis for considering transactions non-comparable under any provisions of the Agreement, exchange-rate movements do not justify the division of the investigation period into separate averaging periods.[30]

[30] *See* Korea's Second Submission, paras. 102-107.

ANNEX 2-1

FIRST SUBMISSION OF THE UNITED STATES

(26 May 2000)

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NOTE: In this submission, including the exhibits, the United States has placed information which POSCO has previously designated as business proprietary information in brackets ("{ }"). This information has been omitted and the brackets left in the text."{ }"

I. INTRODUCTION

1. The Republic of Korea ("Korea") contests two determinations by the United States Department of Commerce (the "Department") establishing dumping by Korean producers of stainless steel plate in coils ("SSPC")and stainless steel sheet and strip ("SSSS") in coils.[1] According to Korea, the United States erred in three general respects: 1) by including in the determination of export price sales for which the customer never paid, even though those sales were made in accordance with the producer's normal selling practices and the company recognized the bad debt expense in its accounting records for the period of investigation; 2) by establishing different weighted-average export prices and normal values for periods in which market conditions differed significantly; and 3) by treating as Korean won transactions sales which, although invoiced in both won and US dollars, were actually paid in Korean won.

2. Korea contends that the errors of the United States resulted in an overstatement of the dumping margin found for Pohang Iron & Steel Co., Ltd. ("POSCO").[2] As a result, according to Korea, these actions of the United States are inconsistent with the obligations of a Member of the World Trade Organization ("WTO"), including certain obligations contained in Articles VI and X of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Articles 1, 2, 6, and 12 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement").[3]

3. As the United States demonstrates below, Korea's claims are without foundation.

4. With respect to the issue of sales to a customer that failed to pay due to bankruptcy, the Department included those sales in the determination of export price, consistent with Article 2.1 of the Agreement. Based on the evidence of record, the Department concluded that the sales were representative of POSCO's normal selling practices and, therefore, they did not distort the determination of export price. Moreover, POSCO recognized the bad debt expense generated by those sales in its accounting records for the period of investigation. Therefore, the Department took account of that expense in the construction of export price for sales through POSCO's US affiliate, consistent with Article 2.3 of the Agreement. Moreover, before comparing export price and normal value, the Department made due allowance for differences in selling expenses such as bad debt, consistent with Article 2.4. Through an appropriate adjustment to normal value, the United States ensured that differences in such expenses had no impact on the dumping analysis.

5. With respect to the United States' conclusion that transactions made prior to a currency devaluation of almost 50 per cent were not "comparable" to transactions made during that devaluation, and thus that separate averages should be created with respect to sales during the different periods, the United States' action is in accordance with Articles 2.4, 2.4.1 and 2.4.2. Specifically, this action is most pertinently addressed by the provision of the AD Agreement governing averaging, Article 2.4.2. This provision contemplates averages of only those normal value and export price transactions which are "comparable." Further, 2.4 confirms that comparability includes such concepts as levels of trade, physical characteristics, and time. The United States reasonably concluded that a significant devaluation of a currency rendered sales in that currency made

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[1] *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea*, 64 Fed. Reg. 15444 (31 March 1999) (hereinafter *SSPC Final Determination*) (ROK Ex. 11); and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 Fed. Reg. 30664 (8 June 1999) (hereinafter *SSSS Final Determination*) (ROK Ex. 24). The *Federal Register* is the United States' official publication of notices by all government agencies and organizations, including the Department.

[2] First Submission by the Republic of Korea, 5 May 2000 ("ROK First Submission") at para. 1.2.

[3] ROK First Submission, at para. 1.1.

prior to the devaluation not comparable to sales made after such a devaluation. Establishing separate averages ensured that the devaluation did not distort the dumping analysis.

6. With respect to the issue of the United States' treatment of home market sales to local customers, the United States made a factual determination that the sales at issue were transactions made in Korean won based upon the evidence of record that the sales were paid in won, and the won amount on the invoice was recorded in the respondent company's accounting records, notwithstanding a US dollar figure separately listed on the invoice. Based upon its well-established practice of using the currency of the transaction, the United States converted these won-sale prices into US dollars in accordance with Article 2.4.1 of the Anti-dumping Agreement.

7. Finally, with respect to all three issues, the United States afforded POSCO a full and adequate opportunity to defend its interests. This opportunity included an extensive period in which POSCO submitted any factual information which it believed was relevant to the determination of dumping. Moreover, POSCO was given full access to the administrative record which contained all factual information on which the United States based its determination. Finally, POSCO was given the opportunity to present legal arguments, as well as rebuttal to arguments raised by other parties, and could participate in a hearing at which POSCO could address the United States' officials in charge of the investigation in person. These procedures, of which POSCO took full advantage, provided a level of transparency and a full opportunity for POSCO to defend its interests which more than met the obligations of Article 6 of the AD Agreement. Moreover, all of the United States' determinations were published in notices that met all of the requirements of Article 12.2.

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

8. For purposes of this first submission, the United States does not take exception to Korea's statement concerning the "procedural background" of this case.[4]

B. FACTUAL BACKGROUND

9. In this section the United States will review the procedures undertaken by the Department, the investigating authority in the United States charged with determining whether sales to the United States are sold at less than normal value (*i.e.* whether such sales are "dumped"). This review will demonstrate the transparency, and full opportunity to participate enjoyed by all parties. Because Korea has alleged three unrelated deficiencies of the US anti-dumping measures against Korean SSPC and SSSS, rather than discussing the facts pertinent to each of those claims in this section, the United States will introduce, prior to each issue-specific discussion, the facts most pertinent to that claim. In doing so, the United States will review the evidence contained in the administrative record that was before the Department with regard to each of the three contested issues demonstrating that the facts were properly established and reasonably supported the United States' determination.

10. Korea begins its discussion by describing generally the anti-dumping law and practice of the United States.[5] For purposes of this first submission, the United States does not take exception to Korea's description of this general law and practice discussed in paragraphs 3.2 through 3.10 of Korea's first submission, except with respect to footnote 2, as discussed further below.[6]

[4] ROK First Submission, at para. 2.1 - 2.4.
[5] ROK First Submission at para. 3.2 - 3.10.
[6] See, discussion in section III.D., below.

1. Initiation, Fact-Gathering, and the Preliminary Determination

11. The investigation of SSPC was initiated on 20 April 1998 pursuant to a petition brought by domestic producers of a like product and workers in that industry. The United States announced that, in order to determine the existence of dumping, it would examine imports during calendar year 1997.[7]

12. The investigation of SSSS was initiated on 30 June 1998 pursuant to a petition brought by domestic producers of a like product and workers in that industry. The United States announced that, in order to determine the existence of dumping, and in accordance with its regulations, it would examine imports during the period 1 April 1997 through 31 March 1998.[8]

13. Upon filing of the petitions, the United States International Trade Commission (USITC), the investigating authority in the United States charged with determining whether dumped imports have caused material injury or a threat of material injury, began its investigations. USITC issued a preliminary finding of material injury or threat of material injury to the domestic industry by reason of dumped imports of SSPC and SSSS.

14. After initiation of the SSPC investigation and the preliminary finding of material injury by USITC, the United States proceeded to gather information regarding sales to the United States by POSCO for purposes of calculating a margin of dumping. In this regard, the United States issued POSCO an initial questionnaire in the SSPC investigation on 27 May 1998.[9] After having received an extension of time from the United States, POSCO provided information in response to the initial questionnaire on 1 July 1998 and 20 July 1998. After reviewing POSCO's responses, the United States identified specific areas about which it required further clarification. POSCO provided further information and clarification as requested on such issues from August through October 1998.[10]

15. After initiation of the SSSS investigation and the preliminary finding of material injury by USITC, the United States proceeded to gather information regarding sales to the United States by POSCO for purposes of calculating a margin of dumping. In this regard, the United States issued an initial questionnaire in the SSSS investigation on 3 August 1998.[11] After having received an extension of time from the United States, POSCO provided information in response to the initial questionnaire on 2 September 1998 and 23 September 1998. After reviewing POSCO's responses, the United States identified specific areas about which it required further clarification. POSCO provided further information and clarification as requested on such issues from October through December 1998.[12]

16. The United States published its preliminary determination in the SSPC case on 4 November 1998, preliminarily finding dumping by the only known Korean producer of SSPC, POSCO, at a rate of 2.77 per cent.[13] The United States published its preliminary determination on

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[7] *Notice of Initiation of Antidumping Investigations: Stainless Steel Plates in Coils form Belgium, Canada, Italy, South Africa, South Korea and Taiwan*, 63 Fed. Reg. 20580 (27 April 1998) ("*SSPC Initiation*") (ROK Ex. 3).

[8] *Initiation of Antidumping Duty Investigations: Stainless Steel Sheet and Strip in Coils from France, Germany, Italy, Japan, Mexico, South Korea, Taiwan and the United Kingdom*, 63 Fed. Reg. 37521 (13 July 1998) ("*SSSS Initiation*") (ROK Ex. 15).

[9] (US Ex. 1).

[10] ROK First Submission, at para. 3.12.

[11] (US Ex. 2).

[12] ROK First Submission, at para. 3.20.

[13] *Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils* ("*SSPC*") *from the Republic of Korea*, 63 Fed. Reg. 59535 (1998) (hereinafter "*SSPC preliminary determination*") (ROK Ex. 4).

SSSS on 4 January 999.[14] Subsequent to issuance of this preliminary determination in the SSSS case, and in accordance with the United States' regulations, at 19 C.F.R. § 351.224, POSCO alleged that the United States had made certain ministerial errors in the calculation of POSCO's antidumping margin. Commerce carefully reviewed POSCO's allegations and concluded that POSCO was correct. Accordingly, on 26 January 1999 the United States published a notice which corrected POSCO's antidumping duty rate to 3.92 per cent.[15]

17. With regard to sales to the bankrupt customer, in the SSPC investigation the issue arose just before the Department's preliminary determination. Therefore, for purposes of the preliminary determination, the United States accepted POSCO's argument that the sales should be excluded from the dumping analysis. The United States also excluded the sales in the SSSS preliminary determination but, based on a more complete record, took account of the bad debt expense in the dumping analysis.[16] As will be discussed below, both POSCO and the US domestic industry commented on this issue throughout the proceedings. As explained fully in the notices of the final determinations, the United States ultimately concluded that the sales should be included in the dumping analysis, with appropriate adjustments to account for the bad debt and other selling expenses.

18. With regard to the depreciation of the won during November and December 1997, in the preliminary determinations, as in the final determinations, the United States accepted arguments advanced by POSCO, over the objections by the domestic industry, that the depreciation was so large and precipitous that Commerce should apply daily exchange rates during the period, rather than 40-day rolling average exchange rates, as it had in all prior cases involving depreciation.[17] The United States explicitly requested comments on whether, in the final determination, it should divide its POI such that pre- and post-devaluation sales would not be compared.[18] This issue is also discussed in further detail below.

19. With regard to the issue of home market sales to "local customers" in Korea (which were invoiced in both US dollars and Korean won, but paid in won), in the preliminary determination of SSPC the United States excluded these sales from its analysis of sales in the home market because it was under the mis-impression at the time that these sales were destined for export, and thus not sales "for consumption in the home market".[19] For the preliminary determination in the SSSS case, the United States accepted POSCO's argument that the sales were "consumed" by its customer in the home market. Therefore, the United States included such sales in its analysis of home market sales.

20. Finally, in the preliminary determinations in both cases, parties were notified that they had an opportunity to submit briefs addressing the issues raised by the preliminary determination. Further, parties were notified that they had the opportunity to respond to briefs filed by other parties. Finally, the United States notified the parties that, if they so requested, the United States would hold a hearing

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[14] *Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from South Korea*, 64 Fed. Reg. 137 (1999) (hereinafter "*SSSS preliminary determination*") (ROK Ex. 16).

[15] *Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Korea*, 64 Fed. Reg. 3928 (1999) (ROK Ex. 18).

[16] *SSPC preliminary determination*, 63 Fed. Reg. at 59536-37 (ROK Ex. 4); *SSSS Preliminary Determination*, 64 Fed. Reg. at 140 (ROK Ex. 16).

[17] *SSPC preliminary determination* 63 Fed. Reg. at 59539 (ROK Ex. 4); *SSSS preliminary determination*, 64 Fed. Reg. at 145 (ROK Ex. 16). The United States' general rules for conversion of currency are discussed in detail below.

[18] *Id*.

[19] *SSPC Preliminary Determination*, 63 Fed. Reg. at 59536 (ROK Ex. 4) ("we are disregarding home market local sales because there is knowledge that these sales are not consumed in the foreign market"). The United States' designation of these sales as "local sales" was a terminology adopted from POSCO.

so that the parties could address their arguments regarding the preliminary determination to an official in charge of making the final determination.[20]

21. Subsequent to the preliminary determination, the United States began imposing provisional measures on those companies found to be dumping in the form of a cash deposit requirement upon importation based upon the weighted-average dumping margin calculated in the preliminary determination.

2. Verification, Opportunity for Comment, and the Final Determination

22. After the preliminary determination was issued, the United States continued to receive factual information from POSCO in response to requests for clarification on various issues. Department personnel visited POSCO from 9 November until 13 November 1998, and verified the accuracy of POSCO's responses submitted in the SSPC investigation. Department personnel again visited POSCO from 1 March until 5 March 1999, and verified the accuracy of POSCO's responses in the SSSS investigation. As will be discussed further below, during verification the United States was able to clarify a number of issues raised during the investigation. For example, in the SSPC investigation, an examination of the records of POSCO's US affiliate revealed that the sales that were not paid due to the customer's bankruptcy were written off and the bad debt expense was recognized in the company's accounting records for the period of investigation. The United States published its factual findings from its verification trips in reports available to all parties.[21]

23. Subsequent to verification, all parties were afforded an opportunity to present written arguments on all issues which they considered relevant to the United States in reaching its final determination.[22] Parties were also permitted to provide a written rebuttal to any written argument raised by another party.[23] Notwithstanding Korea's suggestion in the current dispute that it did not have an opportunity to comment on the United States' determination with respect to the three issues it raises, an examination of the briefs reveals that POSCO did, in fact, provide extensive arguments relating to each of the issues which are the subject of this dispute.

24. The United States also afforded all parties an opportunity for a hearing at which they could make an oral presentation of their arguments to Department officials in charge of making the final determination, and could respond orally to arguments raised by other parties. Although the US domestic industry requested such a hearing in the SSPC case, POSCO did not request a hearing to address the issues. The domestic industry subsequently withdrew its request and the hearing was cancelled.[24] In the SSSS case both parties requested a hearing, and one was held on 26 April 1999.[25]

25. The United States published its final determination in the SSPC investigation on 31 March 1999, finding dumping by POSCO at a rate of 16.26 per cent.[26] The United States published

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[20] *SSPC Preliminary determination*, 63 Fed. Reg. at 59539 (ROK Ex. 4); *SSSS preliminary determination*, 64 Fed. Reg at 147 (ROK Ex. 16).

[21] (ROK Ex. 6) and (ROK Ex. 19).

[22] POSCO presented its written arguments in the SSPC case to the United States on 26 January 1999. See *POSCO SSPC Brief* (ROK Ex. 7). POSCO presented its written arguments in the SSSS case to the United States on 15 April 1999. See *POSCO SSSS Brief* (ROK Ex. 20).

[23] POSCO presented its written rebuttals in the SSPC case to the United States on 2 February 1999. See *POSCO SSPC Rebuttal Brief* (ROK Ex. 9). POSCO presented its written rebuttals in the SSSS case to the United States on 21 April 1999. See *POSCO SSSS Rebuttal Brief* (ROK Ex.22).

[24] See *SSPC Final Determination* ("Case History"), 64 Fed. Reg. at 15444 (ROK Ex. 11).

[25] See *SSSS Final Determination* ("Case History"), 64 Fed. Reg. at 30665 (ROK Ex. 24).

[26] *SSPC Final Determination*, 64 Fed. Reg. at 15456 (ROK Ex. 11). Note that in addition to POSCO, the United States also investigated Inchon Iron and Steel Co., Ltd. ("Inchon"), and Taihan Electric Wire Co., Ltd. ("Taihan"). The United States found that Inchon was not dumping, in both the preliminary and final

its final determination in the SSSS investigation on 8 June 1999 finding POSCO's margin of dumping to be 12.12 per cent. The substance of these final determinations is discussed in greater detail below, with respect to each of the three issues raised by Korea.

26. Subsequent to these final determinations, and the affirmative injury determinations, POSCO challenged the United States' determinations before the United States Court of International Trade on 15 June 1999. However, POSCO voluntarily abandoned its judicial challenges on 22 October 1999.[27]

III. ARGUMENT

A. STANDARD OF REVIEW

27. With respect to its challenge to the Redetermination Results, Korea seeks to retry several factual issues that were before the DOC. To accomplish this, Korea invites the Panel to step into the shoes of the DOC and engage in a *de novo* review of the facts. However, under Article 17.6(i) of the AD Agreement and GATT and WTO jurisprudence, the Panel is precluded from engaging in such an exercise.

28. It is well-established as a general matter that panel review is not a substitute for proceedings conducted by national investigating authorities. Numerous panels – both GATT and WTO – have recognized that the role of panels is not to conduct a *de novo* review of the factual findings of a national investigating authority.[28] In describing the role of panels when reviewing factual issues, the panel in the *Korean Resins* case stated, in part:

> The Panel . . . should [not] substitute its own judgment for that of the KTC as to the relative weight to be accorded to the facts before the KTC. To do so would ignore that the task of the Panel was not to make its own independent evaluation of the facts before the KTC to determine whether there was material injury to the industry in Korea but to review the determination as made by the KTC for consistency with the Agreement, bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts.[29]

29. Similarly, in the *Softwood Lumber* case, the panel described the appropriate standard of review as follows:

> The Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States

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determinations, and thus no antidumping duties have been required on exports by Inchon. Taihan did not provide any information in response to the United States' questionnaire, nor did it participate in any other manner in the investigation; consequently, Taihan's antidumping margin was based upon the facts available under 19 USC. § 1677e. See, *SSSS preliminary determination* 64 Fed. Reg. at 146-147. None of the issues raised by Korea relate either to Inchon or Taihan.

[27] (US Ex. 4).

[28] *See, e.g., United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, Report of the Panel, as modified by the Appellate Body, adopted 25 February 1997, para. 7.12., citing *Korea – Anti-dumping Duties on Imports of Polyacetal Resins from the United States*, Report of the Panel adopted 27 April 1993, BISD 40S/205, para. 227 (hereinafter "*Korean Resins*"); *United States – Initiation of a Countervailing Duty Investigation into Softwood Lumber Products from Canada*, BISD 34S/194, Report of the Panel adopted 3 June 1987, BISD 34S/194, para. 335 (hereinafter "*Softwood Lumber*"); *United States – Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden*, ADP/117, Report of the Panel issued 24 February 1994 (unadopted), para. 284 and 387 (hereinafter "*Plate from Sweden*").

[29] *Korean Resins*, para. 227.

> authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities. Rather, in the view of the Panel, the review to be applied in the present case required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation.[30]

30. More recently, the panel in the *Argentina Footwear* case declared as follows:

> In our view, we have no mandate to conduct a *de novo* review of the safeguard investigation conducted by the national authority. Rather, we must determine whether Argentina has abided by its multilateral obligations under the Agreement on Safeguards . . . in reaching its affirmative finding of injury and causation in the footwear investigation.[31]

The Appellate Body concluded that the panel "stated the standard of review correctly ... ."[32]

31. In the case of anti-dumping measures, any doubt on this score is eliminated by Article 17.6 of the AD Agreement, which expressly sets forth the standard of review to be applied by this Panel. In subparagraph (i), panels are instructed not to substitute their judgment for that of the national investigating authorities, but instead to proceed as follows:

> in its assessment of the facts of the matter, the panel shall determine whether the authorities' *establishment of the facts was proper* and whether their *evaluation of those facts was unbiased and objective*. If the establishment of the facts was proper and the evaluation was unbiased and objective, *even though the panel might have reached a different conclusion, the evaluation shall not be overturned ...* . (Emphasis added).

32. In interpreting subparagraph (i), the panel in the *Guatemala Cement* case found the standard articulated by the *Softwood Lumber* panel to be consistent with the standard of review under Article 17.6(i), concluding as follows: "Thus, we agree with the Panel in Softwood Lumber that our role is not to evaluate anew the evidence and information before the Ministry at the time it decided to initiate."[33] Although the Appellate Body reversed the panel in *Guatemala Cement* on other grounds, the panel 's articulation of the appropriate standard of review was subsequently followed by the panel in the *HFCS* case.[34]

33. In addition to establishing the standard of review for factual issues, the AD Agreement also establishes the "scope" of that review. Specifically, Article 17.5(ii) of the AD Agreement directs the

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[30] Softwood Lumber, para. 335.

[31] *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/R, Report of the Panel as modified by the Appellate Body adopted 12 January 2000 (hereinafter "*Argentina Footwear*"), para. 8.117.

[32] *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Report of the Appellate Body adopted 12 January 2000, para. 117.

[33] *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, Report of the Panel, as reversed on other grounds by the Appellate Body, adopted 25 November 1998, para. 7.57.

[34] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, Report of the Panel adopted 24 February 2000, paras. 7.94-7.95 (hereinafter "*HFCS*").

Panel to limit its review to the facts that were before the DOC when it made its determination (*i.e.*, the evidence contained in the administrative record).[35]

34. Finally, in reviewing legal questions that turn on the proper meaning to be ascribed to the AD Agreement, subparagraph (ii) of Article 17.6 states as follows:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

35. Thus, the relevant question in every case is not whether the challenged determination rests upon the best or the "correct" interpretation of the AD Agreement, but whether it rests upon a "permissible interpretation" (of which there may be many). If it does, then this Panel must uphold the determination.

B. AS THE COMPLAINING PARTY, KOREA HAS THE BURDEN OF ESTABLISHING A VIOLATION OF A WTO AGREEMENT

36. A complainant bears the initial burden of coming forward with evidence and argument that establishes a *prima facie* case of a violation.[36] In addition, if the balance of evidence is inconclusive with respect to a Korean claim, Korea must be held to have failed to establish that claim.[37] Accordingly, the burden is on Korea to demonstrate that the United States' actions are inconsistent with United States' WTO obligations.

37. This principle is not affected by Korea's incorrect assertion that anti-dumping measures constitute "derogations" from alleged free-trade principles of the WTO. To the contrary, the right conferred by Article VI and the AD Agreement to impose anti-dumping measures forms part of the carefully drawn balance of rights and obligations in the WTO Agreement.

38. The principle that trade remedies authorized by the WTO agreements do not constitute "exceptions" was endorsed by the Appellate Body in the *Wool Shirts* case, which involved the US application of a special safeguard restraint under the WTO Agreement on Textiles and Clothing (ATC). In challenging the US measure, India made the same argument that had been made in the past with respect to anti-dumping measures. Specifically, India argued that because the special safeguard remedy in the ATC allegedly is an "exception" to other "free trade" provisions of the ATC, the burden of proof shifted from India to the United States. The Appellate Body roundly rejected this argument, holding that India, as the complainant, bore the burden of presenting a *prima facie* case of a violation. The Appellate Body reasoned that rather than being an "exception," the special safeguard restraint provisions of the ATC constituted part of an overall balance of rights and obligations. This reasoning applies with equal force to anti-dumping measures; namely, the right to impose anti-dumping

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[35] *See HFCS*, para. 7.43 ("[W]e are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement.").

[36] See, e.g., *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body adopted 23 May 1997, page 14 (hereinafter "*Wool Shirts*"); and *European Communities - Measures Affecting Livestock and Meat* (*Hormones*), WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 104 (hereinafter "*EC Hormones*").

[37] *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, Reports of the Panel and the Appellate Body adopted 22 September 1999, para. 5.120.

measures constitutes part of an overall balance of rights and obligations contained first in GATT 1947, and now in the WTO.

39. Even if anti-dumping measures could be characterized as a derogation from, or an "exception" to, alleged free-trade principles, this would not affect the assignment of the burden of producing evidence of a violation. As the Appellate Body stated in the *EC Hormones* case:

> The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely 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 examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.[38]

40. In summary, the burden of proving that the United States has acted inconsistently with its WTO obligations rests with Korea as the complaining party.

C. THE ACTIONS OF THE UNITED STATES WERE NOT INCONSISTENT WITH ARTICLE X:3 OF GATT 1994

41. Korea contends throughout its arguments that the actions of the United States were not in accordance with Article X:3 of GATT 1994. In essence, Korea argues that Article X:3 provides for panel review of the consistency of any action by a Member with its own domestic law, regulation and practice. That reading cannot be found in Article X:3.

42. The task of a panel is to review the consistency of a Party's actions with the Agreement and not with that Party's domestic laws, regulations or practices. Throughout its submission, Korea argues that various actions of the United States were inconsistent with some precedent under United States practice, or with the holding of some domestic court of the United States. However, this Panel's mandate is set forth in its terms of reference and DSU Article 7.2, which requires panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Further, under Article 3.2 of the DSU, the purpose of the dispute settlement system of the WTO is to: "preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those agreements. . . ." Finally, Article 3.7 of the DSU provides that ". . .the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Thus, the clear focus of the dispute settlement system is consistency of an action with the covered agreements.

43. The panels which have addressed the meaning of Article X:3 have, as Korea asserts, held that Article X:3 established some minimum standards of transparency and fairness. However, as observed by the Appellate Body in *Bananas*, Article X:3 does not address the consistency of particular administrative rulings, but rather the *administration* of such rulings.

> The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is

[38] *EC Hormones*, para. 104 (emphasis added).

> entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.[39]

44. In the present case, Korea is not arguing that the United States, having issued anti-dumping administrative rulings on *SSPC* and *SSSS* otherwise in accordance with GATT 1994 and the AD Agreement, is *administering* those rulings in an unfair manner. Rather, Korea's complaints focus on the rulings themselves. As the panel observed in *Bananas*, to the extent those rulings are inconsistent with a covered agreement, the Panel can address the issues without reference to Article X:3.[40]

45. This understanding of Article X:3 is reinforced by the fact that the disputes in which panels applied that provision relate to situations in which the overall administration of some program was alleged to be arbitrary. For example, the allegation addressed under Article X:3 by the Appellate Body in *United States - Import Prohibition of Certain Shrimp and Shrimp Products*[41] was that the entire procedure under review was "non-transparent and ex-parte," that there was no formal notice of or reasons provided for actions, and that there was no opportunity for review of or appeal from an action.

46. Such cases, in which the allegation is one of overall arbitrary application addressed by Article X:3 are very different from the purpose for which Korea uses Article X:3 in the present case. Korea has not alleged that the overall procedure of the anti-dumping law of the United States is applied arbitrarily, or that Members are otherwise deprived of basic due process, such as notice and opportunity for review in anti-dumping proceedings.

47. Consistency is an important feature of a transparent anti-dumping procedure. In fact, as discussed in the following sections, each allegation of inconsistency made by Korea is without merit. Moreover, it is a fundamental principle of all administrative law in the United States that a government agency must follow its prior practice, or give a reasoned explanation for its departure.[42] Thus, the United States operates an anti-dumping system which meets the general transparency, due-process and consistency parameters of Article X:3.

48. However, a "uniform, impartial and reasonable" system is not necessarily one in which each decision looks like the one before. The benefits of consistency do not always outweigh the need of investigating authorities to allow their policies to evolve to suit new factual scenarios. Consistency with prior cases is a laudable goal, to the extent the actions taken in such cases were themselves consistent with the AD Agreement, in that it enhances predictability and transparency. However,

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[39] *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body, 9 September 1997 (hereinafter "*Bananas*"), at para. 200 (emphasis in original).

[40] *Id.*

[41] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, Report of the Appellate Body, 12 October 1998 (hereinafter "*Shrimp*"), at para. 188.

[42] The United States Supreme Court explained this rule under the law of the United States: an agency "must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances," but "an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 42 (1983), (US Ex. 5). In the antidumping context, the United States Court of International Trade has stated that "well established principles of administrative law provide that an administrative agency has the authority to change or revoke its policies and practices, if a reasonable explanation is provided for such a change." *Sanyo Electronics v. United States*, 86 F. Supp. 2d 1232, 1241 (Ct. Int'l. Trade, 4 June 1999) (US Ex. 6).

where facts properly established and objectively assessed reveal flaws or gaps in prior practice, reasonableness requires that the practice be changed or supplemented.

49. Moreover, while Article X:3 establishes broad due process parameters for all areas of trade subject to a covered agreement, the AD Agreement establishes specific due process requirements applicable to antidumping proceedings. In this regard, Article 6 provides exporters opportunities to defend their interests, and Article 12 requires public notice and explanation of determinations. Further, under Article 17.6 a panel may review whether an investigating authority has properly established and objectively evaluated the facts, and interpreted relevant provisions of the AD Agreement reasonably. These specific provisions demonstrate that the panel should look first to the AD Agreement, which deals specifically with antidumping inquiries.[43]

50. Finally, domestic judicial review retains an important function under the dispute settlement system. In the antidumping context in particular, Article 13 of the AD Agreement requires that members maintain independent judicial, arbitral or administrative tribunals or procedures for the resolution of disputes relating to antidumping actions.

51. The United States notes that in the cases before the panel, POSCO had the right, under United States law, to bring before domestic courts its arguments about the consistency of the actions taken with United States law, regulations, practice, and prior court holdings.[44] Indeed, POSCO brought such challenges before the United States Court of International Trade. However, POSCO voluntarily dismissed those cases one week after Korea requested panel review.[45] Thus, Korea has elected not to bring its allegations of inconsistency with US law and practice before the domestic tribunal which is charged with deciding such issues, and which the United States is required to make available to POSCO under Article 13 of the AD Agreement. Moreover, to the extent the arguments presented to this panel rely on judicial holdings in the United States, POSCO has declined to bring its arguments to the very body which issued those holdings.

52. Thus, the panel should disregard Korea's various arguments that some alleged inconsistency by the United States with domestic law or practice constitutes a violation of Article X:3.

D. THE UNITED STATES' TREATMENT OF SALES TO A US CUSTOMER THAT WENT BANKRUPT AND FAILED TO PAY WAS CONSISTENT WITH ARTICLES 2.4 AND 12.2 OF THE AGREEMENT AND ARTICLE X:3 OF GATT 1994

1. Statement of Relevant Facts

53. As noted above, in the SSPC and SSSS investigations, the United States examined POSCO's US sales of the subject merchandise during the periods 1 January through 31 December 1997, and 1 April 1997 through 31 March 1998, respectively.[46] During these periods, POSCO made sales primarily through two affiliated companies: (1) POSCO Steel ("POSTEEL"), a trading company in Korea; and (2) Pohang Steel America Corporation ("POSAM"), a wholly-owned subsidiary located in the United States.

54. The United States requested that POSCO report all sales of the subject merchandise to the United States made during the period of investigation. In its response to the United States' initial questionnaires, POSCO stated

[43] *Bananas*, at para. 204.

[44] See, 28 USC. § 1581(c) which vests the United States Court of International Trade with jurisdiction over all civil actions relating to the anti-dumping statute. (US Ex. 3).

[45] See, (US Ex. 4).

[46] *SSPC Final Determination*, 64 Fed. Reg. at 15444 (ROK Ex. 11); *SSSS Final Determination*, 64 Fed. Reg. at 30666 (ROK Ex. 24).

> "The reported amounts ... include sales to a now bankrupt US company, [...]. That company did not pay POSCO for certain sales but did take possession of some of POSCO's merchandise in the POI. *POSCO wrote the unpaid sales off in the POI* and expects to exclude them from its US database."[47]

55. It is the United States' treatment of those sales to ABC Company[48] that Korea now challenges. Although the issue arose in a similar manner in both investigations, how the record and the issue developed differed.

56. In the SSPC investigation, POSCO initially referred to these sales as having been written off, as noted above, and then subsequently stated merely that they were unpaid.[49] POSCO also claimed that they were insignificant and atypical and, therefore, should be excluded.[50] Approximately one week before the United States' preliminary analysis, petitioners submitted comments in which they argued, on the basis of legal precedents, that these sales should be treated as a direct selling expense for bad debt.[51] POSCO also submitted rebuttal comments.[52] For purposes of the preliminary determination, the United States accepted POSCO's argument and excluded the sales to ABC Company.[53]

57. The issue arose in a similar manner in the SSSS case except that, prior to the preliminary determination, the United States obtained additional accounting information that demonstrated that the sales had been written off.[54] Based on that information, in the preliminary determination, the United States accounted for the bad debt as an indirect selling expense, although it continued to exclude the sales, as it had in the SSPC case.[55] Thus, as of 4 January 1999, three months prior to the SSPC final determination and six months before the SSSS final determination, POSCO was on notice that the United States viewed the customer's failure to pay as a bad debt expense.

58. The verification in both investigations confirmed the write off of these sales,[56] and the parties continued to comment on this issue in their case and rebuttal briefs.[57] The United States then reviewed the evidence in light of the parties' comments and the applicable legal precedent. For the final determinations, the United States determined that the sales to ABC Company should be included in the calculation of export price and constructed export price. The United States allocated the bad debt expense over *all* US sales of the subject merchandise.[58]

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[47] SSPC POSCO Response to Section A of Initial Questionnaire dated 2 July 1998, at A-3, (US Ex. 7); SSSS POSCO Response to Section A of Initial Questionnaire dated 3 September 1998, at A-3, (US Ex. 8) (emphasis added).

[48] We have adopted the designation for this company chosen by Korea for reasons of confidentiality. ROK First Submission, at para. 3.30.

[49] SSPC Supplemental Questionnaire Response, Sections B and C, at 15 (ROK Ex. 28). As the United States noted in its final determination, POSCO requested exclusion based on its belief that the sales would be treated as unpaid and that the credit expense would be distortive. SSPC Final Determination, 64 Fed. Reg. at 15448 (ROK Ex. 11).

[50] *Id.*

[51] Letter of 19 October 1998 from US Petitioners to Department of Commerce at 2-3, (ROK Ex. 31).

[52] Letter of 22 October 1998 from POSCO to Department of Commerce at 2-5, (ROK Ex. 32).

[53] *SSPC Preliminary Determination*, 63 Fed. Reg. at 59536-37, (ROK Ex. 4).

[54] *SSSS Preliminary Determination*, 64 Fed. Reg. at 140, (ROK Ex. 16).

[55] *Id.*

[56] SSPC POSAM Verification Report, at 8-9 and Exhibit 5 (US Ex. 9); SSSS POSAM Verification Report, at 8, (US Ex. 10).

[57] US Petitioners' SSPC Case Brief at 1-9, (ROK Ex. 8); POSCO's SSPC Rebuttal Brief at 3-11, (ROK Ex. 9).

[58] *SSPC Final Determination*, 64 Fed. Reg. at 15448-49, (ROK Ex. 11); *SSSS Final Determination*, 64 Fed. Reg. at 30673-74, (ROK Ex. 24). The change in the United States' methodology to treat bad debt as a

59. As demonstrated below, the United States' final determinations were entirely consistent with Articles 2.4, and 12.2 of the Agreement and Article X:3 of GATT 1994.

2. Introduction to the Argument

60. In challenging the United States' treatment of POSCO's US bad debt expense, Korea presents four lines of argument: (1) these sales are "atypical" and the fair comparison requirement of Article 2.4 requires the exclusion of atypical export sales from the determination of export price; (2) an adjustment for bad debt expense is inconsistent with Article 2.4 because such expenses do not affect price comparability; (3) if an adjustment for bad debt expense is consistent with Article 2.4, the manner in which the United States made the adjustment in this case is not; and (4) the United States' treatment of these sales was inconsistent with the procedural requirements of Article 12.2 of the Agreement and Article X:3 of GATT 1994.

61. Moreover, the theme that runs through all of Korea's arguments is that the United States ' treatment of POSCO's US bad debt expense is not only an issue of a fair comparison, but an issue of fairness in some broader sense. Korea urges this panel to develop rules to govern the conduct of anti-dumping investigations and, in doing so, to look beyond the substantive and procedural requirements of the Agreement.[59] The panel should reject such arguments.

62. Articles 3.2 and 19.2 of the DSU state explicitly that the panel's role is to "clarify" the agreements and in so doing the panel "cannot add to or diminish the rights and obligations provided in the covered agreements." Moreover, the role of the panel in reviewing anti-dumping measures is more explicitly circumscribed in Article 17.4 of the Agreement, which states

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

63. Therefore, whether the United States' determinations are consistent with the Agreement may only be judged by reference to the terms of the Agreement itself, as interpreted in accordance with customary rules of international law. If those determinations rest on a permissible interpretation, they are in conformity with the Agreement.

64. The rules embodied in the *Vienna Convention on the Law of Treaties* have attained the status of customary rules of international law. In accordance with those rules, terms must be given their

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direct selling expense, rather than an indirect selling expense, was necessary to conform the determination to US law and practice. See, *e.g.*, *Daewoo Electronics Co. v. United States*, 712 F. Supp. 931, 938-40 (Ct. Int'l. Trade 1989) (the court agreed with Korean producers of color television receivers that bad debt is a direct selling expense that must be included in the circumstance of sale adjustment to normal value (then called "foreign market value" or "FMV")), (US Ex. 11); *Notice of Final Determination of Sales at Less Than Fair Value: Foam Extruded PVC and Polystyrene Framing Stock from the United Kingdom*, 61 Fed. Reg. 51411, 51417 (2 October 1996), (US Ex. 12); *Color Television Receivers from the Republic of Korea: Final Results of Administrative Review*, 61 Fed. Reg. 4408, 4412 (6 February 1996) (hereinafter "CTVs from Korea"), (US Ex. 13).

[59] Korea's First Submission, paragraph 4.26, footnote 104.

ordinary meaning in their context, and in light of the object and purpose of the treaty. It is those principles that must guide the panel in making its rulings and recommendations.[60]

3. Article 2.4 Does Not Require Exclusion of Sales from Export Price

65. Korea argues that the United States violated Article 2.4 by failing to exclude certain sales that it alleges to be "atypical" from the export price. However, Article 2.4 does not address the issue of what sales establish export price and normal value. That matter is addressed in Article 2.1.[61]

66. It is evident that, in drafting Article 2.1, limitations on the sales used to determine export price and normal value were considered. Article 2.1 expressly limits the determination of normal value to sales "in the ordinary course of trade." It is significant that there is no such limitation in Article 2.1 on the determination of export price.[62] The absence of a limitation on sales used to determine export price must be interpreted as intentional. It is also logical in that it is the export sales that are alleged to be dumped and causing injury. The fact that dumped sales may be atypical in some respect does not alter their potential to injure.

67. While it is Article 2.1 that addresses the sales used to determine export price and normal value, Korea bases its argument on Article 2.4 which addresses the *comparison* of export price and normal value. Specifically, the second and third sentences of Article 2.4 require that the comparison of export price and normal value

> shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

68. Article 2.4 explicitly recognizes that sales may differ in many respects that affect the comparability of their prices. Where such differences exist, it is "due allowance," not exclusion, that Article 2.4 requires.[63] Establishing price comparability through appropriate adjustments is all that is necessary to achieve the object and purpose of the Agreement, which is to determine dumping through a comparison of export price and normal value.

69. In an attempt to support its argument that Article 2.4 requires more than "due allowance" for differences affecting comparability, Korea presents a distorted view of US legislative history and

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[60] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996 (hereinafter "*Reformulated Gasoline*") at 23; *Japan - Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 (hereinafter "*Taxes on Alcoholic Beverages*") at 12; *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather (WT/DS126) - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, 14 January 2000 (hereinafter "*Automotive Leather*") at para. 6.25.

[61] Article 2.1 defines dumping as existing where, "the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

[62] As discussed below, Article 2.3 addresses the construction of export price in special circumstances. As in Article 2.1, there is no limitation in Article 2.3 on the sales used to establish export price.

[63] The contrary interpretation asserted by Korea ignores the customary rules of treaty interpretation. In attempting to read a limitation on export price sales into Article 2.4, Korea directly contradicts Article 2.1, where such limitations are addressed and applied only to normal value. The "fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility." *Automotive Leather*, at para. 6.25.

judicial precedent and of US practice. Citing to the Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA") and judicial decisions, Korea asserts that the United States routinely excludes atypical sales from its analysis of "both *export price* and normal value."[64] However, the language quoted from the SAA refers solely to the exclusion from *normal value* of sales not in the ordinary course of trade. It has nothing to do with the determination of export price. Furthermore, US courts have repeatedly recognized that US law, like Article 2.1, does not require the exclusion of sales from export price.[65] Rather, the US courts have recognized that the goal is to include all export sales, but to utilize appropriate adjustments to ensure a fair comparison.[66] Thus, contrary to Korea's assertion, US law and practice reflects the interpretation of Articles 2.1 and 2.4, discussed above.

70. Although the goal is to include all export sales, the United States may exclude export sales in certain situations. Exclusion of export sales is a narrow exception, not the rule. Generally, the United States will only exclude US sales if they are (1) not representative of the seller's normal selling behaviour, and (2) are so small that they would have an insignificant effect on the dumping analysis.[67] In these situations, providing for allowances to establish a fair comparison can be difficult, impossible or unduly burdensome.[68]

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[64] Korea' s First Submission at paragraph 4.32. (Emphasis added). Korea argues that the United States acted inconsistently with Article X:3 of GATT 1994 by failing to follow the alleged contrary US legal precedent. As discussed above, Korea misreads and misapplies Article X:3. Nevertheless, as discussed below, Korea's assertion that the United States failed to follow precedent is false.

[65] In *Chang Tieh Industry Co., Ltd. v. United States*, 840 F. Supp. at 145, (ROK Ex. 35), a case cited by Korea, the court stated

> if Congress intended to require [ITA] to exclude all sales made outside the 'ordinary course of trade' from its determination of United States price it could have provided for such an exclusion in the definition of United States price, as it has in the definition of foreign market value.

[66] *American Permac, Inc. v. United States*, 783 F. Supp. 1421, 1423-24 (Ct. Int'l. Trade 1992). (US Ex. 15). In holding that US sales outside the ordinary course of trade should normally be included, the court stated:

> ... whether sales are in or out of the ordinary course of trade is not the determinative factor on the US sales side of the equation. Fairness, distortion, representativeness are the issues to be examined. The goal is to include the sales but to utilize whatever methodology is needed to ensure a fair comparison.

[67] *IPSCO, Inc. v. United States*, 714 F. Supp. 1211, 1216-17 (Ct. Int'l. Trade 1992), (US Ex. 16).

[68] *See, e.g., Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 57 Fed. Reg. 42942, 42949 (17 September 1992), (US Ex. 17) (resale of damaged or defective merchandise excluded); *Preliminary Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea*, 55 Fed. Reg. 49668, 49669 (30 November 1990), (US Ex. 18) (sales of subject merchandise further manufactured in the United States excluded because of small volume and added burden on respondents and the United States). The United States has also excluded US sales where it has determined that the sales are not *bona fide*. *Manganese Metal from the Peoples' Republic of China: Final Determination of Sales at Less Than Fair Value*, 60 Fed. Reg. 56045 (6 November 1995), (US Ex. 19).

Korea cites one determination in which it alleges the United States excluded sales as unrepresentative solely because the customer failed to pay. However, in that case the United States stated that it was excluding the sales for which payment was not received "because we were not able to calculate an accurate credit adjustment for them at this time." *Fabric and Expanded Neoprene Laminate from Taiwan: Final Determination of Sales at Less Than Fair Value*, 52 Fed. Reg. at 37194, (ROK Ex. 37). That statement implies that, were such an adjustment possible, the sales could have been included. The United States went on to note that the sales represented less than one per cent of the total value of US sales during the period of investigation and that unusual circumstances surrounding the sales indicated that they were not representative of the respondent's selling practices. However, the primary reason given for the exclusion was the inability to make the credit adjustment.

71. The sales to ABC Company were not so small that they would have an insignificant effect on the dumping analysis. Furthermore, they are not unrepresentative of POSCO's normal selling practices. Bad debt is a normal cost of doing business. Far from being an atypical event, companies – including POSCO – routinely establish reserve accounts for bad debt, in accordance with Generally Accepted Accounting Principles.[69] Thus, a sale is not atypical simply because it generates a bad debt expense, even if it is the first bad debt experienced in a particular channel of trade. Moreover, there is nothing about the prices, products or terms of sale for these transactions that is unrepresentative of POSCO's normal selling practices. Therefore, there is nothing distortive or unfair about including POSCO's sales to ABC Company in the determination of export price.

72. Although differences in selling expenses such as bad debt may affect the comparability of export price and normal value, allowance for such differences can be made, and such allowance is all that Article 2.4 requires. Korea acknowledges that Article 2.4 requires due allowance for differences that affect price comparability, but asserts that an adjustment for POSCO's US bad debt expense – the very condition that Korea argues renders the sales incomparable – was prohibited. Having assumed away any possible adjustment, Korea then argues that, unless the sales are excluded, the dumping comparison is unfair. However, Korea's premise, *i.e.*, that an adjustment for bad debt expense is prohibited, is incorrect; therefore, the argument is fatally flawed.

73. As discussed below, the United States' allowance for POSCO's US bad debt expense, both in constructing export price and in comparing export price to normal value, was entirely consistent with Articles 2.3 and 2.4.

4. The United States' Treatment of Bad Debt Expense in the Calculation of Constructed Export Price Was Consistent With the Requirements of the Agreement

74. During the period of investigation, POSCO made some sales through its US associate, POSAM. For these sales, the United States constructed the export price, consistent with Article 2.3.[70] Despite the obvious relevance of Article 2.3, Korea ignores it entirely, focusing solely on Article 2.4.

75. While the export price is normally the price first charged by the exporter to a buyer in the importing country,[71] Article 2.3 of the Agreement states:

> where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer. . . .

76. To construct the export price for POSCO's sales through POSAM, the United States started with the price to the first independent buyer in the United States, consistent with Article 2.3. The United States then deducted expenses, including an allocated portion of the bad debt expense,[72] incurred in connection with the sale from POSAM to the independent buyer, and an amount for profit. By deducting from the price to the independent purchaser the expenses and profits associated with the transaction between that purchaser and the associated importer, a constructed price from the exporter

[69] See, *e.g.*, Exhibit 23 to SSPC Supplemental Response to Section A, 17 July 1998, (US Ex. 20).

[70] Korea does not challenge the United States' use of constructed export price for sales through POSAM.

[71] See Article 2.1.

[72] The United States allocated the bad debt expense over all US sales of the subject merchandise. The United States then deducted the allocated portion of the bad debt expense from POSAM's price to the independent US buyer in constructing the export price. The allocation of the bad debt expense is discussed more fully below.

to the associated importer, *i.e.*, the export price, was created. Therefore, for the sales through POSAM, the bad debt expense was not an *adjustment to* export price under the "due allowance" provision of Article 2.4, but rather a deduction made *to construct* the export price.

77. Article 2.4 specifically envisions the type of constructed export methodology employed by the United States. In particular, Article 2.4 envisions the deduction of the selling expenses associated with the sale by the affiliated importer. The fourth and fifth sentences of Article 2.4 state

> In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph.

78. Based on the fifth sentence of Article 2.4, it is evident that the allowances for costs and profits contemplated in the fourth sentence are not those which establish comparability, but rather are adjustments made to construct export price. In the fifth sentence, Article 2.4 recognizes that such adjustments might render the constructed export price and the normal value incomparable, giving rise to the need for "due allowances" to establish comparability.

79. As discussed above, the United States' construction of the export price for POSCO's sales through POSAM, including the deduction of an allocated portion of the bad debt expense incurred in connection with POSAM's resale to the unaffiliated customer, was consistent with Article 2.3 of the Agreement. Further, before comparing that constructed export price to normal value, the United States made a *downward* adjustment to normal value to account for differences in the circumstances of sales in the home market which affect price comparability.

80. Korea gives the false impression that the United States' adjustment is entirely one-sided, i.e., a downward adjustment to export price. That is not the case. In fact, the United States' adjustment for differences in circumstances of the sales that affect price comparability are always made to normal value, not export price. Moreover, the adjustment is neutral, i.e., it may either raise or lower normal value, depending on the facts of the case. The United States' circumstance of sale adjustment is further described below.

5. Allowance For Differences in Selling Expenses Such as Bad Debt in The Comparison of Export Price And Normal Value is Consistent With Article 2.4

81. During the period of investigation, POSCO also made sales of the subject merchandise directly to independent buyers in the United States. For those sales the United States used the price charged by POSCO to the independent buyer as the export price.[73] When comparing that export price to normal value, the United States made an adjustment to normal value to account for differences affecting price comparability that was consistent with Article 2.4.

82. Article 2.4 contains a general requirement to make due allowance for differences that affect price comparability as well as an illustrative list of such factors, *e.g.*, conditions and terms of sale, taxation, physical characteristics, quantities. Korea asserts that selling expenses such as bad debt do not fall within any of the factors explicitly listed in Article 2.4. The United States disagrees. Allowance for differences in conditions and terms of sale is among the adjustments specifically

[73] Transportation, brokerage and handling expenses were deducted, where appropriate, to determine the ex-factory export price. This is consistent with Article 2.4, which states that comparisons will normally be made at the ex-factory level.

contemplated by Article 2.4. The United States interprets differences in "conditions and terms of sale" as including differences in selling expenses such as bad debt. That is a permissible interpretation based on the ordinary meaning of the words.

83. An ordinary meaning of "terms" of sale is the stipulations and conditions that define the nature and extent of the sales contract (*e.g.*, quantity, delivery).[74] An ordinary meaning of "conditions" of sale is the "mode or state of being" of sales.[75] Thus, it is permissible to interpret conditions of sale to include the mode or circumstances under which sales are made in each market. For example, in the domestic market a producer may sell directly to consumers and provide a warranty, while in an export market the product may be sold to distributors with no warranty. Similarly, the nature of the customer base in the domestic market may generate more bad debt than the customer base in the export market. These differences in the selling conditions in each market would be reflected in the additional warranty or bad debt expenses in the export market.

84. Selling expenses such as warranty costs and bad debt not only reflect conditions of sale in the market, they are also an element of price.[76] Therefore, differences in such selling expenses affect price comparability. Requiring "due allowance" for such differences ensures that any positive difference between export price and normal value reflects dumping rather than differences in the selling conditions in each market.

85. Korea asserts that due allowance for differences in selling conditions cannot be made unless the condition is one within the exporter's control and known at the time of sale.[77] Article 2.4 contains no such limitation.

86. Many normal selling conditions, in addition to bad debt, are not within the exporter's control and the amount of the associated expense is not known at the time of sale. For example, warranty, technical assistance and credit expenses are not entirely within the exporter's control and the exporter does not know at the time of sale whether or to what extent such expenses will be incurred. Nevertheless, sellers, including POSCO, anticipate such costs and they are an element of price. Most importantly, as discussed above, Article 2.4 recognizes that differences in conditions of sale may affect price comparability. Therefore, making allowance for such differences is consistent with Article 2.4.

87. To ensure that the expenses associated with conditions of sale in each market are neutralized, the United States deducts the home market expenses from normal value and then adds to normal value the US expenses.[78] As a result, both export price and normal value reflect identical conditions of sale. The adjustment neither inflates nor deflates margins; it neutralizes differences in selling conditions in the two markets.[79] By virtue of this adjustment, consistent with Article 2.4, differences in conditions of sale do not have an effect on the dumping analysis.

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[74] Webster's II New Riverside University Dictionary (1984), definition of "terms." Some terms of sale, such as quantity, are also listed separately in Article 2.4. Because of the potential overlap, Article 2.4 requires that there be no duplicate adjustments. Footnote 7 to Article 2.4.

[75] *Id*., definition of "condition."

[76] See, *e.g.*, Article 2.2, which provides for constructing normal value on the basis of the cost to produce the product plus "a reasonable amount for administrative, *selling* and general costs." (Emphasis added)

[77] ROK First Submission, paragraphs 4.8, 4.18 and 4.29..

[78] The United States refers to this as a "circumstance of sale" adjustment.

[79] For example, in the hypothetical situation describe above, the net result would be to lower normal value because the home market selling expenses that would be deducted from normal value would be higher than the US expenses added to normal value. In such situations, exporters routinely insist on the circumstance of sale adjustment. See, e.g. *CTVs from Korea*, 61 Fed. Reg. at 4412 (United States agreed with exporter that adjustment for difference in home market bad debt expense was required). (US Ex. 13).

88. Finally, Korea asserts that, even if an allowance for differences in selling conditions such as bad debt is permitted under Article 2.4, the means by which the United States made the adjustment in this case is not. Specifically, Korea argues that Article 2.4 only permits the allocation of such expenses on a transaction-specific basis.[80]

89. Nothing in Article 2.4 requires the allocation of selling expenses on a transaction-specific basis. What constitutes a reasonable allocation may depend on the nature of the expense or the particular facts of the case. For example, it may be reasonable to allocate transportation costs on a transaction-specific or customer-specific basis because there are known variances in distance. In contrast, while bad debt is a normal, anticipated expense, specifically what transactions, or even what customer, will generate a bad debt is not known in advance. All transactions and customers sold on credit are a potential source of bad debt. Therefore, it is reasonable to reflect an allocated portion of that expense in all prices.

90. For the reasons discussed above, the United States' calculation of this adjustment is consistent with Article 2.4.

6. The United States' Decision to Include The Sales to ABC Company in the Dumping Analysis And the Rationale Provided for That Decision Was Consistent With the Requirements of Article 12.2 of the Agreement and Article X:3 of GATT 1994.

91. Article 6 of the Agreement requires that interested parties be given a full opportunity to defend their interests throughout an anti-dumping investigation[81] and sets forth certain procedural obligations in the conduct of anti-dumping investigations.[82] US law and practice, both generally and in the investigations at issue here, demonstrate the United States' strong commitment to fulfilment of those obligations.

92. The United States issues written questionnaires to exporters, including supplemental questionnaires to clarify or supplement information previously submitted. Throughout US anti-dumping investigations the parties are afforded timely access to all information provided to or obtained by the United States, including confidential information made available under administrative protective order, all comments and legal arguments presented by the parties and the United States' internal memoranda.[83]

93. Normally, within 75 days before its final determination, the United States issues a preliminary determination, which sets forth the United States' preliminary conclusions and the evidence relied upon in reaching those conclusions, consistent with Article 12.2 of the Agreement. The parties are then given the opportunity to comment on the preliminary determination, both in writing and at a public hearing.[84]

94. The United States is required by law to consider the comments of the parties and address them in its final determination. Upon considering the parties' comments, the United States may determine that a change in the methodology used in the preliminary determination is warranted, or

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[80] ROK First Submission, paragraph 4.22.

[81] Article 6.2.

[82] Those cited by Korea are Article s 6.1, 6.2 and 6.9.

[83] The United States also maintains a publicly available website on the internet which contains the US anti-dumping and countervailing duty laws and regulations, the United States' policy bulletins and the United States' anti-dumping and countervailing duty determinations. These can be viewed at:
http://www.ita.doc.gov/import_admin/records.

[84] Although parties can and often do submit arguments prior to the preliminary determination, following the preliminary determination the parties submit a "case brief" that presents all of the arguments they wish the United States to consider for the final determination.

that its preliminary determination was correct. In either event, the United States is required to explain the reasons for its decisions in the public notice of its final determination.

95. These procedures ensure that all interested parties are informed of the essential facts and issues under consideration and have a full opportunity to defend their interest. The fact that it is not uncommon for the United States to change its methodology in response to comments by the parties proves that these procedures are meaningful and effective tools that, in fact, fulfill the requirements of the Agreement.

96. As discussed above, in these investigations the parties, including POSCO, took full advantage of these procedures to defend their interests, vigorously arguing numerous issues before the United States, including the treatment of POSCO's US sales to ABC Company. Nevertheless, Korea claims that the United States failed to meet the minimum standards of transparency and procedural fairness required by Article X:3 of GATT 1994 and Article 12.2 of the Agreement.

97. Korea's claim under Article X:3 is based on essentially three allegations: (1) it is unreasonable to include atypical sales in the dumping analysis; (2) the United States failed to follow US legal precedent regarding the exclusion of US sales, and (3) the United States gave inconsistent explanations in the notices of final determination.[85] Korea also argues that the third allegation gives rise to a violation of Article 12.2 of the Agreement.[86]

98. The United States has demonstrated above that these sales were not atypical and that including them in the dumping analysis was reasonable and consistent with the Agreement. Moreover, the United States' decision to change its treatment of the sales to ABC Company in its final determinations was neither abrupt nor inconsistent with the United States' practice, as Korea asserts.[87] To the contrary, we have demonstrated above that the change was made as a result of a thorough examination of the facts, in light of the comments of the parties, and to *conform* the United States' final determination to US law and practice.

99. Quoting selectively from the United States' final determinations, Korea also asserts that the reasons given in the notices of the final determinations for the treatment of the sales to ABC Company were "inherently contradictory."[88] Therefore, Korea claims that the explanations are unreasonable and, as such, inconsistent with the requirements of Article X:3 of GATT 1994 to administer the law in a uniform, impartial and reasonable manner. Korea further argues that these allegedly contradictory explanations are an inadequate statement of the reasons for the decision and, therefore, inconsistent with Article 12.2 of the Agreement.

100. As discussed above, the United States agrees that Article X:3 requires that the United States cannot be arbitrary in its administration of its anti-dumping determinations. However, this does not require complete consistency with all prior cases. Similarly, Article 12.2 requires an explanation of the factual and legal basis for a dumping determination. However, Article 12.2 does not impose any requirements *across* cases. Article 12.2 requires that *each* public notice of a dumping determination contain "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." As long as each decision is adequately explained, the requirements of Article 12.2 are met. There are many reasons why the explanation in one case may differ from the explanation in another (*e.g.*, a difference in the facts; a change in policy). Such differences do not render the decision arbitrary or the explanation inadequate. As long as the investigating authority

[85] ROK First Submission, paragraph 4.40.
[86] ROK First Submission, paragraph 4.41.
[87] ROK First Submission, paragraphs 4.39 and 4.40.
[88] ROK First Submission, paragraph 4.41.

provides a rational explanation for its determination the requirements of Article X:3 and Article 12.2 are fulfilled.

101. Moreover, when the United States' explanations for these decisions are read in their entirety, the inconsistency alleged by Korea disappears. In both notices, the United States discussed the criteria the United States normally uses in determining whether to exclude US sales from its analysis, *i.e.*, (1) whether the sales were representative of the POSCO's behaviour, and (2) whether they were so small that they would have an insignificant effect on the margin.[89] A failure to meet *either* criterion could result in a decision not to exclude the sales. Therefore, a discussion of both criteria is not necessary to explain adequately a decision not to exclude US sales. Nevertheless, both criteria were discussed in these cases.

102. In the *SSPC Final Determination*, the United States explained its decision not to exclude the sales to ABC Company, stating that

> the sales account for such a large percentage of POSCO's US sales that they cannot be dismissed as abnormalities. *Moreover, the price of the sales themselves is not necessarily distortive because, at the time they were made, POSCO was not aware that the customer would declare bankruptcy.*[90]

103. Thus, in addition to finding that the volume of sales was not insignificant, the United States' explanation included a finding that the sales to ABC Company were not unrepresentative of POSCO's selling practices, *i.e.*, when POSCO set the prices it was acting in accordance with its normal selling practices, not based on the subsequent bankruptcy. Therefore, using those prices did not distort the dumping analysis.

104. Similarly, in the *SSSS Final Determination*, with respect to whether the sales were representative of POSCO's selling practices the United States stated

> There was nothing atypical about the sales at the time they were made; we agree with petitioners that there is an inherent risk, when selling to customers on a credit basis, that the customer might not make full or even partial payment. *Moreover, the price of the sales themselves is not necessarily distortive because, at the time they were made, POSCO was not aware that the customer would declare bankruptcy.*[91]

105. With respect to whether the sales were too small to have an impact on the dumping analysis, the facts in the SSSS case were not as clear cut as in SSPC. The discussion in the SSSS notice focused on a particular argument raised by POSCO, which it could not raise in the SSPC case because of the difference in the quantities involved in the sales at issue. Specifically, POSCO argued in the SSSS case that it was the United States' practice to treat 5 per cent as the threshold for determining that the volume of sales is significant.[92] In response, the United States explained that the 5 per cent threshold was not generally used in determining whether to exclude US sales.[93] The United States then chose not to make an explicit finding on the issue of whether the sales were insignificant, explaining that it was relying instead on the fact that the sales were not unrepresentative.[94] Because that finding provided a sufficient basis for the decision not to exclude the US sales, it was unnecessary

[89] This practice is discussed more fully above.
[90] *SSPC Final Determination*, 64 Fed. Reg. at 15449 (emphasis added) (ROK Ex. 11).
[91] *SSSS Final Determination*, 64 Fed. Reg. at 30673-74 (emphasis added) (ROK Ex. 24).
[92] *Id*. at 30672.
[93] *Id*. at 30674.
[94] *Id*.

for the United States to address the question of whether the volume of the sales at issue was significant in order to adequately explain its decision.

106. Thus, when read in their entirety, it is evident that the United States' explanations in these two cases are complete and entirely consistent with each other and with the United States' established practice. Therefore, Korea has no basis for its claim that the United States' determinations are inconsistent with Article 12.2 of the Agreement and Article X:3 of GATT 1994.

E. THE UNITED STATES PERMISSIBLY CONCLUDED THAT PRICES ESTABLISHED PRIOR TO A SEVERE DEVALUATION OF THE KOREAN WON SHOULD NOT BE AVERAGED WITH PRICES ESTABLISHED AFTER SUCH A DEVALUATION IN ACCORDANCE WITH ARTICLES 2.4, 2.4.1, 2.4.2, 6.1, 6.2, 6.9 AND 12.2

1. Introduction

107. In the cases which are the subject of this dispute, the United States was faced with an unprecedented situation: during the period being examined by the United States in order to determine dumping, the value of the historically reliable and stable Korean won fell over 40 per cent in a two-month period, and entered a prolonged phase of instability.

108. As illustrated by the facts described in the following section, the United States provided all parties t o the two investigations in question, including POSCO, ample opportunity to present in writing all evidence which it considered relevant regarding this situation in accordance with Article 6.1 of the AD Agreement. Moreover, the Korean producers were given access to the complete administrative record and provided extensive opportunities to present arguments and defend their interests in accordance with Articles 6.2 and 6.9 of the AD Agreement. Significantly, with respect to the issue of the devaluation of the won, and the issue of whether the United States should avoid comparison of pre-devaluation prices with post-devaluation prices, POSCO, as well as domestic interested parties, made full use of such opportunities to present evidence and legal arguments both during the information-gathering phase of the investigation, as well as during the argument phase.

109. In light of all of the evidence gathered, and arguments presented, the United States made a reasonable conclusion, which it fully explained to all parties. The United States concluded that it agreed with POSCO that the United States should deviate from its normal practice in light of the serious devaluation, and use daily exchange rates throughout the devaluation period rather than the average exchange rates which would otherwise be called for. However, the United States also reasonably concluded that prices which were set in the home market in Korean won during a period in which the won was experiencing historically extreme devaluation were not comparable to export transactions the prices of which were established prior to such period, and that the two could not be compared without risking serious distortion to the dumping margin being calculated. To prevent such comparisons, the United States created separate averages for each period.

110. In the section below, the United States will first outline the facts surrounding the devaluation of the Korean currency beginning in the last two months of 1997, and the procedures undertaken by the United States in establishing and evaluating the relevant facts, and reaching a reasonable conclusion. The United States will then discuss the consistency of its action with Articles 2.4.1 and 2.4.2 of the AD Agreement. Finally, the United States will address Korea's arguments, demonstrating that they mis-apprehend the actions taken by the United States, and misinterpret the obligations established by the AD Agreement.

2. Statement of Relevant Facts

(a) The Situation of the Korean Won in 1997-1998

111. Throughout the first ten months of 1997, the Korean won, although experiencing a moderate overall decline, remained remarkably stable relative to the US dollar. Throughout this period the won/dollar exchange rate remained at approximately 900 won to the dollar. To be more specific, during this period the won ranged from approximately 850 won to the dollar in January, 1997, gradually decreasing to a low of approximately 918 won to the dollar in mid-October, 1997.[95] This decrease in value of roughly 8 per cent occurred slowly and steadily over the ten month period. This general stability during 1997 reflected the stability in the relationship between the two currencies which had existed for many years.

112. By contrast, the months of November and December 1997, were, by any measure, a time of dramatic changes in the value of the Korean won. During this period the won/dollar exchange rate fell from a high of 965 won to the dollar on 4 November 1997 to a low of 1960 won to the dollar on 23 December 1997.[96] Thus, the value of the won, an historically stable currency, dropped by 50 per cent in a period of two months. This dramatic drop was followed by an extended period of currency instability.[97]

(b) The United States' Conduct of the Investigation

113. As noted previously, the United States initiated its investigations of alleged dumping of Stainless Steel Plate in Coils from Korea on 20 April 1998.[98] This investigation covered sales to the United States during the period 1 January 1997 through 31 December 1997.[99] The United States initiated its investigation of alleged dumping of Stainless Steel Sheet and Strip from Korea on 30 June 1998.[100] This investigation covered imports during the period 1 April 1997 through 31 March 1998.[101] In other words, the collapse in the value of the Korean won happened to coincide with the periods in which the United States was attempting to determine whether dumping had occurred. This situation presented a novel set of issues in the calculation of dumping margins.

114. The circumstances of the collapse of the won were first brought to the United States' attention in the SSPC investigation by POSCO in its response to the United States' questionnaire.[102] In that response, POSCO requested that the United States vary its normal methodology, and apply daily exchange rates throughout the fourth quarter of 1997, i.e. during the period of the won's collapse. In response, the domestic industry argued that the United States should apply the same methodology for a sustained decrease in a currency that it applies in the face of a sustained increase.[103] As discussed further below, in essence the domestic industry argued that the United States should ignore the daily exchange rates, and use the high exchange rate in effect prior to the collapse of the won for some

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[95] The exchange rates cited herein are derived from the United States Federal Reserve Bank weekly statistical release for Foreign Exchange Rates which can be found on the Internet at http://www.bog.frb.fed.us/releases/H10/hist. (ROK Ex. 50). These are the official rates used by the Department of Commerce in its antidumping proceedings.

[96] (ROK Ex. 50).

[97] (ROK Ex. 50). See also (US Ex. 21), a chart supplied to the Department by POSCO, which dramatically illustrates the fundamental shift in the value of the won during the POI.

[98] *SSPC Preliminary Determination*, 63 Fed. Reg. at 59535 (ROK Ex. 4).

[99] *Id.* at 59536

[100] *SSSS Preliminary Determination*, 64 Fed. Reg. at 137 (ROK Ex. 16).

[101] *Id.* at 139.

[102] See, POSCO Response to Section B of Antidumping Questionnaire, dated 21 July 1998 (US Ex. 21).

[103] (ROK Ex. 38).

unspecified period. Such a methodology would increase normal value and the resulting margin of dumping. In response, POSCO argued that the United States' stated policy required it to use daily exchange rates during periods of "precipitous and large" declines in the value of a foreign currency. According to POSCO, the collapse of the won at the end of 1997 met this test.

115. In the preliminary determinations in both cases, the United States agreed with POSCO that the decline in the value of the won was precipitous and large, and thus that the United States should use daily exchange rates during the period of the won's collapse:

> Our preliminary analysis of Federal Reserve dollar-won exchange rate data shows that the won declined rapidly at the end of 1997, losing over 40% of its value between the beginning of November and the end of December. The decline was, in both speed and magnitude, many times more severe than any change in the dollar-won exchange rate during the previous eight years. Had the won rebounded quickly enough to recover all or almost all of the initial loss, the Department might have been inclined to view the won's decline at the end of 1997 as nothing more than a sudden, but only momentary drop, despite the magnitude of that drop. As it was, however, there was no significant rebound. Therefore, we have preliminarily determined that the decline in the won at the end of 1997 was so precipitous and large that the dollar-won exchange rate cannot reasonably be viewed as having simply fluctuated during this time, i.e., as having experienced only a momentary drop in value. Therefore, in making this preliminary determination, the Department used daily rates exclusively for currency conversion purposes for HM sales matched to US sales occurring between 1 November and 31 December 1997.[104]

116. The United States elaborated on this conclusion in its preliminary determination in the SSSS case:

> Our preliminary analysis of Federal Reserve dollar-won exchange rate data shows that the won declined rapidly at the end of 1997, losing over 40 per cent of its value between the beginning of November and the end of December. The decline was, in both speed and magnitude, many times more severe than any change in the dollar-won exchange rate during the previous eight years. Had the won rebounded quickly enough to recover all or almost all of the initial loss, the Department might have been inclined to view the won's decline at the end of 1997 as nothing more than a sudden, but only momentary drop, despite the magnitude of that drop. As it was, however, there was no significant rebound.
>
> We have preliminarily determined that the decline in the won at the end of 1997 was so precipitous and large that the dollar-won exchange rate cannot reasonably be viewed as having simply fluctuated during this time, i.e., as having experienced only a momentary drop in value. Therefore, in making this preliminary determination, the Department used daily rates exclusively for currency conversion purposes for home market sales matched to US sales occurring between 1 November 1997 and 31 December 1997.
>
> For sales occurring after 31 December, but before 1 March 1998, the Department relied on the standard exchange rate model, but used a modified benchmark. In calculating a benchmark rate, the Department's standard practice is to incorporate rates extending back 40 days from the date of sale. However, using such a benchmark rate would incorporate rates during November and December of 1997, when the

[104] *SSPC Preliminary Determination*, 63 Fed. Reg. at 59539 (ROK Ex. 4).

> dollar-won exchange rate dropped, and hence would result in apparent significant fluctuations in the dollar-won exchange rates used in the Department's margin calculation.
>
> In order to ensure that rates used are more indicative of the exchange rate climate during January and February 1998, the benchmark was modified to include rates extending back only to 1 January 1998. Therefore, we have applied an up-to-date (post-precipitous drop) benchmark, while at the same time we have avoided making sales comparisons using exchange rates with excessive day-to-day fluctuations. By 1 March 1998, the dollar-won exchange rate had stabilized sufficiently so that the Department's standard model could be employed. For sales occurring after 1 March the standard model and benchmark rate were used.
>
> Petitioners have suggested that the Department segregate the current POI into multiple periods to account for the effect of the devaluation of the Korean won during the last portion of the POI. See petitioners' submission of 2 December 1998. Petitioners state that the Department has examined this question in a recent preliminary determination involving the same POI and Korea, namely, Emulsion Styrene-Butadiene Rubber from the Republic of Korea. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Emulsion Styrene-Butadiene Rubber from the Republic of Korea, 63 FR 59514 (4 November 1998). However, the Department used the same currency conversion methodology described above in that case, and for the preliminary determination, did not average margins based on multiple periods within the POI. In the one case cited by petitioners in support of averaging multiple periods, PVA from Taiwan, the Department used multiple periods when there was a significant change in pricing. However, in that case, the decline in pricing was due to a company-specific change in selling practices made at a particular point in the POI (i.e., the use of long term contracts versus purchase orders), rather than a devaluation of the local currency. See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from Taiwan, 61 FR 14064 (29 March 1996). The Department preliminarily determines that the modification of currency conversion reasonably accounts for the devaluation of the won, and that the use of multiple periods for averaging purposes is unwarranted.[105]

117. This last statement notwithstanding, in both cases the United States also recognized that, in addition to the effects on the exchange rates it used, the collapse of the won may also have affected the comparability of sales before and after the collapse. Although it did not take action on this issue in the preliminary determinations, the United States specifically advised all of the parties that it was considering the issue, and asked for comment. In both cases the United States included the following statement inviting comments on this issue:

> The Department makes this determination without the benefit of extensive case precedent dealing with this area of our currency conversion policy. The Department therefore welcomes comments from interested parties on all aspects of our analysis and the time period-specific exchange rates used. For the purposes of the final determination, the Department will continue to analyze the implications, if any, of the

[105] *SSSS Preliminary Determination*, 64 Fed. Reg at 145 (ROK Ex. 16).

> decline in the won during 1997 for price averaging and whether multiple averages are warranted.[106]

118. After the preliminary determinations, the United States gave all parties an opportunity to provide arguments regarding any issue they wished the United States to address in the final determinations. Parties also had the opportunity to reply to arguments raised by other parties.[107] The domestic interested parties commented that they believed that multiple averages were warranted. POSCO responded to these comments.

119. The United States also afforded all parties an opportunity for a hearing at which they could make an oral presentation of their arguments to Department officials in charge of making the final determination, and could respond orally to arguments raised by other parties.[108] Although the US domestic industry requested such a hearing in the SSPC investigation, POSCO declined to request a hearing to address the issues. The domestic industry subsequently withdrew its request and the hearing was cancelled.[109] In the SSSS case both parties requested a hearing, and one was held on 26 April 1999.[110]

120. The United States made its final determination in the SSPC case on 31 March 1999. In its final determination, the United States addressed the arguments made by POSCO and the domestic industry on a point-by-point basis.

121. The United States continued to agree with POSCO that it should use daily exchange rates throughout the period of devaluation as it had in the preliminary determination. However, the United States decided to adopt for the final determination the proposal on which it had asked for comments in the preliminary determination: the United States concluded that the severe devaluation of the won could have a distortive effect on the calculation of dumping margins, and thus that the United States should not consider sales made prior to the devaluation period to be comparable to sales made during that period.

122. In the public notice in the Federal Register announcing its position on the devaluation which was applied in calculating the final dumping margins, the United States stated:

> We have continued to use daily exchange rates in this case, for the reasons explained in the preliminary determination. However, we agree with petitioners that separate averaging periods should be used. Under section 777A(d)(1)(A) of the Act, the Department has wide latitude in calculating the average prices used to determine whether sales at less than fair value exist. More specifically, under 19 CFR 351.414(d)(3), the Department may use averaging periods of less than the POI when normal value, export price, or constructed export price varies significantly over the POI. In the instant case, NV (in dollars) in the last two months of the POI differs significantly from NV earlier in the POI due primarily to a significant change in the underlying dollar value of the won. In this case, the change is evidenced by the precipitous drop in the won's value that began in November 1997 and continued through the end of the POI, without a quick, significant rebound. In the span of two months, the won's value decreased by more than 40 per cent in relation to the dollar.

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[106] *SSPC Preliminary Determination*, 63 Fed. Reg. at 59539 (ROK Ex. 4) and *SSSS Preliminary Determination*, 64 Fed. Reg. at 145 (emphasis added) (ROK Ex. 16).

[107] The United States is required to provide this opportunity to all parties to anti-dumping investigations under 19 C.F.R. § 351.309 (ROK Ex. 2).

[108] Hearings are provided for under the Department's regulations at 19 C.F.R. § 351.310 (ROK Ex. 2).

[109] See *SSPC Final Determination* ("Case History") 64 Fed. Reg. at 15444 (ROK Ex. 11).

[110] See *SSSS Final Determination* ("Case History ") 64 Fed. Reg. at 30665 (ROK Ex. 24).

> Consequently, it is appropriate to use two averaging periods to avoid the possibility of a distortion in the dumping calculation. Moreover, we disagree with respondent's claim that the use of averaging periods is dependent upon a change in a respondent's selling practices. In the final determination of certain preserved mushrooms from Indonesia, the Department stated that "in addition to changes in selling practices, we believe that we should also consider other factors, such as prolonged large changes in exchange rates, in determining whether it is appropriate to use more than one averaging period." See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Indonesia, 63 FR 72268, 72272 (31 December 1998). Therefore, we have used two averaging periods for the final determination: January through October and November through December 1997.[111]

123. In reaching its final determination in the SSSS case, the United States reiterated its conclusion that, while it agreed with POSCO's position that the appropriate methodology for addressing precipitous and large depreciations in a foreign currency relative to the US dollar is to use daily rather than average exchange rates, it agreed with the domestic industry that comparisons of prices established prior to the devaluation prices established during the devaluation period could result in a distorted calculation. The United States explained:

> In the preliminary determination, the Department determined that the decline in the won at the end of 1997 was so precipitous and large that the dollar-won exchange rate cannot reasonably be viewed as having simply fluctuated during this time, i.e., as having experienced only a momentary drop in value. Therefore, the Department used daily rates exclusively for currency conversion purposes for HM sales matched to US sales occurring between 1 November and 31 December 1997, and the standard exchange rate model with a modified benchmark for sales occurring between 1 January 1999 and 28 February 1999. See Preliminary Determination, 64 FR at 145. As discussed in Comment 2, the Department continues to find that use of daily exchange rates and modified benchmarks are warranted during the periods noted above. In addition, as discussed in Comment 2 and Analysis Memo: POSCO, we have determined that the severe and precipitous drop in the value of the won from November 1997 through February 1998 necessitates the use of two averaging periods, under 19 CFR 351.414(d)(3).
>
> * * * * *
>
> We agree with petitioners. Given the economic situation in Korea during the POI, it is most appropriate to use daily and modified exchange rates in this case, for the reasons explained in the preliminary determination, and to employ two averaging periods in calculating the dumping margin. Under section 777A(d)(1)(A) of the Act, the Department has broad authority to use a number of methodologies in calculating the average prices used to determine whether sales at less than fair value exist. More specifically, under 19 C.F.R. 351.414(d)(3), the Department may use averaging periods of less than the POI when normal value, export price, or constructed export price varies significantly over the POI. In this investigation, in the last five months of the POI, NV (in dollars) differed significantly from NV earlier in the POI, due primarily to a significant change in the underlying dollar value of the won, evidenced by the precipitous drop in the won's value that began in November 1997 and continued through December 1997. In the span of two months, the won's value decreased by more than 40 per cent in relation to the dollar. Consequently, it is

[111] *SSPC Final Determination*, 64 Fed. Reg. at 15452 (ROK Ex. 11).

> appropriate to use two averaging periods to avoid the possibility of a distortion in the dumping calculation. Moreover, we disagree with respondent's claim that the use of averaging periods is dependent upon a change in a respondent's selling practices. In the final determination of Preserved Mushrooms, the Department stated that "in addition to changes in selling practices, we believe that we should also consider other factors, such as prolonged large changes in exchange rates, in determining whether it is appropriate to use more than one averaging period." See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Indonesia, 63 FR 72268, 72272 (31 December 1998). Therefore, for both POSCO and Inchon, we have used two averaging periods for the final determination: January through October 1997 and November 1997 through March 1998.[112]

124. In the preceding discussion the United States described the factual background concerning the Korean won during 1997 and 1998 which led to the conclusion with which Korea takes issue, i.e. that prices established prior to a currency devaluation of unprecedented magnitude should not be compared with prices established after such a devaluation. Following, the United States will demonstrate that the United States' action was fully consistent with both the language and purpose of the relevant provisions of the AD Agreement, Articles 2.4.1 and 2.4.2, and that Korea's arguments represent a misunderstanding of the United States' actions and the requirements of the AD Agreement. Finally, the United States will discuss how the procedures used in reaching this decision were consistent with Articles 6.1, 6.2, 6.9 and 12.2 of the AD Agreement, as well as Article X:3 of GATT 1994.

3. The Exchange Rate Policy Applied in This Case Is Consistent With Article 2.4.1 of The AD Agreement

(a) Article 2.4.1 Does Not Address Construction of Averages in Light of Sudden and Precipitous Currency Devaluations

125. Article 2.4.1 is the section of the AD Agreement which provides guidance to Members in selecting the exchange rates for use in antidumping investigations. Importantly, however, the issue addressed by Korea, although precipitated by a currency situation, actually relates to the United States' construction of averages under Article 2.4.2, rather than its selection of exchange rates under Article 2.4.1. In other words, Article 2.4.1 does not address the currency conversion problem faced by the United States in the investigations of *SSPC* and *SSSS*, and is not relevant to the issue raised by Korea.

126. Article 2.4.1 is structured in terms of a general rule, with several exceptions, *all of which relate to the selection of an exchange rate*. The general rule is that investigating authorities should convert currency using the exchange rate in effect on the date of sale. The provision makes exception for three situations in which a different exchange rate should be selected: forward exchange contracts, currency fluctuations, and sustained movements. Article 2.4.1 states:

> When the price comparison under this paragraph requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and, in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements during the period of investigation.

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[112] *SSSS Final Determination* , 64 Fed. Reg. at 30670 and 30675-76 (ROK Ex. 24).

127. Upon completion of the Uruguay Round, the United States adopted the currency conversion rules of Article 2.4.1 into the antidumping statute with little change. Thus 19 USC. § 1677b-1 provides:

> (a) In General -- In an antidumping proceeding under this title, the administering authority shall convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise, except that if it is established that a currency transaction on forward markets is directly linked to an export sale under consideration, exchange rate specified with respect to such foreign currency in the forward sale agreement shall be used to convert the foreign currency. Fluctuations in exchange rates shall be ignored.
>
> (b) Sustained Movement in Foreign Currency Value. -- In an investigation under subtitle B, if there is a sustained movement in the value of the foreign currency relative to the United States dollar, the administering authority shall allow exporters at least 60 days to adjust their export prices to reflect such sustained movement.

128. In presenting the amendments to the antidumping law to the legislature, the executive branch also presented the "*SAA*" describing the intent of the changes. Regarding the currency conversion provisions, the *SAA* states:

> Section 225 of the bill adds new section 773A to implement the requirements of the Agreement regarding currency conversions. Typically in antidumping proceedings, the prices or costs used to determine normal value are denominated in a foreign currency. To determine whether dumping exists, these prices or costs must be converted to US dollars. To a large extent, the Agreement tracks existing practice, the goal of which is to ensure that the process of currency conversion does not distort dumping margins. The Administration intends that Commerce will promulgate regulations implementing the requirements of section 773A. To the extent that the requirements of the Agreement apply only to investigations, as opposed to reviews, the regulations will reflect this distinction.
>
> Under new section 773A, the general rule will be to convert foreign currencies based on the dollar exchange rate in effect on the date of sale. Under current practice, Commerce utilizes a quarterly rate, unless the daily rate varies by more than five per cent from the rate in effect on the first day of the quarter. Some firms, including US firms, commonly engage in hedging on forward currency markets to minimize their exposure to exchange rate losses. Therefore, as under existing practice, where a company demonstrates that a sale of foreign currency on forward markets is directly linked to a particular export sale, Commerce will use the rate of exchange in the forward currency sale agreement. Group sales of foreign currency on forward markets will be allowed, provided that sufficient documentation to establish the link between the currency purchase and the particular export sale is provided.
>
> Section 773A also provides that Commerce will ignore fluctuations in exchange rates. In addition, in an investigation, Commerce will allow exporters at least sixty days in which to adjust their prices to reflect a sustained increase in the value of a foreign currency relative to the US dollar.[113]

129. In drafting its new regulations, the United States recognized that Article 2.4.1 and the new statutory provision, provided very little concrete guidance in selection of exchange rates. Indeed, the

[113] *SAA* at 841-42. (US Ex. 14).

language of Article 2.4.1 raises more questions than it answers. Thus, rather than adopt a regulation which might produce unexpected and unintended consequences, the United States announced a policy which it would apply to cases on an "experimental" basis. This policy was announced in policy bulletin number 96-1 entitled "Import Administration Exchange Rate Methodology."[114]

130. The fundamental principle of the United States' exchange rate policy is normally to use the daily exchange rate in effect on the date of sale for converting currencies, rather than an average rate. According to the policy bulletin, the United States concluded that the phrase "rate in effect on the date of sale" contained in Article 2.4.1 and the US statute should be interpreted to refer to a daily rate, rather than an average rate, for example a monthly or quarterly rate.[115] As noted previously, for South Korea the United States uses the daily exchange rate published by the Board of Governors of the US Federal Reserve System, as it does for many other countries.[116] The United States' published policy also reflects the three exceptions to the general requirement to use daily exchange rates which are established by Article 2.4.1 and adopted in the United States antidumping statute: 1) forward currency contracts; 2) fluctuations in exchange rates; and 3) sustained movements in exchange rates. However, as discussed below, the United States concluded that none of these exceptions is relevant to the circumstances surrounding the precipitous decline in the value of the Korean won in 1997.

131. With respect to the first exception, the United States' policy provides that it will use the rate of exchange in a forward exchange rate contract directly linked to the sale, rather than the daily exchange rate in effect on the relevant day. The United States has rarely been asked to apply this exception.[117] It has never been argued that this exception is relevant to the present case.

132. With respect to the second exception to the use of daily exchange rate, i.e. that the United States shall ignore fluctuations in such exchange rates, the main difficulty has been to define a "fluctuation." This is because a fluctuation can only be identified by comparison to some baseline. Under the United States' policy, the requirements of Article 2.4.1 and of the US statute with respect to this exception are accomplished as follows:

> The model classifies each daily rate as "normal" or "fluctuating" based on a "benchmark" rate. The benchmark is a moving average of the actual daily exchange rates for the eight weeks immediately prior to the date of the actual daily exchange rate to be classified. Whenever the actual daily rate varies from the benchmark rate by more than two-and-a-quarter per cent, the actual daily rate is classified as fluctuating. If within two-and-a-quarter per cent, the actual daily rate is classified as normal.

Actual daily rates classified as normal are the official exchange rate for that day. However, when an actual daily rate is classified as fluctuating, the benchmark rate is the official rate for that day.[118]

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[114] The policy bulletin was published in Federal Register under the title *Notice: Change in Policy Regarding Currency Conversion*, 61 Fed. Reg. 9434 (8 March 1996) (ROK Ex. 49).

[115] This interpretation is not challenged by Korea. Indeed, during the investigations POSCO argued that daily rates should be used throughout the devaluation period. However, the United States notes that there may be other reasonable interpretations of the phrase "rate in effect on the date of sale."

[116] The United States uses the Federal Reserve exchange rates for most countries for which such rates are available.

[117] See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India*, 63 Fed. Reg. 72246, 72252 (31 December 1998) (US Ex. 22) ("[A]ccording to the Departments' practice, in the final determination we have used the exchange rate specified in the forward sales agreement instead of the actual exchange rate on the date of sale in making all currency conversions.").

[118] *Notice: Change in Policy Regarding Currency Conversions*, 61 Fed. Reg. at 9435 (ROK Ex. 49).

133. As noted, the Korean won was highly stable during the first ten months of 1997, with very few fluctuations.[119] By contrast, the devaluation of the Korean won during November and December 1997, which rapidly dropped the actual daily rate more than two-and-a-quarter per cent below the average of the previous eight weeks, met the United States' definition of a "fluctuation," which, under Article 2.4.1, the United States should ignore.[120] The United States, however, agreed with the Korean producer POSCO that, although the United States' technical definition of a "fluctuation" had been met, i.e. daily rates more than two-and-a-quarter per cent below the average, the size and precipitous nature of the drop, as well as the lack of any significant rebound precluded the possibility that the won was merely "fluctuating.[121] Consequently, the United States concluded, in accord with POSCO, that this exception was simply not relevant.

134. The third exception to use of normal daily exchange rates, under Article 2.4.1 and the US statute, requires the United States in an investigation to give exporters 60 days to adjust their export prices to reflect "sustained movements" in exchange rates. The United States also agreed with POSCO, contrary to arguments by the domestic industry in the United States, that this exception was not relevant in the case of the devaluation of the Korean won.[122]

135. As demonstrated by the above discussion, none of the exceptions contained in Article 2.4.1, and implemented through the United States' exchange rate policy, apply in the situation presented by the investigations of SSPC and SSSS from Korea. More importantly, however, the above discussion demonstrates that all of the language of Article 2.4.1 deals with selection of exchange rates for converting prices in a foreign currency prior to comparing those prices with export prices. Article 2.4.1 does not deal with the comparison itself, including any averaging of prices. Rather, this topic is addressed under Article 2.4.2.

(b) The United States' Actions in Creating Two Averaging Periods Is in Accordance with the Purpose of Article 2.4.1

136. As discussed above, Article 2.4.1 deals with selection of exchange rates, rather than comparison of prices after currencies have been converted. However the purpose of Article 2.4.1 is to ensure that calculated margins of dumping are not simply a function of exchange rates; this purpose was furthered by the United States' action in avoiding comparison of pre-devaluation prices with prices established during the devaluation.[123]

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[119] See, graph of won/dollar exchange rate supplied by POSCO in its questionnaire response, (US Ex. 21).

[120] *Id.*

[121] Note that, had the United States agreed with the US domestic industry that the "fluctuation" exception to the use of daily rates applied in the present cases, the margins of dumping found would have been significantly higher. That is because the rolling average eight week benchmark rate was partially made up rates from before the drop in the value of the won, or from early in the drop. Thus, the benchmark rate was significantly higher than the daily rate on any given day. For example, the daily rate in effect on 23 December 1997 was 1960 won to the dollar, while the eight-week rolling average benchmark rate on that day was 1109 won to the dollar. See, (ROK Ex. 50) and (ROK Ex. 51). Consequently, had the benchmark rate been used, the value in dollars of home market sales denominated in won would have been significantly higher, and thus the margin of dumping found when comparing such sales to exports to the US, would have been significantly greater as well.

[122] The United States agrees with that portion of the ROK First Submission, at para. 4.50 - 4.53, and accompanying footnotes, to the extent it asserts that this provision of Article 2.4.1 should be interpreted to apply to appreciating currencies. However, as noted below, Korea is not really arguing that the United States selected the incorrect exchange rate under Article 2.4.1, but rather that it averaged improperly under Article 2.4.2.

[123] As observed previously, the *Vienna Convention*, Article 31, requires that a treaty be interpreted "in light of its object and purpose." However, the United States notes that, while recourse to a treaty's object and purpose is permissible, it may not override the clear meaning of the text. As the Appellate Body in the Japan

137. In its final determinations, the United States made two decisions in light of the devaluation. First, under Article 2.4.1, in accordance with arguments advanced by POSCO, the United States employed daily rates throughout the period of depreciating currency; in essence, it suspended its rule which would have identified the exchange rates during this period as fluctuations. Second, under Article 2.4.2, the United States determined that transactions prior to the depreciation period were not comparable to transactions during that period. In this way, the United States prevented the vagaries of exchange rate movement from completely disguising the fact that POSCO had engaged in substantial dumping throughout most of the period of investigation.[124]

138. The purpose behind Article 2.4.1 is to ensure that the calculation of dumping margins is not driven by currency movements. This purpose can be seen, for example, in the requirement of Article 2.4.1 that investigating authorities ignore fluctuations in exchange rates, to ensure that unpredictable spikes do not generate a dumping margin on a particular day, even though prices have not changed. Similarly, Article 2.4.1 requires investigating authorities to give exporters a period of time to adjust their prices in the face of sustained increases in the value home market currency to avoid creating a dumping margin solely due to currency movements.

139. The United States' action complained of by Korea in this case was not addressed by Article 2.4.1 because the action involved averaging under Article 2.4.2, rather than selection of an exchange rate under Article 2.4.1. Nevertheless, the United States' action was consistent with the purpose of Article 2.4.1. Had the United States compared post-devaluation prices with pre-devaluation prices, POSCO's substantial dumping margin would have been disguised solely due to exchange rate movement. By creating two averages, the United States ensured that exchange rate movements did not dominate the calculation of dumping margins, in accordance with the purpose of Article 2.4.1. Thus, the United States' action, although not governed by the language of Article 2.4.1, was fully consistent with the purpose of 2.4.1. By contrast, had the United States not created separate averages, as now urged by Korea, the resulting margin would largely have been a function of the devaluation of the won rather than a reflection of POSCO's pricing practices.[125]

(c) Korea's Arguments Regarding Article 2.4.1 are Without Merit

140. Korea argues that "departures from normal price comparisons to account for changes in exchange rates are permitted only when the currency of the exporting country was appreciating in relation to the currency of the importing country."[126] This statement takes a narrow exception to a rule set forth in Article 2.4.1 out of context, and uses it as a general rule prohibiting actions in unrelated parts of the AD Agreement, specifically Article 2.4.2.

141. Article 31 of the *Vienna Convention* requires that a treaty be interpreted in accordance with "the ordinary meaning to be given to the terms of the treaty in their context" (emphasis supplied). Read in context, the language to which Korea refers in Article 2.4.1 normally requires the use of daily exchange rates, but requires use of a different form of exchange rate when the currency of the exporting country is undergoing a sustained increase. Thus it addresses the exchange rate which must be used prior to the comparison. It has no bearing on how the comparison should be made, and does

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Taxes case recognized, a "treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation." *Japan Taxes*, at 12 n. 20.

[124] As discussed in more detail below, this action is actually governed by the averaging provision of Article 2.4.2 rather than by the exchange rate selection provision of Article 2.4.1.

[125] In the following section, the United States demonstrates by example that in a situation of rapidly devaluing currency, the same comparison of a price in the home market with the price of an export transaction could produce radically different margins depending on the timing of those transactions relative to one another.

[126] See, ROK First Submission, para. 4.49.

not prohibit an investigating authority from concluding that prices established prior to a fundamental shift in the value of the currency should not be compared with prices established after such a shift.[127]

142. In effect, Korea is arguing that the phrase "authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements during the period of investigation" contained in Article 2.4.1 establishes a limit on which transactions may be considered "comparable" within the meaning of the phrase "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" contained in Article 2.4.2. However, these two phrases appear in separate provisions of the AD Agreement, and have nothing to do with one another.

143. The fundamental reason Article 2.4.1 has so little bearing on the issue raised by Korea is that 2.4.1 provides guidance on the exchange rate which should be used. However, Korea is not complaining that the United States used the wrong exchange rate. Indeed, the United States used the daily exchange rates urged by POSCO itself. Rather, Korea is arguing about the United States' method of averaging. Such issues are addressed under Article 2.4.2, and not under Article 2.4.1.

144. In light of the above, the antidumping measures against SSPC and SSSS are consistent with Article 2.4.1 of the AD Agreement.

4. The Exchange Rate Policy Applied in This Case Is Consistent With Article 2.4.2 of The AD Agreement

145. As noted in the previous section, Article 2.4.1 does not specifically address large and precipitous declines in the value of a foreign currency. Article 2.4.2 similarly does not specifically address this subject. However, Article 2.4.2 does authorize Members to determine which transactions are " comparable," and to limit their comparisons to such transactions. With this authority, the United States determined that prices set prior to the period of such a drop in the home market currency were not comparable to prices established during that period, and thus that it should create separate averages for comparison purposes.

146. Article 2.4.2 addresses the bases which may be used for comparison of normal value with export price or constructed export price. It is not disputed that in this case, the United States used average-to-average comparisons. Such comparisons are governed by the following phrase of Article 2.4.2:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted-average normal value with a weighted average of prices of all comparable export transactions. . . .

147. This provision requires that margins of dumping be based upon a comparison of an average of normal value prices with an average of the prices for export transactions, but requires that the transactions included in these averages be comparable.[128] The reason for this limitation is clear:

[127] Although not directly relevant, Korea's argument does not explain why it has singled out the sustained increase provision as the only exception in Article 2.4.1. As discussed above, the language of Article 2.4.1 clearly contains three exceptions to the general rule.

[128] Article 2.4.2 also permits comparisons of individual transactions with individual transactions, or, in certain situations, of individual export transactions with an average of normal values. However, neither of these methodologies is relevant in the cases before the panel.

including merchandise in the averages to be compared which is not comparable could result in a dumping margin based upon factors which are not related to dumping.

148. For example, an investigating authority may conduct an investigation of a product which comes in high quality and low quality forms. If producers tend to sell more of the high quality merchandise in the home market, while exporting more of the low quality product, creating a single average normal value and a single average of prices for export transaction might result in a dumping margin solely because the exported merchandise is of lower quality and commands a lower price for that reason. While it may be possible to make an adjustment to the prices to approximate the effect of such a difference, the AD Agreement recognizes that it may be better not to make such a comparison in the first place.

149. The concept of comparability is expressed in the AD Agreement not only by the use of the word "comparable" in Article 2.4.2, but also by the fact that application of Article 2.4.2 is explicitly subject to the provisions of Article 2.4. As discussed elsewhere, Article 2.4 details that the comparison of normal value and export price is to be made "at the same level of trade. . . in respect of sales made at as nearly as possible the same time," and requires that due allowance be made, inter alia, for differences in physical characteristics."

150. The considerations of levels of trade, time and physical characteristics, *inter alia*, illustrate that Article 2.4 contemplates that comparisons normally must be made on a level-of-trade basis, a product-specific basis (to account for differences in physical characteristics) and a time-period basis. Thus, the mandate of Article 2.4 contemplates that there may be several to several thousand export prices and normal values which are compared within an investigation for a respondent company, depending on such factors as the variety of products, levels of trade, selling conditions involved, and the time periods chosen.

151. The significance of the concept that transactions included in the averages be "comparable," and thus that such averages should not encompass all transactions taking place during the period of investigation, can also be seen from the negotiating history of Article 2.4.2.[129] During the Uruguay Round negotiations, it was proposed that averages should encompass all transactions, with few exceptions.[130] Significantly, the only difference between the language of Article 2.4.2 contained in the Dunkel Draft, and the final version of Article 2.4.2 is the addition of the word "comparable."[131] It is a fundamental principle that an interpretation of a provision should not render a word a nullity.[132] This is particularly true where, as here, the only change negotiators made to a draft provision was to insert a single qualifying word. In such a situation it is plain that the word was carefully considered. Moreover, seen in light of the proposals that averages should encompass all transactions, an interpretation which might have been reflected had no modification of earlier drafts been made, the addition of the qualifier "comparable" can only have been intended to limit the transactions which were to be averaged together.

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[129] Under Article 32 of the *Vienna Convention*, where the meaning of a provision is not clear from the language of the provision itself, read in context, and in light of its object and purpose, then the "preparatory work of the treaty and the circumstances of its conclusion" may be considered to confirm the meaning.

[130] The GATT Uruguay Round: A Negotiating History (1986-1992): Antidumping, Stewart, T., Ed. (1993, Kluwer) at 157, (US Ex. 23).

[131] *Id.* at 159.

[132] As noted above, the "fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility." *Automotive Leather*, at para. 6.25. Further, in *Reformulated Gasoline*, the Appellate Body noted that "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to <u>all</u> the terms of the treaty" (emphasis supplied). *Reformulated Gasoline*, at 23.

152. In light of the requirement of Article 2.4.2 that averages be limited to "comparable" transactions, the United States, in every case, creates numerous averages to ensure that comparisons are not distorted by averaging of non-comparable transactions. As an example of the identification of comparable transactions, the United States created multiple averages in the present case to account for differences in physical characteristics among different types of the merchandise under investigation. Early in the case, the United States gathered, based upon suggestions from the parties,[133] a list of the most significant physical characteristics which should be used to identify individual models of the merchandise.[134] Each unique set of physical characteristics is considered a "model" of the merchandise. All sales of a model in the United States are averaged, and the resulting average is compared to an average of sales of the same model in the home market, or, if the identical model is not sold in the home market, with the most similar model which is sold in the home market. In this way, the United States ensures that averages of normal values are only compared to averages of comparable export transactions.

153. Contrary to the position Korea now advances before the panel, POSCO argued that the United States was not only permitted to, but should, create multiple averages. For example, during the SSPC investigation POSCO filed a submission with the United States fully endorsing the "hierarchy" of physical characteristics which the United States would use to create its various average normal values and export prices.[135] In the SSSS investigation POSCO affirmatively argued that certain physical distinctions not identified by the United States should be used in creating multiple averages for comparison purposes.[136] In both cases, POSCO argued in its legal brief to the United States that the United States should create separate averages for prime and secondary quality merchandise.[137] In other words, POSCO argued that the United States should not create a single weighted-average normal value and export price, but rather should create numerous such averages. This position is inconsistent with the argument advanced now by Korea that Article 2.4.2 prohibits creation of more than one average normal value and export price.[138]

154. Although in every case the United States creates multiple averages based on the "comparability" of the physical characteristics of the models of merchandise, the United States also identifies transactions as not comparable based upon factors other than the physical characteristics of the merchandise being compared. For example, in order to fulfill the requirement of Article 2.4 that the "comparison shall be made at the same level of trade," in all cases in which the United States identifies more than one level of trade, it creates average normal values and average export prices for sales at each level of trade.[139] In this way, the United States avoids having to make an adjustment for differences in levels of trade whenever possible. Further, when conducting an investigation of sales from a country suffering from high levels of inflation, the United States typically divides the averages by month to ensure that the effect of inflation on prices does not distort the comparison.[140]

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[133] See, e.g. Letter from POSCO to the Department in the SSSS Investigation, dated 27 July 1998, (US Ex. 24).

[134] The list of physical characteristics on which the United States would base its averages, and, in turn, its matches of normal value transactions with export transactions was set forth in the questionnaire issued to POSCO. See, (US Ex. 1), and (US Ex. 2).

[135] Letter from POSCO to the Department in the SSPC Investigation, dated 21 May 1998, (US Ex. 25).

[136] Letter from POSCO to the Department in the SSSS Investigation, dated 27 July 1998, (US Ex. 24).

[137] (ROK Ex. 7), at 7-8; (ROK Ex. 20), at 6-7.

[138] See ROK First Submission, at para 4.48 ("The US practice of comparing "multiple averages" to "multiple averages" finds no support in Article 2.4.2.").

[139] In both *SSPC* and *SSSS* , the Department stated that "to the extent practicable, we determine NV [i.e. "normal value"] based on sales in the comparison market at the same level of trade ("LOT") as the EP [i.e. "export price"] or constructed export price . . . transaction." *SSPC Preliminary Determination*, 63 Fed. Reg. at 59537 (ROK Ex. 4); *SSSS Preliminary Determination*, 64 Fed. Reg. at 142 (ROK Ex. 16).

[140] See, e.g. *Notice of Preliminary Results of Antidumping Duty Administrative Review: Certain Pasta from Turkey*, 64 Fed. Reg. 43157, 43158 (9 August 1999) (US Ex. 26) (in light of annual inflation of over 60 per

155. Although the United States had not previously been faced with the situation of a sudden plummet in the value of a foreign currency of the magnitude presented by the facts of SSPC and SSSS, the United States reasonably determined that this characteristic had as much of an effect on comparability of transactions as did physical characteristics, levels of trade or high inflation. This is because comparison of a given amount of dollars received for an export transaction with a given amount of won on a normal value transaction produces a dramatically different margin of dumping depending on whether the sales occurred before or during the devaluation period.

156. Because of this exaggerated effect on the margin in this case of the timing of the sales used for comparison, the United States reasonably concluded that the timing of the sales, before or during the devaluation period, should be a factor used to determine whether sales are comparable for purposes of constructing averages within the meaning of Article 2.4.2, and for purposes of making a fair comparison under Article 2.4.

157. Korea's contention that the United States acted in a manner not in accordance with Article 2.4.2 is without merit.[141] Korea argues that a simple textual analysis reveals that Article 2.4.2 is written in the singular. This, according to Korea, requires the conclusion that all sales in the home market must be averaged together, and that all sales in the US market must be averaged together. However, the fact that Article 2.4.2 uses singular terms only indicates that, once an investigating authority has identified which transactions are "comparable," it may only create a single average from those transactions. It does not require creation of a single average of all transactions.

158. In light of the above, the antidumping measures against SSPC and SSSS are consistent with Article 1 and Article 2.4.2 of the AD Agreement.[142]

5. The Procedures Used in Reaching The Decision to Apply Multiple Averages Were Consistent With Articles 6.1, 6.2, 6.9, And 12.2 of The AD Agreement

159. Korea further argues that the United States acted in a manner inconsistent with the procedural requirements of GATT 1994 and the AD Agreement. Specifically, Korea argues that the United States, in reaching its determination to create separate averages for sales made prior to and

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cent during the period of review, the Department limited its comparisons to sales made in the same month). Note that in the preliminary determination in the *SSSS* case, the domestic interested parties alleged that the inflation rate in Korea during three months of the period of investigation warranted use of these special inflation procedures. However, the United States responded that it looks for an *annual* inflation of over 25 per cent for purposes of determining whether the special procedures for highly inflationary economies should be applied. The United States noted that the actual inflation in Korea for the period of investigation was only 17.06 per cent. *SSSS Preliminary Determination*, 64 Fed. Reg. at 139 (ROK Ex. 16).

[141] ROK First Submission, at para. 4.45 - 4.48

[142] Finally, in several places Korea mentions the issue of "zeroing," that is, measurement of dumping according to the amount by which subject merchandise is sold at less than fair value under Article 2.1, without offsetting that amount by the amount by which other models of subject merchandise may be sold at more than fair value. ROK First Submission, at para. 3.46 and 4.43. However, the issue of zeroing is not directly relevant to creation of separate averages for prices established before and during the depreciation of the won. In other words, the panel can address the issue of whether investigating authorities may calculate more than one average normal value and export price without addressing the entirely separate issue of whether, after such averages are constructed, and after comparisons are made, investigating authorities are required to offset dumping found under such comparisons with "negative dumping," i.e. sales at greater than normal value. According to the Appellate Body's report in *Wool Shirts* the normal practice of WTO and GATT panels has been to "address[ ] only those issues that such panels considered necessary for the resolution of the matter between the parties, and [to] decline[ ] to decide other issues." Thus, panels "have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter." *Wool Shirts*, at 19 (emphasis in original).

during the devaluation period was not in accordance with the requirements of Articles 6.1, 6.1, 6.9 and 12.2 of the AD Agreement. According to Korea, taken together these provisions "establish a broad requirement that the investigating authorities interpret the relevant laws in a reasonable and consistent manner – and that they provide private parties of an explanation of their proposed interpretation of the relevant laws in a manner that will allow the private parties a "full" and "ample opportunity" to defend their interests.

160. The United States agrees that the AD Agreement requires investigating authorities to interpret the Agreement in a reasonable manner. Indeed, this understanding is at the heart of Article 17.6(ii).[143]

161. Further, the United States agrees that under Articles 6.1, 6.2 and 6.9 parties should be afforded a full and ample opportunity to defend their interests. Access to all information before the investigating authority, issuance of a preliminary determination including all matters covered in Article 12.2.1,[144] and establishment of a period for argument provides such an opportunity. As noted above, the United States provided POSCO with access to its complete factual record, issued a detailed preliminary determination, and provided an opportunity to present arguments and to request a hearing. POSCO, in fact, availed itself of such opportunities.

162. Korea argues that because the United States did not create separate averages in the preliminary determination, POSCO did not have a full and ample opportunity to defend its interests with respect to this issue. Korea neglects to mention, however, that in its preliminary determination, although the United States did not create separate averages for sales prior to and during the devaluation period, it specifically notified all parties that it was considering adopting such a policy for the final determination, and requested parties comment on this issue.[145] Articles 6.1, 6.2, and 6.9 require investigating authorities to provide an opportunity for a party to defend its interests. In this case, the United States not only provided an opportunity for POSCO to comment on this issue, it went

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[143] Although the United States agrees that a panel should determine, in situations in which the AD Agreement permits more than one possible interpretation, whether the investigating authority has offered a reasonable interpretation, the United States disagrees with the suggestion in Korea's submission that the panel should determine whether a Member has interpreted all "relevant laws" in a reasonable manner. This statement suggests that the panel could engage in the exercise of determining, notwithstanding consistency with the AD Agreement, whether the actions of a member represented reasonable interpretations of that member's national legislation. Such an exercise is decidedly not the province of a panel formed under Article 17 of the Agreement and the Dispute Settlement Understanding. Indeed the terms of reference of this panel relate to consistency with the AD Agreement, and not to consistency with national legislation. If Korea wanted review of the consistency of the United States' actions with the domestic laws of the United States, POSCO was free to pursue judicial remedies before the Federal Courts of the United States. As noted elsewhere, POSCO elected not to pursue such remedies.

[144] Article 12.2.1 requires preliminary determinations to include: "(i) the names of the suppliers, or when this is impracticable, the supplying countries involved; (ii) a description of the product which is sufficient for customs purposes; (iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2; (iv) considerations relevant to the injury determination as set out in Article 3; [and] (v) the main reasons leading to the determination."

[145] As noted previously, in both preliminary determinations, the United States included the following statement:

> The Department makes this determination without the benefit of extensive case precedent dealing with this area of our currency conversion policy. The Department therefore welcomes comments from interested parties on all aspects of our analysis and the time period-specific exchange rates used. For the purposes of the final determination, the Department will continue to analyze the implications, if any, of the decline in the won during 1997 for price averaging and whether multiple averages are warranted. *SSPC Preliminary Determination*, 63 Fed. Reg. at 59539 (ROK Ex. 4); *SSSS Preliminary Determination*, 64 Fed. Reg. at 145 (ROK Ex. 16).

well beyond its obligations and provided an explicit invitation to do so. Therefore, the United States acted in accordance with Article 6.1, 6.2 and 6.9 in this regard.

163. Korea also argues that the United States failed to address the determination in *Preserved Mushrooms from Indonesia*[146] in which, according to Korea, the United States "rejected the petitioners' request for multiple averaging, and maintained the established practice of declining to deviate from its standard methodology because of a currency devaluation."[147] However, Korea again neglects to mention that in *Preserved Mushrooms* the United States did not find that creation of multiple averages in light of a fall in the value of the currency was improper. Rather, the United States found that creation of multiple averaging periods, under the specific facts of that case, had no effect on the overall margin of dumping. In light of that fact, the United States declined to address the issue of whether creation of multiple averages was proper or not.[148] However, in a foreshadowing of SSPC and SSSS, the United States warned that large changes in exchange rates might result in the use of multiple averaging periods. The determination in that case reads, in relevant part:

> Whether the Department should use shorter averaging periods where there is a significant decline in the value of the foreign currency over the POI is a complex issue. In such cases, we are concerned that using a single average NV for the POI could mask significant dumping during the period prior to the devaluation. Consequently, it may be necessary to use two or more averaging periods to avoid a distortion in the dumping analysis. However, we note that using two averaging periods in this case, as proposed by the petitioners, would have virtually no effect and therefore this issue is without consequence. Thus, we have declined to alter our methodology in this case. We will continue to examine in future cases whether it is appropriate to use two or more averaging periods, or some other method, to avoid distortion in the dumping analysis. We note that we have given further consideration to the reasons stated in the preliminary determination for using one averaging period. Although we continue to find that there are distinctions between PVA from Taiwan and this case, we believe that consideration of those distinctions is not sufficient. In addition to changes in selling practices, we believe that we should also consider other factors, such as prolonged large changes in exchange rates, in determining whether it is appropriate to use more than one averaging period.[149]

164. Further, even assuming *arguendo* that *Preserved Mushrooms* did address the issue of whether multiple averages should be created in light of a falling currency, such a decision hardly would represent an "established policy." First, the *Preserved Mushrooms* case would represent only a single decision, and admittedly a case of first impression, and thus hardly constitutes an established "practice." Second, the issue of whether the fall of a currency's value warrants use of multiple averages turns on the facts surrounding that fall: how significant was the drop, and how quickly did it occur. Thus any conclusion in *Preserved Mushrooms* about whether a decline in the value of the Indonesian Rupiah of a certain magnitude over a certain period warrants separate averages does not necessarily determine whether a decline in the value of the Korean won of a different magnitude and over a different period warrants separate averages.[150]

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[146] Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Indonesia, 63 Fed. Reg. 72268, 72272 (31 December 1998) (Preserved Mushrooms) (ROK Ex. 40).

[147] ROK First Submission, at para. 3.44.

[148] Note that this decision by the United States is similar to the policy discussed elsewhere that adjudicating bodies should not address issues not necessary for resolution of the dispute before them.

[149] *Preserved Mushrooms*, 63 Fed. Reg. at 72272 (emphasis supplied) (ROK Ex. 40).

[150] Korea repeatedly asserts that the similarities between the decline of the Indonesian rupiah addressed in *Preserved Mushrooms* and the devaluation of the Korean won demanded the same treatment. ROK First

165. In any event, the benefits of consistency do not always outweigh the need of investigating authorities to allow their policies to evolve to suit new factual scenarios. Consistency with prior cases is a laudable goal, to the extent the actions taken in such cases were themselves consistent with the AD Agreement, in that it enhances predictability and transparency. Moreover, consistency with prior cases reinforces the conclusion that publication of a notice in accordance with Article 12.2.1 has given parties a full and ample opportunity to defend their interests. However, investigating authorities may change their policies, to the extent the new policies are consistent with the AD Agreement. Given this authority, parties who wish a policy applied in a prior case to be either adopted or abandoned in the instant case, should be afforded an opportunity to present such arguments. However, the obligation of members to provide a full and ample opportunity for parties to defend their interests does not equate to a prohibition on changes in policy.

166. Korea cites Article 6.9 for the proposition that any decision to change policy between the preliminary and final determination constitutes an "essential fact" which must be disclosed to parties prior to issuance of the final determination. This position would amount to a requirement that, if the investigating authority decides to change any aspect of the preliminary determination, it must issue a new preliminary determination, and seek new legal arguments. This process would continue until all aspects of the preliminary determination would remain unchanged for the final determination, at which point the investigating authority could issue the final determination.

167. The AD Agreement contains no support for this proposed procedure; indeed Articles 7.1 and 12.2 only contemplate a single preliminary determination. Moreover, the requirements contained in Article 6 that parties be given a full and ample opportunity to defend their interests implies that, if the investigating authority is persuaded by such arguments, it will change its decision in the final determination. Finally, a decision to change policy by the investigating authority is not a "*fact under consideration* which form[s] the basis for the decision" within the meaning of Article 6.9. Rather, such a change in policy *is* the decision.[151]

168. In light of the above considerations, the panel should conclude that the United States' decision that transactions prior to the period of devaluation and transactions during that period were not comparable within the meaning of Article 2.4.2, and the resulting use of separate averages for those transactions, was based upon properly established and objectively evaluated facts and represented a permissible interpretation of the AD Agreement.

Submission, at para. 3.45 and 4.56 - 4.58. However, while the 50 per cent devaluation of the won occurred over a two month period, the 60 per cent devaluation of the rupiah occurred over a seven month period. See, *Preserved Mushrooms*, at 72272 (noting a 60 per cent decrease in the value of the rupiah between July and December 1997), (ROK Ex. 40). Although the United States has not been required to address the devaluation of the rupiah, it has stated that the " precipitousness" of the devaluation is a relevant consideration. Thus, the situations may not be as similar as asserted by Korea.

[151] Korea also argues that, while "dumping [was] based solely on pre-devaluation sales," injury was based primarily on the "Asian economic crisis that accompanied the devaluation of the Korean won." ROK First Submission at para. 4.61 - 4.63. This argument, however, has no bearing on the question of whether the United States properly constructed averages for comparison purposes under Article 2.4.2, or even whether the United States made a fair comparison under Article 2.4. Even if Korea's argument were relevant to the issue of the consistency of the measured with Article 3 of the AD Agreement, Korea did not raise a claim under Article 3 in its request for panel review. Consequently, this issue is outside the panel's terms of reference, and must be disregarded.

F. THE UNITED STATES' TREATMENT OF HOME MARKET SALES TO LOCAL CUSTOMERS WAS CONSISTENT WITH ARTICLES 2.4, 6.1, 6.2, 6.9 AND 12.2

1. Statement of Relevant Facts

169. Pursuant to its obligations under the Uruguay Round Agreements, and specifically Article 2.4 of the Anti-Dumping Agreement, the United States enacted into law a specific provision on currency conversion, as discussed in the preceding section.[152] Consistent with Article 2.4.1 of the Agreement, the United States converts foreign currencies into US dollars on the date of sale for purposes of its anti-dumping analysis. The United States' well-established practice is to accept the currency of the transaction (*i.e.*, to use the currency in which the sales price is earned or incurred).[153]

170. The sales at issue here are sales between POSCO and a customer in Korea, which POSCO reported as home market sales. POSCO reported the won amount of the sale[154] and stated that the sales were paid in won. The won amount on the invoice was recorded in POSCO's accounting records.[155] Later in the proceeding, POSCO volunteered dollar-denominated amounts for these sales and argued that these domestic sales should be treated as transactions in dollars.[156]

171. In its preliminary determination in the SSPC case, the United States had excluded these home market sales from its calculation of normal value based upon its mis-impression that the sales were not sold *for consumption* in the home market and therefore did not qualify as home market sales.[157] In case briefs before the Department, POSCO pointed out that the United States erred in its conclusion and that, in fact, the merchandise was consumed in the home market by POSCO's customers.[158]

172. In its final determinations, the United States accepted POSCO's argument that the sales were in fact for consumption in the home market and therefore included the sales in its calculation of

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[152] 19 USC. 1677b-1 (1994). (ROK Exh.1). *See also Notice: Change in Policy Regarding Currency Conversions*, 61 Fed. Reg. 9434 (8 March 1996). (ROK Exh.49).

[153] *See, e.g.*, 3 August 1998 Questionnaire in SSSS, at B-20, (US Ex. 2). *See also Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses From Colombia*, 60 Fed. Reg. 6980, 7006 (6 February 1995) (ROK Ex. 52) ("It is the Department's practice to accept charges in the currency in which the charges are made.") ("*Roses from Colombia*"). In rare instances, the Department has used something other than the currency of the transaction. See, e.g. *Roses from Colombia*, discussed further below. In *Final Determination of Sales At Less Than Fair Value: Silicon Metal From Argentina*, 56 Fed. Reg. 37891, 37896 (9 August 1991) (ROK Ex. 53), also addressed by Korea, the Department used a dollar amount; however, this determination was based upon its finding at verification that "the Argentine economy is indeed dollarized."

[154] SSSS 23 September 1998 Section B Response, at B-22, (US Ex. 27); *see also* SSPC Section B Response, at B-22, (US Ex. 21). POSCO stated that it has "reported the actual invoiced price per metric ton in Korean won" and further reported that "[a]ll sales have been recorded in Korean Won in the database."

[155] See SSPC Final Determination, 64 Fed. Reg. at 15456. (ROK Ex. 11). The won amount is listed on the tax invoice issued to the customer. The won amount is also listed on the invoice (known as the shipping invoice or shipping list) for channel 2 sales. See SSSS Sales Verification Report, Exhibit 17, (US Ex. 28); see also SSPC Sales Verification Report, Exhibit 6, and Exhibit 23, (US Ex. 29).

[156] SSSS 23 November 1998 Supplemental Sales Response, at 19, (ROK Ex. 45); see also POSCO's SSPC Case Brief, at 4. (ROK Ex. 7).

[157] *SSPC Preliminary Determination*, 63 Fed. Reg. at 59536 (4 November 1998). (ROK Ex. 4).

[158] POSCO's SSPC 26 January 1999, Case Brief, at 4. (ROK Ex. 7); *see also* POSCO's SSSS Case Brief, at 3-5 (ROK Ex. 20). In the preliminary determination in SSSS, the Department included the sales in its calculation of normal value. The Department, however, mistakenly converted the dollar-denominated amount into won for the preliminary determination, but corrected the error for the final determination, using instead the won amount reported by POSCO. *See Preliminary Analysis Memorandum for SSSS*, at 9. (ROK Ex.17).

normal value.[159] The United States also concluded, based upon the facts discussed above, that these home market sales were in Korean won, not US dollars.[160]

173. Having determined that these home market sales were made in Korean won, the United States next considered whether the situation that led to the exception in *Roses From Colombia* was present in these cases, as POSCO had claimed. In both SSSS and SSPC, the United States cited "a disparity between the exchange rates reflected in POSCO's accounting records and those [rates] used by the Department" as the primary basis for finding that the exception did not apply.[161]

174. Because there was no need to deviate from the standard methodology for determining normal value, the United States used the currency in which the transaction occurred, i.e. Korean won, and made a single conversion from won into dollars in its determination of normal value.[162]

2. The United States Converted Won-Denominated Sales By Using Exchange Rates Established Under a Methodology Consistent With Article 2.4

175. The principal issue in this section is whether Article 2.4.1 mandates that the United States accept POSCO's exchange rates in lieu of exchange rates determined under the rules of Article 2.4.1. Korea believes that Article 2.4.1 obligates an investigating authority to avoid a currency conversion where a "reasonable alternative" is available.[163] However, Article 2.4.1, when interpreted in accordance with the fundamental rules of treaty interpretation, contains no such requirement.[164]

176. Article 2.4.1 sets out rules governing the use of exchange rates. It does not in any way address the issue of how to determine the currency in which a sale is transacted. Article 2.4.1 states:

> When the comparison under paragraph 4 [of export price and normal value] requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets

[159] *SSPC Final Determination*, 64 Fed. Reg. at 15456. (ROK Ex. 11).

[160] *Id.*; see also *SSSS Final Determination*, 64 Fed. Reg. at 30678. (ROK Ex. 24).

[161] *Id.* The factual data on exchange rates supports the United States' conclusions that the exchange rates varied. For example, in the month of November 1997, which is an "overlap" month (*i.e.*, a month included in both investigations) the exchange rates are as follows:

Date of Sale	Federal Reserve Rates	Rates POSCO Used	Per cent Difference
{			
			}

Although Korea is correct that the Department mistakenly used adjusted exchange rates in the *SSPC* case, correction of the error does not alter the conclusion that POSCO's rates did not mirror the official rates, as demonstrated by the table above. The table reflects sale dates within the periods of investigation of both *SSSS* and *SSPC*. For a listing of such exchange rates, see, e.g ., SSPC Sales Verification Report, Exh. 6 (US Ex. 29). See also, New York Federal Reserve Daily Exchange Rates (ROK Ex. 50), and Korean Exchange Bank Exchange Rates, (ROK Ex. 44).

[162] *SSSS Final Determination*, 64 Fed. Reg. at 30678; see also *SSPC Final Determination*, 64 Fed. Reg. at 15456.

[163] ROK First Submission, at para. 4.66-4.67.

[164] As discussed above, Article 31 of the *Vienna Convention* provides that the words of a treaty must form the starting point for the process of interpretation. In this regard, words must be interpreted according to their "ordinary meaning" taking into account their "context" (*i.e.*, other provisions of the treaty) and the "object and purpose" of the agreement.

> is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

177. When read in context and given its ordinary meaning, the phrase "[w]hen the comparison under paragraph 4 requires a conversion of currencies" establishes the condition under which the rules that follow will apply. Article 2.4.1 *presupposes* that the condition exists; it does not define when the condition exists. Therefore, Article 2.4.1 cannot be read to require that currency conversions be avoided in any particular circumstances, particularly where the transaction occurs in a foreign currency.

178. Nevertheless, Korea argues, in effect, that the United States acted inconsistently with Article 2.4.1 when it converted these won-sales into dollars using exchange rates determined under the requirements of Article 2.4.1 because POSCO had already made the conversions. However, the conversion formula used by POSCO does not satisfy the rules set forth in Article 2.4.1. For example, POSCO's formula does not account for fluctuations. In effect, therefore, Korea asks the panel to read into Article 2.4.1 an obligation to use a conversion methodology that is inconsistent with the rules otherwise set out in that provision. Such a reading has no basis in the customary rules of treaty interpretation.

179. As discussed above, the "object and purpose" of Article 2.4.1 is to provide explicit rules for currency conversions. Those rules require the use of (1) the exchange rate on the date of sale, provided that rate does not constitute a "fluctuation;" (2) the exchange rate of a forward contract directly linked to the sale; or (3) a special exchange rate in the event of a sustained movement, as discussed in the preceding section. The United States has established an exchange rate methodology that selects an exchange rate consistent with the requirements of Article 2.4. Using that exchange rate methodology, the United States converted the won price for POSCO's local sales into dollars to establish normal value. Therefore, its methodology was consistent with the Agreement.

3. The United States' Establishment of the Facts Was Proper, and Its Evaluation Unbiased and Objective

180. Korea attempts to have the Panel retry the Department's factual determination that the currency of the transactions were Korean won, not US dollars. In the alternative, Korea seeks to have the Panel find it "unfair" to convert the won amount to dollars because the currency conversion causes a "distortion." These arguments are without merit.

181. First, panel review is not a substitute for proceedings conducted by national investigating authorities.[165] Numerous panels have recognized that the role of panels is not to conduct a *de novo* review of factual issues.[166] As set forth in Article 17.6(i), the panel's review of findings of fact is limited to determining whether the establishment of the facts was proper, and whether the evaluation of the facts was unbiased and objective.

182. The United States' determination that these sales were transacted in won is supported by a proper assessment of the facts. As discussed above, POSCO reported these transactions as home market sales and stated that the sales were paid in won. The reported won amounts were reflected on

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[165] *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, WT/DS24/R, Report of the Panel, as modified by the Appellate Body, adopted 25 February 1997, para. 7.12.

[166] *See, e.g., Id., citing Korea Resins*, at para. 227; and *Softwood Lumber*, at para. 335. See also, *Plate from Sweden*, at para. 284 and 387 and the panel report in *Argentina Footwear* , at para. 8.117.

POSCO's invoices and records. Although the invoices also reflected dollar amounts, when viewed as a whole, the facts provide a reasonable basis for the United States' conclusion that these were won transactions.

183. Moreover, there is no "unfairness" in converting sales in foreign currencies into US dollars in the manner provided for under Article 2.4.1. Contrary to Korea's claims, the United States made no "double-conversion" of currencies in these investigations. In each case, POSCO reported the invoiced won amount for each transaction. As a factual matter, the United States made one currency conversion. The United States simply converted the won amount reported by POSCO in its response into dollars consistent with the methodology established under Article 2.4.1 of the Agreement.

184. Korea argues that use of the dollar amount is necessary to avoid distortions caused by currency conversions. The premise underlying that argument appears to be that the parties have locked in a dollar price, and therefore, any differences due to currency conversion constitute a "distortion" which is eliminated if no currency conversion takes place. However, this argument is simply another way of saying that the appropriate conversion formula is the one established by POSCO, rather than the method established by the United States consistent with Article 2.4.1. As we have demonstrated above, this argument is without foundation.

4. The Procedures Used In Reaching Its Decision To Apply The Currency of the Transaction Are Consistent With the Requirements of Article 6.1, 6.2, 6.9, and 12.2 of the Agreement and Article X:3 of GATT 1994

185. Korea further argues that the United States acted in a manner inconsistent with the minimum standards for transparency and procedural fairness under Article X:3(a) which is amplified by the procedural requirements of Article 6.1, 6.2, 6.9 and 12.2. Taken together, Korea argues, these provisions establish a broad requirement that investigating authorities interpret the relevant laws in a reasonable and consistent manner, and provide parties with an explanation that will allow for a full and ample opportunity to defend their interests.

186. As discussed above, the United States agrees that the Anti-dumping Agreement requires investigating authorities to interpret the agreement in a reasonable manner. Indeed, this understanding is at the heart of Article 17.6(ii).

187. Further, the United States agrees that under Articles 6.1, 6.2, and 6.9 parties should be afforded a full and ample opportunity to defend their interests. As noted above, issuance of a preliminary determination including all matters covered in Article 12.2.1, followed by a period for written and oral argument, provides ample opportunity for the parties to defend their interests. In both proceedings before the Department, POSCO availed itself of these opportunities. In addition, as discussed above, throughout US anti-dumping investigations the parties are afforded timely access to all information provided to or obtained by the Department, including confidential information made available under administrative protective order, all comments and legal arguments presented by the parties and the Department's internal memoranda.

188. Korea argues that the United States' decision to convert the won amount into dollars was an unprecedented departure from established policy of accepting the charges in the currency in which the charges are made.[167] Korea concludes, therefore, that the United States acted inconsistently with Article X:3 of GATT 1994 by failing to follow its established methodology and by providing

[167] ROK First Submission, at para. 4.72.

incorrect and incoherent justifications.[168] Moreover, Korea claims that the United States violated Article 12.2 by failing to provide an adequate statement of reasons as required by that Article .

189. Korea specifically alleges that there is no distinction between the facts in these cases and those of *Roses from Colombia*; that the rates from the Korean Exchange Bank were actual market rates; and that the actual differences between the Federal Reserve rates and the Korean Exchange Bank rates were, in fact, quite small.[169] Finally, Korea claims that use of the Federal Reserve exchange rate "unreasonably penalized" POSCO, and asserts that the United States failed to explain why its rates should be considered more accurate than the rates used by POSCO.

190. The fundamental issue for the Panel in these cases is not a question of which source for exchange rates is more accurate. Rather, it is a question of whether the exchange rates used by the United States in these cases satisfy the requirements of Article 2.4.1. As demonstrated above, the exchange rates applied by the United States in the instant investigations were specifically selected in accordance with the requirements of Article 2.4.1.

191. Moreover, as discussed above, consistency with domestic law is not for the panel to determine. Nevertheless, the United States' decision in these cases was entirely consistent with its established practice. In arguing to the contrary, Korea relies upon *Roses from Colombia*. However, that case pre-dates the Uruguay Round Agreements Act of the United States in which the new Article 2.4.1 was first implemented.[170] Accordingly, none of the requirements of Article 2.4.1 were considered in the context of that case.

192. In addition, *Roses* represented an exception to the United States' practice, not the rule. In the proceedings at issue, the United States fully explained and properly distinguished the instant cases from its determination in *Roses from Colombia*. The United States reasoned that, unlike *Roses from Colombia*, where "the exchange rates reflected in the dollar-to-peso conversion coincided with the exchange rates used by the Department," in this case "there is a disparity between the exchange rates reflected in POSCO's accounting records and those used by the Department."[171] The evidence concerning exchange rates supports that determination. Contrary to Korea's claim, a comparison of the exchange rates demonstrates that during the month of November 1997, the rates varied by as much as **{ }** per cent. Thus, assuming *arguendo* that *Roses from Colombia* is relevant, the facts of the present cases differ significantly. The evidence in these cases fully supports the United States' determination.

193. Korea's argument that companies are "penalized" because the exchange rates are not the rates used in Korea and are not used in the company's accounting system also misses the mark. No company is "penalized" when an investigating authority (a) sets forth rules that are designed to ensure that the exchange rates used in its dumping analysis are consistent with the Agreement, and (b) adheres to those rules in the course of its proceedings. The United States' exchange rate methodology is transparent. The United States has publicly announced, for purposes of anti-dumping analysis, that it will use its official exchange rates for currency conversions. The methodology used by the United States to select the exchange rates for its dumping analysis have also been published. Indeed, the United States has taken several steps to "ensure that all exporters, when they set their prices and whether under order or not, can know with certainty the daily exchange rate the Department will use in a dumping analysis."[172] For example, companies know that the United States relies upon the

[168] As discussed previously, it is the position of the United States that Korea has mis-interpreted the scope of Article X:3 of GATT 1994.

[169] ROK First Submission, at para. 4.74.

[170] Similarly, the other case Korea also relies upon, *Silicon Metal from Argentina*, also pre-dates the Uruguay Round Agreements Act of the United States. 56 Fed. Reg. 37891 (9 August 1991). (ROK Ex. 53).

[171] *SSSS Final Determination*, 64 Fed. Reg. at 30678. (ROK Ex. 24).

[172] Notice: Change in Policy Regarding Currency Conversions, 61 Fed. Reg. at 9435. (ROK Ex. 49).

Federal Reserve rates,[173] and that fluctuations in the exchange rate, in accordance with Article 2.4.1, "shall be ignored" (i.e., that the average exchange rate for the last 40 days will be applicable). To ensure that companies can ascertain the applicable exchange rate, the United States has taken the unusual step of publishing on the Internet the computer code to allow parties to reproduce the United States' calculations and thus "monitor exchange rates.[174]

194. While there are some natural and inherent constraints to ascertaining the exchange rate for the day on which a transaction occurs, the rules adopted by the United States are highly transparent ones. These rules, and the monitoring tools provided by the United States, enable companies to obtain the applicable exchange rate with a high degree of precision and certainty. Companies can, with the knowledge of the United States' rules, reasonably determine the daily exchange rate. These rules are as transparent as they can be. Thus, the suggestion by Korea that the United States violated the transparency requirements of the Agreement is without merit.

G. THE PANEL SUGGESTION SOUGHT BY KOREA IS INCONSISTENT WITH ESTABLISHED PANEL PRACTICE AND THE DSU

195. In its first submission, Korea requests the Panel suggest that the United States "revoke the anti-dumping duty orders concerning SSPC and SSSS from Korea.".[175] In so doing, Korea seeks to turn the Panel's discretionary mechanism of suggesting ways that the Member could implement its recommendations under Article 19.1 of the DSU into a device for obtaining a specific remedy that is inconsistent with established GATT/WTO practice and the DSU. Therefore, should the Panel agree with Korea on the merits, the Panel nonetheless should reject Korea's request, and instead, make a general recommendation and any suggestions for implementation, consistent with the DSU and established GATT/WTO practice.

196. Furthermore, Korea's request that the Panel suggest revocation far exceeds what would be necessary to bring these measures into conformity with the Agreement. There is simply no basis upon which the Panel could conclude that revocation of the anti-dumping duty orders is necessary for the United States to bring its measures into conformity with the Agreement. Even if the panel were to agree with Korea on the merits, it is impossible for the panel even to know whether a dumping analysis that conformed to the panel's decision would result in a *de minimis* margin for POSCO.

197. In sum, specific remedies are at odds with established GATT and WTO practice and the express terms of the DSU. Moreover, revocation of the anti-dumping orders on SSSS and SSPC far exceeds what would be necessary to bring these measures into conformity with the Agreement. Therefore, regardless of how the merits of this case are decided, Korea's request for revocation of the anti-dumping duty orders on SSSS and SSPC should be rejected.

IV. CONCLUSION

198. For the reasons discussed above, the actions of the United States in conducting the subject investigations were in conformity with the requirements of the AD Agreement and GATT 1994.

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[173] *Id.* at 61 Fed. Reg. 9435, n. 3.
[174] *Id.* at 61 Fed. Reg. 9435.
[175] ROK First Submission, at para 5.9

ANNEX 2-2

**ORAL STATEMENT OF THE UNITED STATES
FIRST MEETING OF THE PANEL**

(13 June 2000)

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I. INTRODUCTION

1. The United States welcomes the opportunity to appear before you today to present its views on the matters raised in this proceeding. Although our arguments are presented fully in its submission, we wish to highlight some key points. I would like to state at the outset that I will largely follow the statement before you. However, I will briefly add some points in response to Korea's statement. In the interest of time, I will address only a few of the issues raised by Korea's statement today; we will respond more fully in our future submissions.

2. It is now well settled that it is the complainant's burden to establish a *prima facie* case of a WTO violation. From that perspective, this case is simple. Korea has failed to meet its burden. That is not to say that this case does not involve complex methodological issues arising out of the particular facts gathered during these investigations. Nevertheless, the complexity of those issues cannot obscure the simple fact that Korea has failed to make its case.

3. It is obvious that Korea believes the United States should have weighed the evidence differently and taken different approaches to certain issues in the underlying investigations. It has simply failed to demonstrate that the United States was required by the Anti-dumping Agreement to do so. There is much rhetoric in Korea's submission about the United States "penalizing" POSCO, underscored by the insinuation that the United States ignored its own legal precedent to do so. But legally and factually there is no case.

4. Trying to make Korea's claim fit into the Agreement is somewhat like trying to put a square peg in a round hole. To do so, it is necessary to ignore relevant provisions of the Agreement and misinterpret the meaning and purpose of others. At times, Korea argues more about whether the United States acted consistently with its own law and practice than whether its actions were consistent with the Anti-dumping Agreement. Of course, the panel is charged with deciding the latter, not the former.

5. With respect to each of the issues challenged in this case, the actions of the United States are in fact based on an objective assessment of the information presented by the exporter and are well grounded in the rules of the Agreement. I would like now to summarize a few points with respect to each issue.

II. BAD DEBT

6. POSCO incurred a bad debt expense on US sales of the subject merchandise during the period of investigation. We identified the expense because POSCO itself had recognized it in its accounting records for the period. I would like to note that Korea made the claim this morning that POSCO had no other experience with bad debt on sales to the United States. That is inconsistent with what POSCO reported in these cases. While POSCO claimed that its US affiliate, POSAM, had never before incurred a bad debt, POSCO reported US bad debt expense with respect to its sales to the United States.

7. POSCO sought to have those sales excluded from the determination of export price, not because there was anything unusual about the prices, terms of sale, or products, but simply because the sales resulted in a bad debt expense. Bad debt is a normal selling expense that is routinely accounted for as part of normal business practice – and, as I mentioned, POSCO accounts for bad debt in its normal accounting records – and is accounted for as part of a normal, Agreement-consistent dumping analysis.

8. Korea argues that, effectively, the United States took account of bad debt by simply lowering all export prices. We would like to take a brief moment to clarify what adjustments were actually made and the basis for them.

9. Korea has suggested that all adjustments are accounted for in Article 2.4. However, a dumping analysis involves a two-step process: first, it is necessary to determine the export price and the normal value. It is only after they have been determined that the comparison required by Article 2.4 is made. Article 2.3 addresses certain situations in which an export price is not available or, as in the present case, is unreliable because of an affiliation between the exporter and the importer. In effect, Article 2.3 allows you to ignore the unreliable export price and construct the export price between the exporter and the affiliated importer. Article 2.3 provides that, in such cases, export price may be constructed on the basis of the price to the first unaffiliated party. The export price must be constructed before the Article 2.4 comparison can be made. It is only after determining export price and normal value that one reaches the step of comparing prices. Then we turn to Article 2.4 to ensure a fair comparison through the adjustments provided for there.

10. POSCO made sales during the period of investigation both through a US affiliate, POSAM, and directly to unrelated customers in the United States. For the sales through POSAM, the United States constructed the export price, consistent with Article 2.3. I would note here that Korea has not raised any claim under Article 2.3. In constructing export price, the United States started with the price at which POSCO's US affiliate sold merchandise to the first unaffiliated customer, then we deducted all expenses associated with that sale, including an allocated portion of the US bad debt expense. That was the method used to determine the constructed export price prior to the comparison under Article 2.4.

11. For the remaining sales made directly to unaffiliated customers in the United States, the United States based export price on the invoice price from POSCO to the unaffiliated US customer. There was *no* deduction from that export price for any selling expenses, including bad debt.

12. Once the export price and constructed export price had been determined, the United States made an adjustment to normal value to eliminate any differences in the conditions and terms of sale in the United States and Korea, consistent with Article 2.4. That adjustment – which the United States refers to as a circumstance of sale adjustment – is achieved by first *deducting* from normal value all expenses associated with conditions and terms of sale in Korea and then adding to normal value the expenses associated with conditions and terms of the export or constructed export sales. In these investigations, for comparison to constructed export price sales, the Korean expenses were deducted from normal value, but there was no *upward* adjustment to normal value. Because all expenses associated with conditions and terms of sale in the United States had been deducted in order to construct the export price, there were no US expenses to add to normal value.

13. Did those adjustments affect POSCO's dumping margin? Yes. Were they unfair? No. Why does Korea think they were unfair? Korea argues that they were unfair because the bad debt was unprecedented and unpredictable, but as I noted earlier, the record established that POSCO has, in fact, incurred bad debts and accounts for bad debt in its normal accounting records. Therefore, POSCO is no stranger to bad debt. Korea also argues that it is unfair to assume that differences in bad debt expense affect price comparability because, for example, POSCO might have elected to cover the US expense by raising prices in Korea. Under that reasoning, POSCO could exploit the Korean market in order to finance low prices in the United States. But, if POSCO made such a choice, that is dumping as defined in the Agreement, and the United States is entitled to grant its domestic industry relief when, as in this case, it is injured by the dumped imports.

14. Judging from the submission of the European Union (EU) and Korea's statement today, there also appears to be a misunderstanding of our interpretation of the phrase "conditions and terms of

sale" in Article 2.4. The United States agrees with the EU and Korea that not every SG&A expense represents a condition of sale within the meaning of Article 2.4. We stated in our submission that, based on an ordinary meaning, it is permissible to interpret "conditions" of sale to include the "circumstances under which the sales are made." By that we mean the circumstances directly connected to the sales under investigation, not general conditions. The United States also agrees that there is a close relationship between the word "conditions" and the word "terms." But, it would be contrary to customary rules of treaty interpretation to render one or the other redundant. Although both relate to the contract between the parties, it is the view of the United States that together they encompass the terms of the contract and all expenses that are incurred as a direct result of the sales transactions under investigation – including bad debt.

15. Where the United States disagrees with Korea and the EU is when they attempt to distinguish bad debt from other conditions and terms of sale, such as credit and warranty expenses. The EU appears to concede that credit and warranty expenses represent "conditions and terms of sale" within the meaning of Article 2.4. The EU also acknowledges that, like bad debt, the eventual cost of extending a warranty is not known at the time of sale. However, the EU would distinguish warranty expense on the grounds that the warranty is part of the contract and influences the purchaser's decision.

16. It is equally true, however, that payment terms are part of the contract and can influence the purchaser 's decision. Therefore, a seller's agreement to sell on credit is no different from an agreement to provide a warranty. In one case, the seller agrees to provide a warranty and accepts the risk of having to repair or replace the merchandise under that warranty. In the other case, rather than demanding payment on delivery, the seller agrees to sell on credit – for example, agreeing to accept payment in 30 days – and the seller accepts a credit expense, including the risk of non-payment. In the case of both selling under warranty and selling on credit, the seller accepts the risk of incurring the expense as part of the bargain.

17. Also, Korea makes a point of saying that bad debt is outside the exporter's control and, therefore, is not a proper adjustment under Article 2.4. Bad debt expense is not entirely outside the seller's control. The seller can decline to sell on credit and establish sound credit practices. This is analogous to the seller's control over what, if any, warranty is offered and establishing sound quality control measures to minimize warranty claims. In both cases – selling on credit and selling under warranty – there is some control, and some inherent risk. This type of contingency expense is routinely accounted for in company books and records – including bad debt expense.

18. Japan also concedes that anticipated expenses affect price and, therefore, can affect price comparability within the meaning of Article 2.4. Japan even acknowledges that bad debt expense may be reflected in POSCO's future US prices. In its view, however, there is no evidence that POSCO should have anticipated the bad debt expense at issue here. That is not the case.

19. POSCO agreed to sell to its US customer on credit and in doing so accepted the risk of non-payment as a condition of sale. As I stated previously, that in itself is sufficient to warrant including bad debt in an Article 2.4 adjustment. In addition, the evidence before the United States showed that POSCO has previously incurred bad debts and maintains bad debt accounts. In fact, POSCO reported bad debt expense for US sales through its Korean affiliate, POSTEEL, as well as the bad debt incurred by its US affiliate, POSAM. Therefore, even under Japan's analysis, the evidence is more than adequate to provide a reasonable basis to conclude that POSCO should anticipate bad debt expense as a condition of sale and to take that expense into account in the price comparison.

20. Korea, and Japan as well, also argues that the United States was required to establish a "difference" in bad debt expense in the US and Korean markets in order to justify the adjustment. That argument simply makes no sense given the manner in which the adjustment is made. As I

explained previously, all expenses related to the conditions and terms of sale in the home market are *deducted* from normal value, then the expenses related to conditions and terms of sale in the United States are added to normal value. There is no need to compare each individual expense before making the adjustment. If there is no difference between the two markets with respect to a particular expense, the adjustment has no effect because the deduction and the addition attributable to that expense are identical. Mathematically, an aggregate adjustment and an expense-by-expense adjustment are identical; in either case only *differences* in conditions and terms of sale in the two markets are eliminated.

21. In sum, although reasonable minds may differ on what constitutes "conditions and terms of sale " within the meaning of Article 2.4, there is no rational basis for finding that the interpretation of the United States is not permissible. The evidence provides more than adequate support for including bad debt in the adjustment for differences in conditions and terms of sale, and the adjustment was performed in a manner consistent with Article 2.4. Therefore, in accordance with Article 17.6, the panel must find the United States' treatment of bad debt to be in conformity with the Agreement.

22. I would also like to address briefly Japan's argument that the United States' deduction of the allocated portion of the bad debt expense in constructing export price was inconsistent with Article 2.3. I believe that argument was echoed by Korea today. Because Korea has not made a claim under Article 2.3, Japan's argument is obviously irrelevant. It is notable, however, that it also has absolutely no basis in the text of Article 2.3.

23. As I have explained here this morning, and we explained in our submission, the United States constructed export price by starting with the price to the first unaffiliated purchaser and deducting all of the expenses incurred in connection with the resale by POSCO's US affiliate, POSAM, including an allocated portion of POSAM's bad debt expense, and an amount for profit. The result is a constructed price between the exporter and the affiliated importer. That methodology is reasonable and consistent with the object and purpose of Article 2.3.

24. In explaining this methodology the United States also noted that the fourth sentence of Article 2.4 envisions such a methodology, although the language of Article 2.4 is neither mandatory nor exclusive, as Japan suggests. Nevertheless, the methodology used by the United States is consistent with the guidance provided in Article 2.4.

25. Finally, the United States would like to respond to Japan's allegation of bias in the US methodology, which is also implied, perhaps more gently, in Korea's argument that the United States departed from its prior practice . Aside from the fact that Japan's allegation is baseless, it is also underscores the irony of this case.

26. The basis for Japan's allegation is a distorted reading of a US decision in a case concerning imports of Brazilian steel. In the Brazilian case, the exporter claimed that an interest expense should not be imputed on certain unpaid sales because there was no basis to assume that the exporter would ever be paid. The burden was on the exporter to prove its claim that the sales were uncollectible. The exporter's claim was contradicted by evidence that it continued to sell to this customer on credit, unlike the present cases where the evidence established that POSCO had ceased selling to the bankrupt customer on credit. In the Brazilian case there was also no accounting evidence of a bad debt, such as we have in the present cases. I would like to make a point about Korea's repeated reference to these as "unpaid sales." The evidence shows that POSCO took a direct write-off for these sales. Assuming that POSCO keeps its accounting records in accordance with generally accepted accounting principles, it could not write off the debt unless it deemed it to be uncollectible. In the Brazilian case, the United States ultimately determined that, absent additional evidence to support the exporter's claim that this was an uncollectible debt, we had no basis to conclude that these were bad debts. A fair and objective reading of that case, therefore, demonstrates that the result was based on

the facts, not a biased methodology, and that the facts differed significantly from the cases at issue here.

27. The irony in the present case is the fact that the United States' current methodology for treating bad debt expense dates back to a 1989 decision by the US Court of International Trade in which the court agreed with Korean producers of color television receivers that bad debt was a direct selling expense for which a circumstance of sale adjustment must be made. It is now standard practice to include US and home market bad debt in the circumstance of sale adjustment. In many cases, some of which are cited in our submission, that adjustment has benefitted the exporter. One cannot fail to see the irony in the fact that Korea is now asking this panel to invalidate the very practice its exporters fought for and won in US court.

III. WEIGHTED AVERAGES

28. I would like now to turn to the issue of multiple averaging periods. This issue concerns how the United States addressed the free fall of the Korean won in late 1997. The guiding principle underlying the United States' ultimate decision was that, consistent with the Agreement, the dumping analysis should not be distorted by exchange rate volatility. That principle led to two separate and distinct methodological decisions.

29. The first methodological decision concerned the selection of exchange rates consistent with Article 2.4.1. It was apparent that the United States' normal currency conversion methodology, which tests daily exchange rates against a rolling average benchmark to detect – and ignore – fluctuations, would have misread the precipitous devaluation as a fluctuation, resulting in the use of the higher, pre-devaluation benchmark rate. Thus, the United States agreed with POSCO that the normal exchange rate methodology could have an unintended effect on the dumping analysis that would have overstated POSCO's dumping margin.

30. To eliminate that unintended effect, the United States altered its normal methodology so that daily rates were used until rates stabilized, at which point testing for fluctuations was resumed, although this testing used a benchmark comprised only of post-devaluation rates. That methodology for determining exchange rates is entirely consistent with Article 2.4.1, and was very favorable to POSCO.

31. The second methodological issue concerned what transactions were comparable for purposes of performing a comparison of weighted-average export price and normal value, consistent with Articles 2.4 and 2.4.2. Article 2.4 recognizes that numerous factors such as physical characteristics of the merchandise, levels of trade and *time* can affect the comparability of export price and normal value. Thus, taking these factors into account in defining and comparing groups of comparable transactions is consistent with the object and purpose of Article 2.4.

32. Korea, this morning, has clarified that it agrees that multiple averages are permissible. Korea, however, has suggested that multiple averages are only permissible for level of trade and physical differences, consistent with Article 2.4. But Korea ignores the fact that Article 2.4 also recognizes that time is a factor that affects price comparability. Like physical differences and level of trade, time can be a factor in constructing weighted average groups.

33. Normally it is reasonable to conclude that the timing of sales transactions during the period of investigation does not affect their comparability. However, in certain situations market conditions may differ so dramatically at different times within the period of investigation that it is necessary -- and certainly reasonable -- to divide the period and compare averages for each sub-period to avoid creating a distortion in the dumping analysis. The most common example of such a situation is where the exporting country is experiencing extremely high rates of inflation. Creating monthly or quarterly

averaging periods eliminates any distortion in the dumping analysis as a result of high inflation over time.

34. The precipitous devaluation of the Korean won presented an analogous situation. The United States determined that the devaluation was a dramatic change that rendered pre- and post-devaluation transactions incomparable. Accordingly, separate weighted-averages were warranted. That decision ensured that the dumping analysis would accurately reflect whether and to what extent dumping had occurred during the period of investigation, both before and after the devaluation. In contrast, comparing pre- and post-devaluation sales would have presented a picture distorted by exchange rate volatility.

35. Despite the logic of that decision, Korea argues that it was inconsistent with prior US administrative decisions. As noted previously, the purpose of this panel is to address consistency of the US measures with the Agreement, rather than with domestic law or practice. Nevertheless, a reading of the case relied on by Korea as evidence of this inconsistency reveals that the United States explicitly declined to address the issue of separate averaging periods in that case because it had no effect on the dumping analysis given the facts.

36. In sum, as the result of a thoughtful, logical analysis, the United States established a reasonable methodology, consistent with Articles 2.4, 2.4.1, and 2.4.2, which prevented the devaluation of the Korean won from distorting the dumping analysis. The results of that methodology do not overstate the margin; they accurately reflect the substantial dumping that actually occurred during the period of investigation.

IV. LOCAL LETTER OF CREDIT SALES

37. The final issue that we are addressing relates to the local sales. Korea went on at length this morning on the facts of this issue. Those facts differ from what POSCO presented during the investigation.

38. The issue of local letter of credit sales is a question of fact. Because the facts supported a reasonable conclusion that these sales are in won, it is beyond question that the United States' decision to convert the won price to dollars on the exchange rate in effect on the date of sale is consistent with Article 2.4.1. I would like to review the facts and the evidence that was before us, particularly how the facts unfolded in the investigation.

39. In plate in coil, which was the earlier of the two cases, the United States originally excluded these sales from normal value because it was unclear whether they were, in fact, domestic sales. We subsequently included them in normal value because POSCO reported that they were, in fact, sales between POSCO and customers in Korea, for consumption in Korea. POSCO also stated that the sales were paid in won and reported the won price on the invoice in its listing of home market sales.

40. Later in the plate in coil investigation, POSCO submitted dollar prices for these sales and argued that we should use the dollar prices instead of the won prices originally reported. They provided no explanation or evidence other than an assertion that the prices were set in dollars.

41. At the plate in coil verification, the United States confirmed that, although the dollar amounts POSCO had reported were on the invoices, the won amounts which are also on the invoices matched what was reported in POSCO's original sales listing and what was recorded in the company's accounts receivable. In short, POSCO failed to substantiate its claim that the prices for these sales were set in dollars rather than won. The United States, therefore, took the verified won price reported by POSCO and converted it to dollars in accordance with Article 2.4.1.

42. Similarly, in the later investigation on sheet and strip, POSCO reported the local letter of credit transactions as sales between POSCO and customers in Korea, for consumption in Korea. POSCO also stated again that the sales were paid in won and reported the won price, which is on the invoice, in their listing of home market sales. Again, it was later that POSCO provided dollar prices for these sales, as it had in SSPC, but it was not until verification that POSCO attempted to substantiate its claim that the prices for these sales were set in dollars, not won.

43. At verification – which I will point out is fairly late in the investigation process – the United States confirmed that the won amounts on the invoices for these sales matched what was reported in POSCO's original sales listing and what was recorded in the company's accounts receivable. In addition, POSCO presented for the first time some evidence that the won amounts reflected on the invoices and accounts receivable entries did not reflect the actual amount of won received. The United States was able to trace a few transactions and confirm separate accounting entries for exchange rate gains and losses that indicated that POSCO received an amount of won other than the amount reflected on the invoice. However, POSCO had not provided any won values other than those on the invoices.

44. Moreover, it is important to note that the evidence that the won amount received differed from the won amount on the invoice was never provided at all in the plate in coil investigation.

45. The United States weighed all of the evidence presented and concluded that the limited information POSCO provided at verification did not constitute a sufficient basis to determine that these sales were made in dollars. Therefore, the United States used the verified won prices reported by POSCO as the basis for normal value. That decision was based on an objective assessment of properly established facts and the conversion of those won prices to dollars was consistent with Article 2.4.1.

46. In contrast, Korea's arguments are inconsistent with both the facts and the Agreement. Factually, Korea argues -- repeatedly I might add -- that the United States made a double conversion. There was no double conversion. There were home market sales for which won prices were reported and verified. The United States simply converted the reported won prices into dollars when comparing export price and normal value, consistent with Article 2.4.1.

47. Korea also argues that Article 2.4.1 required the United States to avoid the currency conversion because a "reasonable alternative" was available. There is no support in the text of Article 2.4.1 for that proposition. Article 2.4.1 presupposes that a conversion is necessary and sets forth rules for how that conversion is to be accomplished.

48. The evidence in these investigations supported the United States conclusion that these sales were in won and, therefore, a conversion was necessary. The United States made the necessary conversion consistent with Article 2.4.1. Therefore, there is no basis for Korea's claim of a violation.

V. PROCEDURE

49. I would also like to address briefly Korea's claims of procedural violations. Any objective review of the record and procedural history of these investigations must lead to the conclusion that the United States fully complied with its procedural obligations under the Agreement.

50. The parties had timely access to all information, including confidential information provided under an Administrative Protective Order. They commented on, briefed and argued all of these issues during the course of the investigations and the United States addressed those arguments in the notice of its final determination, providing the rationale for its decision.

51. The fact that the United States changed its preliminary determination in certain respects does not indicate a lack of process, but rather that the process works. It demonstrates that the parties have a meaningful opportunity to defend their interests and influence the outcome. On some issues, the United States agreed with POSCO -- a fair number of issues I might add. On these particular issues, the United States simply found POSCO's arguments unpersuasive.

VI. ARTICLE X:3 AND STANDARD OF REVIEW

52. Finally, with respect to Korea's argument on Article X:3 and standard of review -- Korea also asserts a number of its claims under Article X:3 of GATT 1994, as well as under provisions of the Agreement. The Appellate body has recognized, however, that where a covered agreement specifically addresses matters covered by a claim under Article X:3, the panel should consider the more specific agreement first. The panel should not presume that the antidumping agreement authorizes unreasonable actions. Thus, where a measure is found to be reasonable under the Antidumping Agreement, the panel should find it to be reasonable also for purposes of Article X:3.

53. Throughout its submission, Korea strays from the language of the Agreement to discuss consistency with US law, regulations, administrative practice and decisions by domestic courts. Korea uses Article X:3 of GATT 1994 to justify these forays into domestic law. To the extent Korea desired rulings on the consistency of the decisions in these cases with US law, it was free to pursue those claims in the US judicial system. It is inappropriate to attempt to circumvent domestic review through the WTO dispute settlement process.

54. Finally, Korea alludes to, and Japan ponders at length the now familiar arguments about whether Article VI of GATT 1994 constitutes a derogation of other provisions of the GATT. It is the view of the United States that Article VI is an integral part of the rights and obligations embodied in the GATT, and not an exception. However, this argument is one which produces more heat than light. As the Appellate Body noted in the EC Hormones case: "merely 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 examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation." Moreover, one cannot brush aside the standard of review mandated by Article 17.6 simply by characterizing Article VI as an exception.

55. If the United States' establishment of the facts was proper, and their evaluation unbiased and objective, then the evaluation shall not be overturned. Further, to the extent there is any ambiguity in a provision of the Agreement, that is, if the language of the Agreement could be read in more than one way, the panel shall find a measure to be in conformity with the Agreement if it rests on any one of the permissible interpretations.

56. I would like to clear up one point of confusion caused by our reference to a "correct" interpretation. A "correct" interpretation is a permissible interpretation. The point we were attempting to make – perhaps inartfully – is that if a determination is based on a permissible interpretation, it must be sustained.

VII. SUMMARY

57. In summary, Korea has failed to meet its burden to make a *prima facie* case of a violation. The United States' final decisions on these issues were based on objective assessments of the facts and permissible interpretations of the Agreement. Therefore, there is no basis for the panel to find the measures at issue inconsistent with the Agreement.

VIII. CONCLUSION

58. We look forward to answering any questions the panel may have.

ANNEX 2-3

QUESTIONS FROM THE UNITED STATES TO KOREA

FIRST MEETING OF THE PANEL

(13 June 2000)

Q.1. In paragraph 26, Korea states that the words "conditions" and "terms" are largely synonymous, implying that there are some distinctions. Please confirm whether, in Korea's view, there is a difference in meaning between the word "conditions" and the word "terms" as used in Article 2.4.

Q.2. In its oral statement, in reference to the second table on page 27 of Korea's First Submission, Korea stated that the United States calculated "invoice price in won" (i.e., column D of the table). Please confirm whether the United States calculated this figure, or whether this figure was reported to the United States by POSCO in its questionnaire response, and recorded in POSCO's books and records.

ANNEX 2-4

RESPONSES OF THE UNITED STATES TO QUESTIONS POSED BY THE PANEL AND BY KOREA

FIRST MEETING OF THE PANEL

(29 June 2000)

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NOTE: In this submission, including the exhibits, the US has placed information which POSCO has previously designated as business proprietary information in brackets ("{ }"). This information has been omitted and the brackets left in the text."{ }"

I. RESPONSES OF THE UNITED STATES TO QUESTIONS POSED BY THE PANEL

A. GENERAL

Q.1. ***For the United States*. Does the United States agree with Korea that the first sentence of Article 2.4 represents a "free-standing and substantial" rule? If not, please explain your view, taking into account the differences between the Tokyo Round AD Code and the WTO *AD Agreement* in this respect.**

1. The United States does not agree with Korea. It is the view of the United States that the first sentence of Article 2.4 cannot be divorced from the context of the remainder of Article 2.4. While the first sentence of Article 2.4 establishes the requirement to make a "fair comparison", the remainder of Article 2.4 *defines* how "this comparison" is made.

2. The predecessor to Article 2.4, Article 2.6 of the Anti-dumping Code, also defined what was required "*[i]n order to effect* a fair comparison" (emphasis added). The "in order to effect" language of this provision was ambiguous. One possible reading of this language was that the fair comparison was not required, but if a Member wished to make one, it should do so as instructed in Article 2.6. Thus, all of Article 2.6 could have been read as non-mandatory. In other words, Article 2.6 clearly mandated *how* to make a fair comparison, but the fair comparison itself was not clearly mandated.

3. That ambiguity was eliminated in the current Agreement by adding the first sentence of Article 2.4, which makes explicit the requirement to make a fair comparison. However, the remainder of Article 2.4, like its predecessor, defines the comparison. Thus, Article 2.4 of the current Agreement is clearly mandatory – it requires members to make the fair comparison, and instructs them how to do it. This interpretation of Article 2.4 is also consistent with its drafting history. In what is known as the "Dunkel Draft", Article 2.4 read:

> "A fair comparison shall be made between the export price and the normal value. *The two prices shall be compared* at the same level of trade. . . ." (Emphasis added).

4. Arguably, that formulation was ambiguous as to whether the requirement to make a fair comparison was free standing. In the final draft, however, the language was amended to read:

> "A fair comparison shall be made between the export price and the normal value. *This comparison* shall be *made* at the same level of trade. . . ." (Emphasis added).

5. Substitution of the phrase "this comparison" establishes a reference back to the subject of the prior sentence, *i.e.*, a fair comparison, which is what is being defined.

6. Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2 which refers to "the provisions governing fair comparison in paragraph 4." The plural term "provisions," as well as the reference to "paragraph 4," rather than "the first sentence of paragraph 4," make clear that this clause refers to the entirety of Article 2.4. Further, this clause clarifies that the entirety of Article 2.4, and not just the first sentence, constitutes the provisions which "govern fair comparison."

7. In light of the object and purpose of the AD Agreement, there is no basis for an interpretation of Article 2.4 that divorces the obligation in Article 2.4 to make a fair comparison from the allowances required to establish price comparability. In accordance with Article 2.1, a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market. By requiring due allowance for all factors affecting price comparability, Article 2.4 assures that the prices used to establish dumping in Article 2.1 are "comparable," *i.e.* a comparison of

such prices is fair. There is simply no logic in asserting that even where transactions in the two markets are rendered comparable in all respects affecting price, comparing them in a dumping analysis could be unfair.[1] The concept of fairness and the concept of comparability are inseparable.

B. MULTIPLE AVERAGING

Q.4. ***For the United States*****. Please explain how, in the view of the United States, exchange rates can affect the comparability of export prices and prices in the market of the exporting country.**

8. Prices can only be compared when they are expressed in a common currency. Therefore, when comparisons of prices are made in respect of sales made in different currencies, exchange rates are an essential element in establishing prices in one of the markets for purposes of comparison with prices in the other market. Converting to a common currency, however, does not automatically render comparable all prices in the two markets irrespective of the time at which those sales were made. Even if no conversion of prices is necessary, it does not follow that it would be appropriate to compare prices without regard to the timing of the sales being compared. Regardless of whether the comparisons involve prices originally denominated in the same currency in both markets or the comparisons involve converted prices in one of the markets, comparisons can be affected greatly by the relative timing of the sales compared. Therefore, time must be a factor considered by authorities in determining what prices should be compared. Indeed, Article 2.4 requires that time be taken into account when comparing prices by requiring that comparisons be as contemporaneous as possible.

9. All price comparisons, whether made on an average to average basis or on a transaction to transaction basis, must take into account the provisions of Article 2.4. In particular, Article 2.4 requires that comparisons be made *in respect of sales made at as nearly as possible the same time*. Hence, Article 2.4 recognizes that time is a factor that authorities must consider in determining what prices should be compared. Moreover, not only does Article 2.4 recognize that time affects price comparability, it further requires that comparisons be made between sales separated by as short a period of time as possible. Therefore, in general, comparisons between sales separated by a short period of time *are preferred* over comparisons between sales separated by a longer period of time.

10. Neither Article 2.4 nor any other Article of the AD Agreement specifies an amount of time between sales that is appropriate or allowable for price comparison purposes. Accordingly, authorities are obligated to determine how best to implement the "same time" provision of Art. 2.4. In light of Article 2.4's preference for comparisons between prices in respect of sales made as nearly as possible the same time, if authorities choose to compare sales made more distant in time when it is otherwise possible to make comparisons that are more contemporaneous, they must ensure that the intent of Article 2.4 is not violated, that is, that time itself is not a factor that affects the price comparisons. Nonetheless, while authorities may determine under appropriate circumstances to compare sales across wider, rather than narrower, spans of time, this does not mean that authorities are obligated to make comparisons between sales further apart in time rather than between sales made closer in time.

C. TREATMENT OF UNPAID SALES

Q.1. ***For both parties*****. Were all of the sales to ABC Company in the plate and sheet investigations made through POSAM? If not, please provide details.**

[1] Similarly, holding the requirement of a fair comparison separate from the requirement of comparability implies that a comparison of two prices which are not comparable could be fair, clearly an absurd result.

11. Yes, in both cases all of the sales to ABC Company were made through POSAM.

Q.2. *For both parties*. Was there any evidence/argument in the record of the plate and/or sheet investigations relating to whether POSCO had any knowledge of ABC company's precarious financial condition at the time it made the sales in question? If so, please specify.

12. There was no evidence in either case that POSCO had any knowledge at the time of sale that ABC Company was in precarious financial condition. There was, however, evidence that POSCO had prior bad debt experience. See response to question 3.

Q.3. *For both parties*. Does the record in the plate and/or sheet investigations contain any information regarding non-payment by either US or Korean customers other than ABC company? If so, please specify.

13. The records of these cases contain substantial evidence of bad debts in POSCO's books and records. First, POSCO's chart of accounts contains a number of bad debt accounts, including accounts for "allowance for bad debt accounts receivable" and "allowance for bad debt long term receivable."[2] Also, both POSCO and POSTEEL have an account called "bad debt expenses".[3] Although POSCO provided no explanation of these accounts, it is reasonable to conclude, based on generally accepted accounting principles (GAAP), that these are reserve accounts which reflect POSCO's experience with bad debt in the form of uncollectible accounts receivable. In fact, POSCO specifically reported that it has incurred bad debts both on its own domestic and export sales, as well as on domestic and export sales made through its Korean affiliate, POSTEEL.[4]

14. In the SSPC investigation, in POSCO's response to the supplemental questionnaire, filed on 26 August 1998, POSCO reported that, during the period of investigation, it incurred bad debt expenses of { } on its export and domestic sales.[5] Further, in the same supplemental response POSCO reported that POSTEEL had incurred bad debt expenses on its export sales in the amount of { } during the period of investigation.[6] That amount does not include the bad debt incurred as a result of non-payment by ABC company. Finally, in its response to section B of the questionnaire, submitted on 20 July 1998, POSCO reported that POSTEEL had incurred bad debt expenses on its home market sales in the amount of { } during the period of investigation.[7]

15. The amounts of bad debt expenses reported in the *SSSS* case differ slightly from those reported in the *SSPC* case because the periods of investigation were not the same, and thus the periods for which POSCO reported bad debt were not the same. In its questionnaire response in the SSSS investigation, dated 23 September 1998, POSCO reported that its own bad debt expenses for the period of investigation on both domestic and export sales were { }.[8] In the same response, POSCO reported that the bad debt expense of POSTEEL on domestic sales was { }.[9] Finally, in its response

[2] See, US Ex. 20.

[3] US Ex. 37. Chart of Accounts from sec. A

[4] Note that POSCO was unable to separately identify the source of its bad debts. Consequently, the figures reported by POSCO and discussed in the response to this question are for all products. POSCO did, however allocate a portion of these expenses to US and home market sales of the subject merchandise.

[5] US Ex. 38. POSCO reported a single figure for both export and domestic sales. POSCO's records gathered at verification reveal the actual amount of this bad debt expense to be { } won. US Ex. 39.

[6] US Ex. 38. The POSTEEL records gathered at verification reveal that the actual amount of POSTEEL's bad debt expense on export sales, which are designated as POSTRADE sales, was { } won. US Ex. 39.

[7] US Ex. 40.

[8] US Ex. 41.

[9] *Id.*

to the supplemental questionnaire, filed on 23 November 1998, POSCO reported that POSTEEL's bad debt expense on export sales was { }.[10]

Q.4. ***For the United States*****. The United States contends that, in respect of sales through POSAM, the United States deducted an allocated portion of the US bad debt expenses as part of the construction of the export price. Please indicate where in the record of the investigations this statement can be verified.**

16. Although the SSPC final determination does not specifically mention this deduction, the SSSS final determination specifically stated with respect to constructed export price sales: "we deducted a per unit direct selling expense to account for bad debt losses incurred by POSAM for sales made to a bankrupt customer."[11]

17. The actual deduction itself can be seen in the analysis memoranda prepared for the final determinations. The analysis memorandum prepared for the final determination in SSPC is dated 19 March 1999.[12] Attachment 1 to this memorandum lists the unpaid sales of SSPC, and includes a total amount of the bad debt.[13] The total amount of bad debt is divided by the total quantity of US sales to arrive at a per-unit expense of { }. This is the portion of the bad debt expense allocated to each sale, whether export price or constructed export price. On page 8 of the memorandum, this allocated amount is added to other direct selling expenses to arrive at a total per-unit amount of direct selling expenses on US sales. This amount is assigned the variable DIREXPU. On page 9 of the memorandum, under the designation *Constructed Export Price ("CEP") Calculation*, in calculating constructed export price, the DIREXPU variable, which, as noted above, included the allocated amount of bad debt, is one of the variables deducted from the gross unit price (designated as "GRSUPRU") to arrive at the net price ("NETPRIU"), *i.e*. the constructed export price.

18. Note that the variable DIREXPU is not one of the variables deducted in the *Export Price (EP) Calculation*, also on page 9 of the memorandum. This is because, as the United States has explained in its First Submission and oral statement, the export price for sales made directly to independent US buyers was based on POSCO's actual invoice price to its independent customers; there were no deductions from that price for selling expenses, including bad debt. Thus, Korea's assertion that the United States reduced all export prices to account for bad debt is incorrect. For the comparison of the export price for these direct sales, direct selling expenses, including the bad debt, were part of the "circumstances of sale" adjustment made to normal value.

[10] US Ex. 42.

[11] *SSSS Final Determination*, at 30668.

[12] See, Memorandum to the File from Carrie Blozy, Case Analyst, entitled *Analysis for the final determination in the investigation of stainless steel plate in coils from Korea - Pohang Iron & Steel Company*, dated 19 March 1999 (US Ex. 35).

[13] The United States calculated the amount of the bad debt expense in accordance with the method used by POSAM in its accounting records. Because of the method used by POSAM to account for these uncollectible receivables – the reversing entries to accounts receivable and sales – the actual expense recognized by POSAM was the cost of the goods sold, *i.e*, the transfer price from POSTEEL to POSCO, rather than the amount of the receivable. SSPC POSAM Verification Report at 8 (US Ex. 9); SSSS POSAM Verification Report at 6-7 (US Ex. 10). The United States also based the calculation of the bad debt expense on the cost of the goods sold. However, because transfer prices between associated companies are deemed to be unreliable, the United States constructed the value of the merchandise POSAM purchased from POSTEEL. The result was a reasonable valuation of the bad debt expense as accounted for in POSCO's records, which POSCO did not contest.

19. The analysis memorandum for SSSS tells a similar story.[14] Attachment 1 to this memorandum lists the unpaid sales of SSSS, and includes a total amount of the bad debt. The total amount of bad debt is divided by the total quantity of US sales to arrive at a per-unit expense of { }. On page 9 of the memorandum, this allocated portion of bad debt is added to other direct selling expenses to arrive at a total per-unit amount of direct selling expenses on US sales (again referred to by the variable "DIREXPU." On page 10 of the memorandum, under the designation *Constructed Export Price ("CEP") Calculation*, the DIREXPU variable is one of the variables deducted from the gross unit price to arrive at the net price, *i.e*. the constructed export price.

Q.5. ***For the United States*. Korea states (oral statement at the first meeting, para. 25) that the United States does not argue in its first submission that unpaid sales were an "other difference []. . . demonstrated to affect price comparability". Is Korea correct that the United States does not advance such an argument?**

20. Because it is the view of the United States that bad debt falls within the meaning of "conditions and terms of sale" in Article 2.4, we have not relied on the reference in Article 2.4 to "other differences" affecting price comparability. That does not constitute a concession that bad debt could not be treated as an "other difference" demonstrated to affect price comparability, consistent with Article 2.4.

Q.6. ***For both parties*. Article 2.4 provides that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale . . . ." The use of the term "on its merits" could be taken to suggest that differences in conditions and terms of sale will not always affect price comparability. Do you agree? Please explain your answer.**

21. It is the view of the United States that the phrase "on its merits" does not suggest that differences in conditions and terms of sale will not always affect price comparability. Article 2.4 defines the phrase "differences which affect price comparability" to "include" those in the illustrative list that follows. Thus, the differences expressly listed – such as differences in conditions and terms of sale – *are* differences which affect price comparability. What must be determined and quantified "on the merits" of each case is what allowances are necessary to account for such differences (*e.g.*, it is necessary to determine whether there are physical differences and, if so, what is the proper adjustment to account for such differences), not whether such differences affect price comparability.

Q.7. ***For the United States*. The United States states in its first submission (para. 84) that "[s]elling expenses such as warranty costs and bad debt not only reflect conditions of sale in the market, they are also an element of price. Therefore, differences in such selling expenses affect price comparability." Please provide further elaboration of the US view regarding when differences "affect price comparability".**

22. As clarified in our opening statement, it is the view of the United States that the conditions and terms of sale are reflected in expenses that are directly related to the sale, *i.e.*, but for the sale the expense would not be incurred – what the United States refers to as "direct" selling expenses. Some of these expenses relate directly to the terms of sale (*e.g.*, installation expense), others relate directly to conditions generated by the terms of sale (*e.g.*, selling on credit generates bad debt expense). Examples of direct selling expenses include expenses for warranty, credit (including bad debt) and technical assistance. Article 2.4 expressly includes differences in conditions and terms of sale in the illustrative list of differences that affect price comparability. The United States, therefore, always

[14] See, *Memorandum to the File from Maria Dybczak, Case Analyst, entitled Analysis for the final determination in the Investigation of Stainless Steel Sheet and Strip in Coils from Korea - Pohang Iron & Steel Company ("POSCO")*, dated 19 May 1999 (US Ex. 36).

makes allowance for differences in direct selling expenses when comparing export price and normal value.

Q.8. ***For the United States*****. Article 2.4 of the *ADP Agreement* requires that a Member make due allowances for "differences which affect price comparability". It could be argued that this means that, where there are differences that should affect the relative prices charged by an exporter in his home market and export market, the Member should make appropriate adjustments. Applying this approach to the case at hand, the logic of the United States' adjustments in respect of unpaid sales is that POSCO should be charging higher prices in the US market than in the Korean market because defaults are more likely for US purchasers than for Korean purchasers. Please comment.**

23. Article 2.4 addresses differences between export price and normal value that affect price comparability, including, *inter alia*, differences in conditions and terms of sale. In essence, Article 2.4 requires that, if the transactions being compared are not identical in such respects, allowance must be made to neutralize the differences. When the differences affecting price comparability have been eliminated, any amount by which the normal value exceeds the export price is, by definition, dumping.

24. As we have explained in our submissions and our statement before this Panel, bad debt is a direct selling expense, *i.e.*, part of the conditions and terms of sale. Sales made on credit carry an inherent risk of non-payment. Such risk may differ between the two markets being compared and thus have different effects on prices in the two markets. Because it is the only practical means – and a method as reasonable as any other – of making a due allowance for any such difference, we base the allowance on the company's actual bad debt experience in the two markets during the period of investigation.[15] That is, we rely on the actual bad debt expenses the company recognizes with respect to each of the two markets being compared. The evidence placed on the record in the cases at issue showed that, during the period of investigation, POSCO actually recognized greater bad debt expenses, as a proportion of sales, in the US market than in the Korean market. This evidence would indicate that POSCO should be charging higher prices in the US market due to a greater proportion of bad debt expenses. Likewise, greater bad debt expenses in the home market would account for higher prices in the home market; therefore the difference attributable to bad debt would not be attributable to dumping. That conclusion is implicit in the Article 2.4 requirement to adjust for such differences to ensure price comparability. As explained previously, through the circumstance of sale adjustment, the United States neutralized any difference in bad debt expense and ensured that the price comparison reflected whether dumping existed, not differences in the conditions and terms of sale.

Q.9. ***For both parties.*** **In its first submission (para. 65), the United States asserts that it is Article 2.1 of the ADP Agreement, and not Article 2.4, that addresses what sales may be used to establish the export price and normal value. The United States further notes Article 2.1 expressly limits the determination of normal value to sales in the ordinary course of trade, that there is no such limitation in respect of the export price, and that this absence of a limitation must be interpreted as intentional. It could be argued that it follows that Article 2.1 precludes a Member from excluding any export sales. The United States however contends (para. 70) that it may exclude export sales in certain circumstances. Please comment.**

25. Article 2.1 defines export price, without limitation, as "the price of the product exported from one country to another." It is the view of the United States that the absence of a limitation on the determination of export price nevertheless permits exclusion of export sales in certain situations. For

[15] This type of "snap shot" analysis is also used for other expenses that cannot be specifically determined for the sales during the period of investigation because of the nature and timing of the expense, *e.g.*, warranty and research and development.

example, it would be inconsistent with the object and purpose of the AD Agreement to interpret Article 2.1 to override Article 2.4. Thus, if it would be virtually impossible or impracticable to establish a normal value that is comparable, within the meaning of Article 2.4, to certain export sales, it is necessary and appropriate to exclude those export sales from the dumping analysis.[16] It is, therefore, permissible to interpret Article 2.1 as permitting the exclusion of export sales in certain situations.

Q.10. ***For Korea*****. Korea argues that the "fair comparison" requirement of Article 2.4 of the *AD Agreement* requires a Member to exclude "atypical sales" where the inclusion of those sales would "distort the results" by increasing the margin. In Korea's view, would a Member also be entitled to exclude "atypical" export sales where those sales would "distort the results" by decreasing the margin?**

26. As discussed in response to question 9, above, it is the view of the United States that export sales may be excluded in certain circumstances. The issue of whether a sale should be excluded depends on the particular facts – not whether the exclusion of the sale increases or decreases the margin of dumping.

Q.11. ***For Korea*****. In the context of its "multiple averaging" claims, Korea emphasizes that the language "*all* comparable export prices" precludes "multiple averaging". Can this view be reconciled with Korea's position that the US DOC was required to exclude certain "atypical" export prices from its dumping margin calculations altogether?**

27. The United States does not agree with Korea's interpretation of the cited language from Article 2.4.2. However, if the Panel were to conclude, as urged by Korea, that Article 2.4.2 requires "one average" which takes into account "all data", logical consistency would dictate that the allegedly "atypical" sales should not be excluded from the analysis.

Q.12. ***For the United States*****. The United States observes (first submission, para. 71) that companies, including POSCO, routinely establish reserve accounts for bad debt. Did the United States have before it in the record of the plate or sheet investigations any information regarding precisely *how* POSCO and/or POSAM treated bad debt for accounting purposes? Specifically, did POSCO and/or POSAM establish a reserve for bad debt? If so, how was that reserve calculated? Did any such reserve distinguish between anticipated levels of unpaid sales in different markets?**

28. The record established that POSCO and POSTEEL, which is responsible for all export sales, maintain bad debt accounts for both domestic and export sales (see response to question 3), indicating that the companies use a reserve accounting method. Although POSCO did not provide specific information about these accounts, such as how the reserves were calculated, under GAAP the reserves should be based on POSCO's bad debt experience. POSCO had the ability to distinguish bad debt expense on home market sales from bad debt expense on export sales, but it did not have the ability to tie specific bad debt expense recognized during the period of investigation to particular products or export markets.

29. With respect to POSAM, the record reveals that the company did not establish a bad debt account. Rather, when POSAM deemed the receivables at issue to be uncollectible, it reversed the accounting entries, effectively "writing off" the sales.

[16] In its first submission, the United States provided examples of such cases which involved small volumes of defective merchandise, or further manufactured products. See US First Submission, at footnote 68 and accompanying text.

Q.13. In its oral statement, the United States argued that POSCO effectively wrote off the unpaid sales. Is the US referring to the issuing of negative invoices by POSAM (thereby cancelling the sales made to the company that went bankrupt) or does the US have in mind another event? In the view of the US, does the cancellation of the sales concerned preclude the possibility that repayment of the amounts outstanding is obtained by POSCO through bankruptcy proceedings?

30. In the view of the United States, POSAM's issuance of "negative invoices", represents the write off of a receivable the company deems uncollectible, *i.e.*, a bad debt. We note that, although POSAM used negative invoices as the accounting mechanism, these do not constitute "cancelled" sales. Generally, cancellation of a sale occurs before the transaction has been completed. Once delivery has been made, the obligation to pay arises, creating a debt. Thus, by reversing the accounting entries after the debt was established, POSAM was recognizing that the debt was uncollectible, *i.e.*, recognizing a bad debt expense.

31. In accordance with GAAP, a company must recognize and account for receivables that are uncollectible. A receivable may be deemed uncollectible, even though there is some possibility that all or part of the amount owed may ultimately be recovered. Bankruptcy of the debtor is generally grounds for treating an unsecured debt as uncollectible.

D. CURRENCY CONVERSION

Q.1. *For both parties*. The United States suggests (first submission, para. 182) that the invoices for what Korea refers to as POSCO's "dollar-priced local sales" reflect a price both in dollars and in won ("The reported won amounts were reflected on POSCO's invoices and records"). *See also Final Determination in SSSS*, p. 59536 (indicating that "for HM channel 2 sales the shipping invoice also shows the won price"). Korea (first submission, para. 3.52) by contrast suggests that the sales in question were invoiced only in dollars and that the invoice did not reflect an amount in won. In its oral statement at the first meeting, however, Korea acknowledged that both dollars and won appeared on the invoices. Please clarify whether the invoices reflected a price in dollars only, or prices in both dollars and won, or whether this varied depending on the invoices in question.

32. Korea's initial statement contained in its first submission (para. 3.52) misstates the facts for both cases. No information on the record of the investigations supports the statement that the sales at issue were invoiced solely in dollars. All tax invoices issued to POSCO's customers with respect to local sales list both a won and dollar amount.[17] Shipping invoices for local sales made to "channel 2" customers also list both a won and dollar amount.[18] The invoicing of the won amount is consistent with the undisputed evidence in both investigations that POSCO is paid in won.

Q.2. *For both parties*. To the extent that the some or all of the invoices reflected won as well as dollar amounts, was the amount actually paid in won the same as the amount reflected in the invoice? Please provide details.

[17] 5 January 1999 Sales Verification Report for POSCO in SSPC, at Exhibit 6. (ROK Ex. 6). See also 6 April 1999 Sales Verification Report for POSCO in SSSS, at 14 (ROK Ex. 19) and Exhibit 17 (ROK Ex. 46).

[18] 5 January 1999 Sales Verification Report for POSCO in SSPC, at Exhibit 23. (US Ex. 50). (For sales in home market channel 1, POSCO's customers contacted POSCO directly to make purchases. POSCO issued both the shipping invoice and the tax invoice to these customers. For sales in home market channel 2, customers contacted POSCO's subsidiary, POSTEEL, to make purchases. For these sales, POSCO issued the shipping invoice to the customer, while POSTEEL issued the tax invoice to the customer. For home market sales in channel 2, POSCO's shipping invoice lists both a won and dollar amount.) See 2 September 1998 Section A Response in SSSS, at A-17 and A-18 (US Ex. 46); See also 1 July 1998 Section A Response in SSPC, at A-14 and A-15. (US Ex. 37).

33. In the SSPC investigation, POSCO reported the actual won amount listed on the invoice. POSCO never claimed during the SSPC proceeding that the won amount listed on the invoice was not the amount actually paid by the customer. To the contrary, POSCO's statements indicated just the opposite. POSCO stated that the "price in effect on the date of shipment is the price for the shipment." Nothing on the record of the SSPC investigation indicates that the won amount paid by the customer differs from the won amount on the invoice, which was the amount reported by POSCO in its response.[19]

34. In the SSSS proceeding, the original information provided by POSCO was consistent with the information it provided and positions it took in SSPC. Later in the proceeding POSCO provided other information about local sales that was ambiguous or vague. At verification in SSSS, the United States examined one local sale and discovered a difference between the won amount on the invoice and the won amount actually paid, which reflected the difference between the dollar/won exchange rates between the date of sale and date of payment.[20]

Q.3. ***For both parties*****. Please provide a comprehensive statement, supported by citations to relevant portions of the record, as to exactly what evidence and arguments were put before the USDOC and at what time in each investigation in respect of the issue whether the "local sales" were dollar or won sales. Please address, *inter alia,* what evidence was placed before the USDOC in each investigation regarding the receipt by POSCO of won amounts that differed from any won amounts reflected in the invoices.**

35. The following is a comprehensive review of the evidence and arguments placed before the United States in each investigation.

(a) The SSPC investigation

36. From the evidence placed before it, the United States properly determined in the SSPC investigation that the currency of POSCO's local sales transactions was Korean won, not US dollars. Throughout the course of the investigation POSCO never claimed that the won amounts received by POSCO differed from the won amounts reflected in the invoices and reported to the United States in its response, and there was no evidence on the record to suggest that was the case. The evidence unfolded as follows:

37. In its first questionnaire issued to POSCO, the United States requested that the company report "all expenses and revenues in the currencies in which they were incurred or earned."[21] The United States also requested information pertaining to, *inter alia*, the date of sale for home market sales and the unit price for such home market sales. Specifically, the United States stated that POSCO is to "[r]eport the unit price recorded on the invoice for sales shipped and invoiced in whole or in part."[22] The United States stated that "[t]his value should be the gross price for a single unit of measure."[23]

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[19] See the United States' response *infra*, at question 3 for a complete examination of the evidence and arguments on the record in the SSPC investigation.

[20] See the United States' response *infra* at question 3 for a comprehensive examination of the evidence and arguments on the record of the SSSS investigation.

[21] Anti-dumping Questionnaire, at B-20. (US Ex. 2).

[22] 20 July 1998 Section B-D Response, at B-22 (repeating the question from the original questionnaire). (US Ex. 40)

[23] *Id*.

38. The United States also requested that POSCO report the "terms of payment" for its home market sales and to "indicate whether the payment terms are stated or coded on each invoice or, otherwise, how customers agree to payment terms."[24] With respect to prices, the United States also asked POSCO to report "any price adjustments made for reasons other than discounts or rebates" and to "[s]tate whether these billing adjustments are reflected in your gross unit price."[25]

39. In its 1 July 1998 response, POSCO stated that "[t]he date of sale for all domestic sales is the date of the shipping invoice, whether categorized as a domestic or local sale."[26] POSCO further stated that the [t]he price in effect on the date of shipment is the price for the shipment."[27] In its 20 July 1998 response where it reported transaction prices for home market sales, POSCO stated that it has "reported the actual invoiced price per metric ton in Korean Won. In the home market, POSCO made local letter of credit sales ("local sales") and domestic sales. All sales were paid in Korean Won and have been recorded in Korean Won on the database."[28]

40. In this investigation, the company consistently presented these as won sales. In discussing the payment terms, POSCO simply stated that "POSCO's home market customers pay on an open (*i.e.*, revolving) account basis that is the normal method of payment in the Korean domestic market."[29] In response to the question about billing adjustments, POSCO noted generally that the adjustments were made "to correct the price on the original invoice."[30] POSCO, however, reported no adjustment to the local sales price for any difference between the invoice price and the amount of payment.

41. On 26 August 1998, POSCO submitted revised computer databases to reflect changes in response to the United States' supplemental questions. POSCO also made "minor corrections" to errors discovered by the company in preparing the supplemental response. In that response, POSCO noted that it "has also added the US dollar sales price for local sales, as reflected on the invoice, *for reference purposes*."[31]

42. Later in the proceeding, POSCO began to change its story. On 16 October 1998, POSCO submitted another revision of its databases to make corrections to cost information. POSCO stated in this submission that it also modified the home market sales to report local sales and related charges "in the currency in which the sales and associated charges were incurred, *i.e.*, US dollars."[32] POSCO stated that in prior submissions both the won and the US dollar prices were reported for local sales. POSCO explained that "[a]ll charges, however, were calculated and reported based on the won."[33] In the October 16 submission, POSCO recalculated and reported all associated charges, such as indirect selling expenses, "on the basis of a dollar price," rather than the won price earlier reported.[34] In this response, POSCO claimed that "the won price and the billing adjustments (also shown in won) are included *for reference purposes*."[35] However, POSCO did not claim that the sales were not paid in won, or that it received an amount other than what was reflected on the invoice. In fact, POSCO argued that "Won amounts should be converted to US dollars based on the daily exchange rate."[36]

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[24] *Id.* at B-18.
[25] *Id*. at B-23.
[26] See, 1 July 1998 Section A Response, at A-14. (US Ex.37).
[27] *Id*.
[28] 20 July 1998 Section B-D Response, at B-22 (footnote pertaining to duty drawback omitted). (US Ex. 40).
[29] *Id.* at B-17 and B-19.
[30] *Id*. at B-23.
[31] 26 August 1998 Section B-C Supplemental Response, at 1, n. 2 (emphasis added). (US Ex. 38).
[32] 16 October 1998 Section D Supplemental Response, at 1. (US Ex. 43)
[33] *Id.*
[34] *Id.* at D-2.
[35] *Id.* at n. 3 (emphasis added)
[36] *Id.*

POSCO claimed that the changes were made "to allow the [United States] to properly analyze local sales on a dollar basis in line with its practice,"[37] apparently a reference to the *Roses* exception, which the United States found inapplicable. POSCO further suggested that the United States "maintain the dollar value of the local sales until the final steps of the calculation,"[38] a statement which appears to urge the United States to convert the dollar figures into won.

43. In its preliminary determination, the United States excluded POSCO's local sales from the calculation of normal value because it was unclear whether the sales were in fact, domestic sales, or export sales.[39] The United States preliminarily decided to disregard the sales because it found that POSCO had "knowledge that these sales are not consumed in the foreign market."[40]

44. The US domestic industry immediately sought to have the United States' preliminary determination amended, arguing that the exclusion of local sales was a ministerial error.[41] POSCO agreed that the sales should be included in the normal value calculation, but noted, *inter alia*, that the impact on the margin was roughly one percent and, therefore, was not considered to be "significant" as defined by the Department's regulations for purposes of amending preliminary determinations.[42] The United States did not amend its preliminary determination, but noted that it would consider this issue further for the final determination.[43]

45. The United States conducted verification of POSCO's home market sales response from 9 November, through 13 November 1998.[44] At the outset of the verification, the United States' normal practice is to request that a company state any corrections to its response.[45] POSCO notified the United States of six corrections to its response at the outset of verification.[46] It said nothing to suggest that the won amount on the invoices and reported to the United States was not the amount paid by the customer.[47]

46. The United States informed POSCO that it would conduct verification of specific sales by tracing the sale "from initial inquiry/order through to payment by the customer."[48] The United States' verification is a spot check of the information submitted by the company designed to test the accuracy and adequacy of the response. Following its normal practice, the United States informed POSCO that it would trace documentation for five home market sales and would select additional sales to test during the course of verification.[49] The United States verified that POSCO received payment for the home market sales selected, and noted no discrepancies in the verification of POSCO's response.[50]

47. One home market sale selected for verification was a local sale. The United States examined the order sheet, mill certificate, invoice, shipping list, tax invoice and the first quarter 1997 price sheet for the customer.[51] None of these documents indicated that the won price listed on the invoice and

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[37] *Id.*
[38] *Id.*
[39] *SSPC Preliminary Determination*, 63 Fed. Reg. at 59536 (4 Nov. 1998). (ROK Ex. 4).
[40] 27 October 1998 Preliminary Analysis Memorandum for POSCO, at 2. (ROK Ex. 5).
[41] 5 November 1998 Comments filed by the US domestic industry, at 3. (ROK. Ex.47).
[42] 6 November 1998 Response by POSCO to US domestic industry, at 3-4. (US Ex. 48). See also 23 November 1998 Memorandum on Ministerial Error Allegation, at 2-3. (US Ex. 44).
[43] *Id.* at 2-3.
[44] 5 January 1999 Sales Verification for POSCO, at 1. (ROK Ex. 6).
[45] 2 November 1998 Verification Outline for POSCO, at 2. (US Ex. 45).
[46] 5 January 1999 Sales Verification Report for POSCO, at 1-2 (summarizing POSCO's pre-verification corrections to its response). (ROK Ex. 6).
[47] See generally, *Id.* at 1-2.
[48] 2 November 1998 Verification Outline for POSCO, at 4. (US Ex. 45).
[49] *Id*. at 4 and Appendix I
[50] 5 January 1999 Sales Verification Report for POSCO, at 21, para.12, and 14. (ROK Ex. 6).
[51] *Id.* at 4 and Ex. 6.

reported by POSCO differed from the payment amount, nor did POSCO at any time during the investigation make any claim to the contrary.

48. In its case brief, POSCO contended that the information collected at verification demonstrates that local sales were negotiated and invoiced in US dollars.[52] POSCO argued that "[l]ocal customers pay POSCO in Korean won based on the US dollar invoiced price."[53] POSCO argued that it made changes to its database consistent with the United States' questionnaire which requests respondents to report all expenses and revenues in the currency in which they were incurred or earned.[54] Although POSCO opposed the use of won prices generally, at no time did it argue that the won price on the invoice was not the final won price.

49. In its final determination for SSPC, the United States weighed the evidence and determined that the currency of the local sales transactions was Korean won. The United States, relying on the record developed during the investigation, stated that although the invoice includes a price in US dollars, the customers pay for the sales in won, not US dollars, and the sales value of the merchandise is charged to the sales ledger in won.[55]

(b) The SSSS Investigation

50. In the SSSS investigation, POSCO provided similar responses to the United States' questions. From the evidence placed before it, the United States properly determined in the SSSS investigation that the currency of POSCO's local sales transactions was Korean won, not US dollars. In this case, as in the prior investigation, there was no evidence indicating that dollars ever changed hands between POSCO and its customers for the sales at issue. The evidence unfolded as follows:

51. In its first questionnaire issued to POSCO, as in the prior case, the United States requested that the company report "all expenses and revenues in the currencies in which they were incurred or earned."[56] The United States also requested information pertaining to, *inter alia*, the date of sale for home market sales and the unit price for such home market sales. Specifically, the United States stated that POSCO is to "[r]eport the unit price recorded on the invoice for sales shipped and invoiced in whole or in part."[57] The United States stated that "[t]his value should be the gross price for a single unit of measure."[58]

52. As in the prior case, the United States also requested that POSCO report the "terms of payment" for its home market sales and to "indicate whether the payment terms are stated or coded on each invoice or, otherwise, how customers agree to payment terms."[59] The United States also requested, again in its first questionnaire, that POSCO report "any price adjustments made for reasons other than discounts or rebates" and to "[s]tate whether these billing adjustments are reflected in your gross unit price."[60]

53. In its 2 September 1998 response, POSCO stated that "[t]he date of sale for all domestic sales is the date of the shipping invoice, whether categorized as a domestic or local sale."[61] POSCO further

[52] 26 January 1999 POSCO Case Brief, at 4. (ROK Ex. 7)
[53] *Id.*
[54] *Id.* at 5.
[55] *SSPC Final Determination*, 64 Fed. Reg. at 15456 (31 Mar. 1999). (ROK Ex. 11).
[56] Anti-dumping Questionnaire, at B-20. (US Ex. 2).
[57] 23 September 1998 Section B-D Response, at B-21 (repeating the question from the original questionnaire). (US Ex. 41).
[58] *Id*. at B-21 and B-22.
[59] *Id.* at B-18.
[60] *Id*. at B-23.
[61] 2 September 1998 Section A Response, at A-16. (US Ex. 46).

stated that "[t]he price in effect on the date of shipment is the price for the shipment."[62] In that response, POSCO reported transaction prices for home market sales, and stated that it has "reported the actual invoiced price per metric ton in Korean Won. In the home market, POSCO made local letter of credit sales ("local sales") and domestic sales. All sales have been recorded in Korean Won on the database."[63] POSCO further noted that a US dollar amount has also been reported for local sales "[f]or ease of verification."[64]

54. In discussing the payment terms, POSCO stated, as in the prior case, that "POSCO's home market customers pay on an open (*i.e.*, revolving) account basis that is the normal method of payment in the Korean domestic market."[65] For the billing adjustments, POSCO stated that it has provided "the billing adjustments that are reflected in the gross price" and that price adjustments were "generally issued to correct a data entry error or to correct the price on the original invoice."[66] But for local sales, POSCO again reported no adjustment to the won invoice price that was reported to the United States.

55. On 23 October 1998, the United States issued a supplemental questionnaire to POSCO requesting that POSCO provide a copy of an invoice for a home market sale and specifically instructed the company that "[i]f any of your sales are invoiced in dollar amounts, please indicate how payment was received. If payment was received in won, please indicate what exchange rate was used."[67] In response, POSCO stated that it "invoices local sales in dollars, and books the sale in its sales ledgers in won using the daily exchange rate in effect on the date of sale." POSCO provided sample documentation for a local sale and stated that "[t]he details on the per ton price are noted on the shipping list detail which is sent to the customer, with the total dollar amount recorded on the tax invoice." POSCO indicated that "[p]ayment is received on a local letter of credit basis in dollars as well. Payment is booked in won with the difference in the exchange rate on the date of sale and the date of payment."[68] POSCO submitted a modified sales listing to report local sales and the related charges in dollars.[69] POSCO indicated that the won amounts were now provided for reference purposes, and suggested that the United States "maintain the dollar value of the local sales until the final steps in the [anti-dumping] calculation."[70] POSCO did not claim that the won amount reported earlier was not the won amount paid by the customer and received by POSCO for such sales.

56. In its 4 January 1999 preliminary determination, based upon POSCO's arguments, the United States concluded that POSCO's local sales were, in fact, consumed in the home market and therefore included the sales in its normal value calculations, as POSCO requested. However, in including those sales in its normal value calculations, the United States mistakenly applied a currency conversion to the dollar-denominated amount of the sale.[71]

57. The United States conducted verification of POSCO's home market sales response from 22 February, through 26 February 1999.[72] At verification, POSCO explained that while domestic sales are made on an open account, local sales are made on a contract basis, with a local letter of credit. The United States examined a local letter of credit involved in a local sale and determined

[62] *Id.* at A-17.
[63] 23 September 1998 Section B-D Response, at B-22. (US Ex. 41).
[64] *Id.*
[65] 23 September 1998 Section B-C Response, at B-16 and B-18. (US Ex. 41).
[66] *Id.* at B-23.
[67] 23 October 1998 Supplemental Questionnaire, at Attachment I, at no. 11. (US Ex. 47).
[68] 23 November 1998 Supplemental Response, at 19 (ROK Ex. 45), and Ex. B-26. (US Ex. 42).
[69] *Id.*
[70] *Id.* at 20, n. 7. (US Ex. 42).
[71] 17 December 1999 Preliminary Analysis Memorandum for POSCO, at 9. (US Ex. 48).
[72] 6 April 1999 Sales Verification for POSCO, at 1. (ROK Ex. 19).

there were no discrepancies.[73] The United States traced a local sale and tied the sale from POSCO's order sheet to a cumulative shipping list/invoice and tax invoice. The United States also verified that POSCO recorded the sale in its books in won as reflected in the tax invoice to the customer. For that sale, the United States found that the won amount listed on the invoice and reported by POSCO in its response was not the won amount actually paid by POSCO's customer and that differences between the recorded sales amounts and payment amounts are reflected in the company's "Foreign Exchange Currency Loss of Transaction for Local Sales" account.[74]

58. In its case brief, POSCO once again argued that because it negotiates and invoices its customers in dollars, the United States should use the dollar amount in its calculations. However, POSCO also stated once again that local customers "*pay POSCO in Korean won* based on the US dollar invoice price."[75]

59. Although the record in SSSS contained more information concerning the dollar prices on the invoices, much of that information was vague or contradictory and was obtained late in the proceeding. For its final determination, the United States weighed all of the evidence and determined that the currency of the local sales transactions was Korean won. As in the prior case, relying on the record developed during the investigation, the United States based its stated determination on the fact that the customer pays in won, not US dollars, and the sales value of the merchandise is charged to the sales ledger in won.[76]

Q.4. *For both parties*. Is there anything in the record of the investigations indicating *why* these sales were paid in won if, as argued by Korea, they were in fact denominated in dollars?

60. Although POSCO repeatedly stated that it was paid in won for these sales, nothing in the record of these investigations indicates why, if these were in fact dollar sales, they were paid in won.

Q.7. *For the United States*. Do you agree that the exchange rates that you refer to as POSCO's "internal exchange rates" are the market exchange rates announced by the Korean Exchange Bank'?

61. Yes. Although the United States made no factual determination as to whether POSCO's "internal exchange rates" are in fact the same exchange rates announced by the Korean Exchange Bank for Inward Remittances, POSCO has stated that it used the daily exchange rates provided by the Korean Exchange Bank for Inward Remittances.[77]

Q.8. *For the United States*. The United States asserts (first submission, para. 192) that, "[c]ontrary to Korea's claim, a comparison of the exchange rates demonstrates that during the month of November 1997, the rates varied by as much as { } percent." Please state the source for this statement. Is the United States here comparing POSCO's "internal" exchange rate to the US Federal Reserve's daily exchange rate or to the USDOC's "official exchange rate"?

62. The United States is comparing POSCO's internal exchange rate to the daily exchange rate provided by the US Federal Reserve. The chart in footnote 161 of the United States' first submission sets out the calculation. The source for the data used in the calculation is as follows:

[73] *Id.* at 11.
[74] Id. at 14.
[75] 15 April 1999 POSCO Case Brief, at 4. (ROK Ex. 20).
[76] *SSSS Final Determination*, 64 Fed. Reg. at 30678 (8 June 1999). (ROK Ex. 24).
[77] See, e.g., 6 April 1999 Sales Verification Report for POSCO in SSSS, at 14. (ROK Ex. 19).

1. For the dates of sales for the local sales: the United States obtained the dates of sale for the local sales set forth in the chart using POSCO's home market database for both SSPC and SSSS.

2. For the exchange rates from the Korean Exchange Bank for Inward Remittances: the United States used the exchanges rates listed in the SSPC Sales Verification Report, Exh. 6 (US Ex. 29).[78]

3. For the exchange rates from the US Federal Reserve: the United States used the rates included in the computer databases for both SSPC and SSSS.[79]

Q.9. ***For the United States*****. The United States asserts (first submission, para. 177) that "Article 2.4.1 cannot be read to require that currency conversions be avoided in any particular circumstances." In the view of the United States, would a Member be permitted by the *AD Agreement* to engage in currency conversion in a case where all the sales in both markets were indisputably both invoiced and paid in the same currency? If not, what provision of the *AD Agreement* would regulate such behaviour?**

63. No. Article 2.4.1 establishes the rules to be applied in converting foreign currencies, whenever a Member determines that the comparison of export price and normal value requires a conversion. A conversion is required only if the sales to be compared were transacted in different currencies. Article 2.4.1 presupposes that a conversion is necessary, *i.e.*, that the transactions were made in different currencies and that a currency conversion is therefore necessary. The issue of whether a currency conversion is necessary rests upon the facts of each case that demonstrate the currencies in which the sales are transacted. In the hypothetical scenario posited by the Panel, where all relevant sales in both markets were "invoiced and paid" in the same currency, there would be no need to engage in any currency conversion because the condition for a currency conversion would not have been satisfied in that case.

Q.10. ***For the United States*****. Assume that the United States had determined that the sales in question were dollars sales, not won sales, and that there was no dispute among the parties on this point. Would it in the view of the United States have been consistent with Article 2.4.1 of the *AD Agreement* to nevertheless convert those sales into won and then back into dollars? Would any other provision of the *AD Agreement* be implicated?**

64. Assuming *arguendo* that the sales in question were dollar sales, the United States would use the dollar amount of such sales and make no currency conversion. In the United States' view, if both the export and domestic sales are in the same currency, the comparison under paragraph 4 does not require a conversion within the meaning of Article 2.4.1.

Q.11. ***For the United States*****. Please clarify how USDOC established the exchange rate applied to the sales which it found were won-denominated. Did it use the "official exchange rate" or daily exchange rates? Did it convert as of the date of sale of the "local sales" or as of some other date? Please address specifically Korea's statements in footnote 142 to its first submission and para. 58 of its oral statement, referring to the exchange rate on the date of the *US* sale.**

65. Although there may be some confusion in terminology, the "official exchange rate" simply refers to the exchange rate actually used by the United States for a given day. This term is contrasted with the raw "daily rates" provided by the Federal Reserve which have not been modified, for example to ignore "fluctuations" pursuant to Article 2.4.1. Thus, the "official exchange rate" for a

[78] See also ROK Ex. 44.
[79] See also ROK Ex. 50.

particular day will usually be a daily rate, although it may be an average benchmark rate if the daily rate on that day is a "fluctuation."

66. As in most cases, in the cases before the Panel, for all won sales, including "local sales," the official exchange rate used by the United States was the daily rate, except on those occasional dates on which it identified an exchange rate "fluctuation" pursuant to Article 2.4.1 (in which the rate used was a rolling-average "benchmark" rate). As discussed elsewhere, however, unlike most cases, during the period of severe devaluation, November and December 1997, the United States used daily rates, even though its normal methodology would have identified the daily rates during this period as fluctuations and applied the benchmark rate.[80]

67. In accordance with Article 2.4.2, the United States first established weighted-average of normal values for comparison with weighted-average export prices of all comparable transactions. For each weighted-average normal value, after identifying the comparable export transactions, the United States calculated a weighted-average exchange rate based upon the dates of those comparable US transactions. The weighted-average normal value was then converted into US dollars using that weighted-average exchange rate.

68. Korea has not challenged the methodology of converting each normal value average based on the exchange rates in effect on the dates of the comparable export sales. Thus, the Panel need not address that issue. Rather, Korea argues, in footnote 142, that the "double-conversion" of currencies was inconsistent with Article 2.4.1 and was distortive. As the United States has argued, there was no "double conversion" in this case. The United States made one currency conversion - from Korean won into US dollars. No other conversion was necessary, or made, for the sales at issue. The single conversion was based upon a factual determination that the sales at issue were made in won, not dollars. Accordingly, the United States currency conversion in these investigations is consistent with Article 2.4.1.

Q.13. ***For the United States*****. In respect of the differences between POSCO's "internal" exchange rate and that of the NY Federal Reserve, Korea notes (first submission, para. 4.74) the existence of a time-lag between Korea and New York which it considers explain those differences. Please comment.**

69. The United States does not know the cause of the difference in exchange rates between the Korean Exchange Bank and the US Federal Reserve. In the United States' view, the issue before the Panel is not a question of which source for exchange rates is more accurate. Rather, it is a question of whether the United State's determination that these were won sales was based on an objective assessment of properly established facts and whether the exchange rates used by the United States satisfy the requirements of Article 2.4.1.

70. Korea has raised a "time-lag" issue in the context of its transparency argument. In the view of the United States, the exchange rate methodology applied by the United States - which includes the use of the NY Federal Reserve rate - is highly transparent. While there are some natural and inherent constraints to ascertaining *the* exchange rate on the day in which a transaction occurs, companies can

[80] In the First Submission of the United States, at footnote 161, the United States stated that it inadvertently used "adjusted exchange rates" in the SSPC case solely for purposes of determining, pursuant to *Roses from Columbia*, whether POSCO's exchange rate mirrored the rate the United States would have used, i.e. the "official exchange rate." The "adjusted exchange rates" referred-to are the rates produced by the normal methodology which did not take into account the devaluation during November and December 1997, i.e. which used benchmark rates rather than daily rates during this period. However, as demonstrated by the table in that footnote, use of the daily rates for this comparison still reveals that POSCO's rates differed substantially from the rates being used by the United States.

ascertain with certainty the daily exchange rate to be applied in an anti-dumping calculation. As discussed in its first submission, the United States has publicly announced, for purposes of anti-dumping analysis, that it will use its official exchange rates for currency conversions. The methodology used by the United States to ascertain the exchange rates for its dumping analysis has also been published. The purpose of these and other actions is to "ensure that all exporters, when they set their prices and whether under [an anti-dumping] order or not, can know with certainty the daily exchange rate the Department will use in a dumping analysis."[81] As noted earlier, along with knowledge of the source of rates and the rules to be applied, the United States has taken the unusual step of publishing on the Internet the computer code to allow parties to reproduce the United States' calculations and thus "monitor exchange rates" to ensure that companies can ascertain the applicable exchange rate. Companies can, with the knowledge of the United States' rules, reasonably determine the daily exchange rate. The rules, and the tools for monitoring and determining the exchange rates, are published and available to all companies.

Q.14. ***For the United States*****. In its oral statement (para. 41), the US asserts that the USDOC did not engage in a "double conversion" because it took directly the won amounts reported by POSCO for the so-called "local" sales. However, in the "preliminary analysis memorandum" for sheet & strip, the USDOC recognized that "for all sales in the home market involving dollar denominated transactions, we have applied a currency conversion to Korean won on the date of the home market sale" (item L., at page 9). Is this not an indication that the USDOC converted the "local" dollar sales into won prior to converting them into dollars and that in so doing the USDOC did undertake a "double conversion"?**

71. The methodology used in the SSSS final determination differed from the preliminary determination; there was no double conversion in the final determination. In its first submission to the Panel, the United States indicated that in SSSS it "mistakenly converted the dollar-denominated amount into won for the preliminary determination."[82] The United States, however, corrected the error in the final determination in SSSS. For the final determinations in both SSPC and SSSS, the United States made one currency conversion from Korean won into US dollars. No other currency conversions were made in these cases.

Q.15. ***For the United States.*** **In its oral statement (para. 39), the US explains that the USDOC was not provided enough evidence by POSCO attesting the fact that POSCO received won amounts other than the amounts reflected in the invoices. The US seems to suggest that this is one of the reasons why the USDOC refused to consider the "local" sales as dollar sales. Could the US explain why this important argument appears to be omitted from the determinations and memoranda relevant to the case?**

72. The picture Korea presented to the Panel in this matter differs from what POSCO presented to the United States during the course of the investigations. In SSPC, there was no evidence at any time during the investigation that the won amounts listed on the invoices and reported by POSCO varied from the won amounts actually paid by the customer. In SSSS, as discussed above, there was additional information about these transactions, but it was insufficient to persuade the United States that there was a basis to treat these sales as dollar transactions.

[81] *Notice: Change in Policy Regarding Currency Conversions*, 61 Fed. Reg. at 9435. (ROK Ex. 49).
[82] *First Submission of the United States*, at 51, n. 158.

73. The final determinations were based on the positive evidence that these were won sales – not on a lack of evidence. The determinations and analysis memoranda reflect the basis for the determinations. The status of the record only became an issue in this proceeding before the Panel. The United States raised this evidentiary issue in response to Korea's repeated statements that customers did not pay "the won amount on the invoice" in support of its argument that the prices were set in dollars. In light of the standard of review, it was necessary for the United States to point out that this fact was never asserted or established on the SSPC record and was asserted but inadequately supported on the SSSS record.

II. RESPONSES OF THE UNITED STATES TO QUESTIONS POSED BY KOREA

A. UNPAID SALES

Q.1. In its oral statement, the United States describes that it classified POSCO's US sales through POSAM as constructed-export-price ("CEP") sales, while it classified POSCO's direct sales to US customers as export-price ("EP") sales.[83] The United States then describes that it made (or did not make) the following adjustments for "bad debt" expenses:

> **For the CEP sales, the United States deducted the allocated US "bad debt" expense from the price to the first unaffiliated customer.[84]**
>
> **For the CEP sales, the United States did not add the allocated US "bad debt" expense to the normal value that was compared to the constructed export price.[85]**
>
> **For the EP sales, the United States did not deduct the allocated US "bad debt" expense from the sales price to the first unaffiliated customer.[86]**

The United States did not address the fourth circumstance, however. In other words, the United States did not state whether, for those sales classified as EP sales, the allocated US "bad debt" expense was added to the normal value that was compared to the export price. Would the United States please confirm whether the allocated US "bad debt" expense was added to the normal value that was compared to the export price for the sales classified as "EP" sales?

74. As the United States explained in its first submission and oral statement, the circumstance of sale adjustment for direct selling expenses was made by deducting from normal value the direct selling expenses for domestic sales in Korea and adding to normal value the US direct selling expenses. The United States further explained that the allocated portion of bad debt was treated as a direct selling expense. Therefore, for POSCO's sales directly to independent US buyers – *i.e.*, EP sales – the addition to normal value included an allocated portion of the US bad debt expense.[87]

Q.2. If the allocated US "bad debt" expense was added to the normal value that was compared to the export price for EP sales, is it the position of the United States that this adjustment was authorized by Article 2.3 of the Anti-Dumping Agreement?

75. As the United States explained in its first submission and oral statement, the circumstance of sales adjustment was made to allow for differences in conditions and terms of sale, consistent with Article 2.4 of the AD Agreement, not as a deduction to construct export price, consistent with Article 2.3. of the AD Agreement. Therefore, in the comparison of EP sales and normal value, the addition to normal value that was made as part of the circumstance of sale adjustment, and which included an allocated portion of bad debt, was an Article 2.4 allowance.[88]

Q.3. Is it the US position that there are no limits on adjustments that may be made under Article 2.3 of the Anti-Dumping Agreement? If there are limits, what are they?

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[83] *See* US Oral Statement, paras. 9 and 10.
[84] *See* US Oral Statement, para. 9.
[85] *See* US Oral Statement, para. 11.
[86] *See* US Oral Statement, para. 9.
[87] First Submission of the United States, paragraphs 82-84 and 87; Oral Statement of the United States at the First Panel Meeting, paragraph 12.
[88] US First Submission, at para. 8; US First Oral Statement, at para. 9-12.

76. Korea has not asserted a claim under Article 2.3 of the AD Agreement, therefore, this issue is not before the Panel. Nevertheless, it is the view of the United States that deductions to construct export price must be consistent with the object and purpose of Article 2.3, which is to construct the export price between the exporter and the associated importer. Beginning with the price to the first independent buyer and deducting all expenses related to the resale by the associated importer is a reasonable methodology for constructing export price, which is consistent with the object and purpose of Article 2.3.

Q.4. The United States contends that, if "the seller agrees to sell on credit ... [it] accepts a credit expense, including the *risk* of non-payment."[89] It also states that, in this case, "POSCO agreed to sell to this US customer on credit and in doing so accepted the *risk* of non-payment as a condition of sale."[90] The United States contends that POSCO's acceptance of this *risk* "is sufficient to warrant including bad debt in an Article 2.4 adjustment."[91] In light of these assertions,

> **a. What evidence was there in the Plate and Sheet cases regarding the risk of non-payment at the time that POSCO made its US sales to the ABC Company (and, according to the United States, agreed to accept the risk of non-payment)?**

77. As the United States explained in its first submission and oral statement, the risk of bad debt is inherent in an agreement to sell on credit rather than demand payment on delivery. The fact that these sales were made on credit establishes that POSCO accepted the risk of non-payment at the time of sale.

> **b. Was there any evidence in the Plate and Sheet cases demonstrating that, at the time POSCO made its sales to the ABC Company, there was a difference in the risk of non-payment for sales to customers in the United States and for sales to customers in Korea?**

78. As discussed above, when a seller sells on credit there is an inherent risk of non-payment. That risk may differ between the two markets and thus have different effects on prices in the two markets. Accordingly, the United States makes an adjustment to eliminate such differences. Because it is the only practical means of making due allowance for any difference in bad debt risk, we base the allowance on the company's actual experience in each of the two markets during the period of investigation. That is, we rely on the actual bad debt expenses the company recognizes with respect to each of the two markets being compared. The evidence placed on the record in the cases at issue showed that, during the period of investigation, POSCO actually recognized greater bad debt expenses, as a proportion of sales, in the US market than in the Korean market.

> **c. If there was no difference in the risk of non-payment for sales in Korea and the United States at the time POSCO made its sales, what is the basis for claiming that there was a difference in the conditions and terms of sale?**

79. As discussed above, the evidence placed on the record in the cases at issue showed that, during the period of investigation, POSCO actually recognized greater bad debt expenses, as a proportion of sales, in the US market than in the Korean market.

Q.5. Does the actual bad debt experience that occurs after a sale is made provide an accurate measure of the risk of bad debt before the sale was made?

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[89] US Oral Statement, para. 15 (emphasis added).
[90] US Oral Statement, para. 17 (emphasis added).
[91] US Oral Statement, para. 17.

80. As discussed above, because it is the only practical means of making a due allowance for that difference, we base the allowance on the company's actual bad debt experience in the two markets during the period of investigation. That is, we rely on the actual bad debt expenses the company recognizes with respect to each of the two markets being compared. Furthermore, in accordance with GAAP, companies normally account for bad debt through a reserve accounting method that is based on the company's experience. Therefore, the bad debt expenses reflected in a company's accounting records for a particular market provides a reasonable measure of the price effect of the risk of bad debt in that market.

Q.6. The United States asserts that the risk of non-payment is equivalent to the risk that a warranty expense will be incurred. The past decisions by the United States have recognized that warranty expenses may fluctuate from year to year and that, where there are fluctuations in warranty expenses, the use of a historical average is appropriate to avoid distortions. The standard questionnaire used by the Department of Commerce therefore requests information on the historical warranty expense experience for sales in the home market and the United States. Did the Department of Commerce request information on POSCO's historical bad debt experience in the home market or the United States in the Plate and Sheet cases? Did the United States evaluate whether the bad debt experience during the investigation periods in those cases was consistent with POSCO's historical experience?

81. As discussed above, companies normally account for bad debt using a reserve accounting method that is based on the company's historical experience. Under a reserve accounting method, the bad debt expense recognized in a given period reflects that experience. Therefore, unlike warranty expense, the bad debt expense reported by an exporter normally reflects the company's historical experience and no additional historical evidence is necessary.

82. The United States learned at verification that POSAM did not use a bad debt reserve. Therefore, the actual amount of bad debt recognized during the period was the only reasonable basis for the adjustment. Furthermore, POSCO only argued that the sales to ABC company should be excluded or, in the alternative, that the bad debt should be allocated over a broader category of sales. POSCO never argued that the amount of bad debt recognized during the period should be adjusted to reflect experience and never provided any data establishing that such an adjustment was appropriate and which could be used as a basis for making such an adjustment.

Q.7. The United States has contended that, under US law, adjustments for differences in "conditions and terms of sale" are referred to as "circumstance-of-sale" adjustments.[92] The Department of Commerce's regulations state that circumstance-of-sale adjustments will normally be made only for "direct selling expenses" (or for expenses that the seller assumes on behalf of the buyer).[93] In these circumstances, what is the significance of the finding by the Department of Commerce that the "bad debt" expense on POSCO's US sales was a "direct" selling expense?

83. As explained previously, "direct" selling expenses are those related to the conditions and terms of sale, which are the basis for the circumstance of sale adjustment to normal value. Because bad debt is a direct selling expense, it is included in the circumstance of sale adjustment.

Q.8. What evidence is there on the records of the Plate and Sheet investigations to indicate that POSCO (or any of its affiliates) experienced actual bad debt expenses on any sales of Plate or Sheet to the United States prior to the sale to the ABC Company?

[92] *See* US Oral Statement, para. 11.
[93] *See* 19 C.F.R. § 410(b).

84. See the United States' response to question 3 (Treatment of Unpaid Sales) from the Panel.

Q.9. Is it the position of the United States that investigating authorities may include any export sales in the calculation of export price, no matter how aberrational they are and no matter how much their inclusion distorts the calculation of the dumping margins? Is it the US position that there are no limits at all on the investigating authorities' discretion to include export sales in the price comparison, including the "fair comparison" requirement of Article 2.4?

85. See the United States' response to question 9 (Treatment of Unpaid Sales) from the Panel.

B. MULTIPLE AVERAGING

Q.1. In employing its "multiple-averaging" comparison methodology (*i.e.*, comparing sub-period averages to sub-period averages and combining the results) in the Plate and Sheet cases, did the Department of Commerce treat the dumping margins for sub-periods that had negative margins as if they were zero margins? In other words, did the United States employ the practice known as "zeroing"?

86. Yes. The United States measured the amount of dumping as the amount by which "the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country," in accordance with Article 2.1 of the AD Agreement. After measuring that difference, the United States did not offset the amount calculated under Article 2.1 by an amount by which some products may have been sold at greater than the normal value.

87. The United States first notes, as did third party Japan,[94] that this issue is not properly before the Panel, and should not be addressed by the Panel. Korea never mentioned this issue in its request for panel review, nor did it do so during consultations. Indeed, Korea has never directly asserted that the practice it refers to as "zeroing" is not authorized by the AD Agreement. Consequently, this question is simply irrelevant for purposes of determining whether the United States properly used multiple averaging in the cases before the Panel.

88. In any event, the practice referred to as "zeroing" is not inconsistent with the AD Agreement. Consequently, should the Panel conclude that the issue is properly before it, the Panel should uphold the action of the United States with respect to this issue. An interpretation of Article 2.4.2 which prohibited "zeroing," if taken to its logical conclusion, would distort many of the requirements of Article 2.4 for a fair comparison and the making of due allowances for differences which affect price comparability.

89. All that Article 2.4.2 requires is that, in making comparisons between the export price and the normal value of the like product in an investigation, each comparison shall be made either on a weighted-average-to-weighted-average basis or a transaction-to-transaction basis. This requirement of comparing weighted-average-to-weighted-average figures or transaction-to-transaction figures is explicitly made subject to the requirements of Article 2.4. Thus, it is clear that the considerations discussed in Article 2.4 may be relevant in determining whether sales are comparable, and thus should be included in the same weighted-average.

90. The considerations of time, levels of trade and physical characteristics addressed in Article 2.4 illustrate that if adjustments are not made to eliminate such differences, then comparisons

[94] See, Third Party Oral Statement by Japan.

normally must be made on a level-of-trade basis, a product-specific basis (to account for differences in physical characteristics) and a time-period basis. Thus, there may be several to several thousand export prices and normal values which are compared within an investigation for a respondent company, depending on, *inter alia*, the variety of products, levels of trade, and selling conditions over time. In the cases before the Panel, the United States not only created different averages based on whether the transactions occurred before or after the devaluation, but also based on the physical characteristics of the products. Thus, these cases involved a multitude of average normal values and average export prices. This multitude of comparisons resulted in the calculation of varying dumping amounts for some US sales, and no dumping for other US sales.

91. It is worth recognizing that Article 2.4.2 was newly introduced with the Uruguay Round of negotiations to address a specific concern of certain Members with respect to the conduct of investigations. Previously, the practice of some Members, including the EC and the United States, was to compare individual export price transactions to weighted-average normal values. Article 2.4.2 was included in the AD Agreement to provide that, except in the case of targeted dumping, margin calculations in an investigation would be made on a consistent basis, i.e., weight-average to weight-average or transaction to transaction.[95] Thus, the intent was to eliminate transaction-to-average comparisons in investigations, not to alter the manner in which authorities calculated overall margins after all appropriate comparisons were made.

92. As discussed above, Articles 2.4 and 2.4.2 provide for a fair comparison between export price and normal value and further provide that such comparisons in investigations should normally be on a weight-average-to-weight-average basis or on a transaction-to-transaction basis. The "zeroing" practice is not covered by Articles 2.4 and 2.4.2 because it arises at a step subsequent to the comparison of export price and normal value. The "zeroing" took place at the stage when the margins from each comparison of comparable weighted-average normal values and export prices were combined into an overall average rate of dumping for the entire investigation.[96] The lack of guidance on the "zeroing" practice is confirmed by the fact that Article 2.4.2 explicitly permits transaction-to-transaction comparisons without providing a methodology for combining margins calculated pursuant to that methodology.

93. When this stage is reached, the individual, product-specific differences between normal value and export price may be positive or negative. If positive, they represent the aggregate amount of dumping duties that the importing country is permitted to collect for that product or group of transactions. If negative, they represent the amount by which the export price exceeded the normal value; however, the AD Agreement imposes no liability on the importing country to make payments to the importer or anyone else involved in the transaction for not dumping the merchandise in question. The negative difference between normal value and export price simply means there is no dumping; i.e., the dumping margin for that product or group of transactions is zero. Thus, for such products with no dumping margins, the amount of dumping duties which the importing country is permitted to collect is zero.

94. Equally important, when the investigating authority calculates an overall, average rate of dumping, neither Article 2.4.2 nor any other Article of the AD Agreement requires that more credit be given for negative dumping amounts than if the dumping duties were to be collected on a product-specific basis. Nevertheless, that would be the result if Article 2.4.2 were interpreted to prohibit zeroing. This problem may be illustrated with the following example:

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[95] See generally, *The GATT Uruguay Round: A Negotiating History (1986-1992): Antidumping*, Stewart, T., Ed. (1993, Kluwer) at 155-61, (US Ex. 23).

[96] See e.g., EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, (4 July 1995) paras. 500-501 (finding the practice of "zeroing" not to be inconsistent with the Anti-dumping Code).

	Aggregate Domestic Market Value in Currency Units (CU)	Aggregate Importing Country Value in CU	Aggregate Dumping Amount Calculated in CU	Product-specific Aggregate Dumping Duties Which May be Collected in CU
Product 1	5500	5000	500	500
Product 2	1800	2000	-200	0
Product 3	3300	3000	300	300
Product 4	4500	5000	-500	0
Product 5	2200	2000	200	200
TOTAL	17300	17000	300	1000

95. Based on the above figures, the overall, average rate of dumping is 5.88 percent (1000/17000). Moreover, the application of that dumping margin to the total import value (5.88 percent * 17000) would result in the collection of 1000 CU in dumping duties – no more and no less than the importing country is permitted to collect on a product-specific basis.

96. By contrast, if this calculation were to be performed by offsetting aggregate dumping amounts by negative amounts, the overall, average rate of dumping would be 1.76 percent (300/17000). Even if we were to ignore the fact that this is a *de minimis* margin, the application of that margin of dumping to the total import value (1.76 percent * 17000) would result in the collection of only 300 CU in dumping duties. Stated another way, there would be an additional 700 CU in dumping which the importing country would not be permitted to remedy. Moreover, because, as noted above, this methodology would result in the calculation of a *de minimis* dumping margin, the importing country would actually be unable to place any dumping duties on these products, despite the fact that the majority of the products (on a value and volume basis) were dumped at an average rate of 10 percent (1000/10000).[97]

97. Similarly, Article 2.4.2 does not require positive margins to be offset by negative margins because it would fail to give meaning to the requirements of Article 2.4, which, as noted above, contemplate that comparisons be made at least on a product-specific basis in order to account for differences in physical characteristics. This failure may be observed utilizing the above example by noting that the difference between the total aggregate home market prices and the total aggregate importing country prices (17300-17000) is 300 CU. In other words, a methodology in which positive margins had to be offset by negative margins necessarily obscures the results of the product-specific comparisons and is equivalent to simply aggregating normal values and export prices regardless of comparability. In other words, if zeroing is not permitted by Article 2.4.2, then the limitation of averaging to "comparable" transactions provided for in Article 2.4.2 has no meaning.

98. For these reasons, the United States believes that treating negative differences between normal values and export prices, calculated on a product-specific basis, as simply zero dumping is a permissible interpretation of Articles 2.4 and 2.4.2.

[97] The 10000 CU denominator is the aggregate value of the imports for which there were positive dumping duties.

Q.2. Article 2.4 specifically refers to a number of "differences" for which adjustments are permitted because they affect "price comparability." This list includes differences in physical characteristics and differences in levels of trade. Where does Article 2.4 indicate that differences in the timing of sales constitute "differences affecting price comparability"?

99. Article 2.4 specifically states that comparisons shall be made in respect of sales made at as nearly as possible the same time. Thus, sales which are not made at as nearly as possible the same time are not to be compared; that is, they are not "comparable" within the meaning of Article 2.4. This requirement of Article 2.4 could be read to mean that comparisons must be limited to sales made on the same day, if possible. However, the United States believes that this provision can also reasonably be read to mean that multiple-day averages are permitted, provided that investigating authorities adopt approaches which limit the maximum amount of time which could occur between sales in the two averages being compared.

100. In most cases, where no evidence has been presented to contradict this conclusion, the United States determines that sales made within the same year are comparable.[98] Under this reading, in general, normal value transactions made during one year, would not be considered comparable to export transactions made in a different year. Similarly, averaging together sales made during a five-year period of investigation would not achieve comparability.

101. Although the United States normally applies a one-year standard for determining that sales have been made at the same time, it applies a shorter period when circumstances warrant. For example, in situations of high inflation, the United States uses one month averages in order to prevent the inflation from distorting the comparison. Similarly, in the present case the United States constructed two averaging periods in order to prevent the 50 percent devaluation from distorting the comparison.

C. DOUBLE CONVERSION OF LOCAL SALES

Q.1. If the prices for the "local sales" were fixed in dollars, as POSCO contended, would it have been appropriate for the Department of Commerce to base its normal-value calculations on won amounts shown on the invoices that did not correspond to the amounts actually paid? Would it have been appropriate in such circumstances to base the normal-value calculations on the US dollar prices set forth on the invoices?

102. The principal issue is whether the currency of the transaction is Korean won or US dollars. If the currency of the transaction were US dollars, then it would be appropriate to base normal value calculations on the US dollar amount and no currency conversion would be required or appropriate. If the evidence, however, indicates that the transaction was made in Korean won, then it is appropriate under the AD Agreement to convert the sales into US dollars through the application of the currency conversion rules prescribed in Article 2.4.1, as was done in these investigations.

Q.2. When the United States reviewed the local sales during the verifications in the Plate and Sheet cases, did it confirm that the dollar prices shown on the invoices matched the dollar prices reported by POSCO?

103. In both investigations, the United States verified that both the dollar and won amounts reported to the United States reflected the amounts on the invoices.[99]

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[98] Technically, the United States uses the four most recently completed fiscal quarters prior to the filing of the petition. See, 19 C.F.R. § 351.204(b).

[99] See 6 April 1999 Sales Verification Report for POSCO in SSSS, at 14. (ROK Ex. 19). See also 5 January 1999 Sales Verification Report for POSCO in SSPC, at 4-5. (ROK Ex. 6).

Q.3. The United States admits that POSCO told it during the course of both the Plate and Sheet investigations that the prices for its "local sales" were fixed in dollars and not in won.[100] The United States also admits that, in the verification in the Sheet case, the Department of Commerce obtained evidence confirming that the amount the customer actually paid for these "local sales" was based on the dollar prices shown on the invoices, and not on the won amounts shown on the invoices.[101] Was there any evidence indicating that any Korean customer who purchased Plate or Sheet in a "local sale" actually paid the won amount shown on the invoice? If there was no evidence that any Korean customer who purchased Plate or Sheet in a "local sale" actually paid the won amount shown on the invoice, what evidence was there to refute POSCO's testimony that the prices for these sales were fixed in dollars, and not in won?

104. POSCO reported these sales in won based on won prices on its invoices and recorded in its accounting records. Although POSCO later claimed that the prices were fixed in dollars, POSCO did not present, and the United States did not discover, sufficient evidence to substantiate this claim. To the contrary, the weight of the evidence provided by POSCO indicated that these were won transactions, as POSCO originally reported. As explained in response to question 15 from the Panel, there was no evidence in SSPC to suggest that the won amount paid was anything other than the amount reported by POSCO. The verification in SSSS provided some evidence that the won amounts on the invoices did not reflect the amounts actually paid but the evidence was very limited and came late in the proceeding.

Q.4. Is it the normal practice of the Department of Commerce to verify that the amounts shown on the invoices to home-market customers correspond to the amounts actually paid by those customers? Is there any evidence that the Department of Commerce departed from that practice in the Plate and Sheet investigations?

105. The United States verifies information to the extent practicable. The United States' normal practice is to spot check the accuracy and adequacy of a company's response by, *inter alia*, conducting sales traces of the company's documentation pertaining to selected sales, as was done in these cases. In these cases, the United States conducted three comprehensive verifications of POSCO's response in each investigation (one for home market sales, one for home market costs, and one for constructed export price sales in the United States). For local sales, POSCO stated that it was paid on a revolving account basis and thus there was no way to tie the payment directly to a particular sale.[102] Thus, further verification was not practicable. Accordingly, there is no evidence to indicate that the United States departed from its normal practices in these cases. However, even if the United States had conducted no verification in these cases, it would not have violated any of the requirements of the AD Agreement.

Q.5. Were the Plate and Sheet investigations the first anti-dumping investigations where some of the home-market sales were dollar-denominated local sales? Does the United States agree or disagree with the statement on para 4.72 of Korea's First Submission that "neither the United States nor the petitioners in the [Plate and Sheet] investigations cited a single case before the investigations at issue where the United States treated a home-market sale priced in dollars as if it had been priced in the local currency"?

106. In this question, Korea attempts to create the false impression that the United States treated a sale actually priced in dollars, as if it had been priced in Korean won. As discussed above, these are simply not the facts. The United States' actions were fully consistent with a long and well-established practice to use the currency in which the revenue or expense was earned or incurred.

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[100] *See* US Oral Statement, paras. 36 and 38.

[101] *See* US Oral Statement, para. 39.

[102] See, e.g., 5 January 1999 Sales Verification Report for POSCO in SSPC, at 14 (ROK Ex. 6), and Exhibit 39 (US Ex. 49).

Q.6. Does the United States agree that the records of the Plate and Sheet cases show that POSCO's "internal exchange rate" was the rate published by the Korean Exchange Bank? If not, please describe the evidence to the contrary in the record.

107. *See* the United States' response to Panel Question # 7.

Q.7. Is it the US position that the fact that the currency conversion was made for accounting purposes in a home-market sale is determinative of, or relevant to, whether that sale was valued in dollars or won? If so, please explain the basis for that position.

108. No. The United States did not base its factual determination on whether a currency conversion was made for "accounting purposes." The United States weighed all of the evidence and concluded that these were won sales based upon the undisputed fact that the sales were invoiced and paid in won and were reported by POSCO as won sales.

ANNEX 2-5

SECOND SUBMISSION OF THE UNITED STATES

(29 June 2000)

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I. INTRODUCTION

1. The United States will devote the majority of this second submission to rebutting Korea's arguments regarding the primary issues involved in this dispute – whether the United States properly adjusted for certain bad debt expenses recognized by POSCO in its accounting records for the period of investigation, whether the United States properly determined that sales before and after a 50 per cent devaluation of the Korean won should not be averaged together, and whether the United States properly treated sales invoiced and paid in Korean won as won transactions.

2. Before addressing the substantive issues before the Panel, the United States must correct certain misstatements contained in Korea's oral statement at the first meeting of the Panel.[1] Specifically, the United States will address the issues of the applicability of Article X:3 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and the allegation, made repeatedly by Korea, that the determinations in question were "result oriented".

3. Next, the United States will address the issue of its treatment of bad debt expenses recognized by POSCO during the period of investigation. The United States will demonstrate that those expenses were deducted in the construction of the export price for sales through POSAM, which is governed by Article 2.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement"). Korea has not asserted any claim under Article 2.3. The United States will further establish that its treatment of the bad debt expense in the comparison of export price and normal value was consistent with the obligation under Article 2.4 to make allowance for differences in conditions and terms of sale. Finally, we will demonstrate that the allowance for bad debt expense was based on an objective assessment of the facts presented by POSCO, as reflected in its normal accounting records for the period of investigation.

4. The United States will also address the issue of use of two averaging periods within the period of investigation to account for the 50 percent devaluation of the Korean won. The United States will demonstrate that the language of Article 2.4.2 clearly limits averaging to transactions which are "comparable," an undefined term with a broad range of permissible interpretations. The United States will show that Article 2.4 establishes that time is a factor to be considered in determining comparability in that it requires that comparisons be made at as nearly as possible the same time. Consequently, in light of the 50 percent devaluation in the home market currency, the United States reasonably concluded that sales before and after such a depreciation should not be considered to have been made at the "same time" within the meaning of Article 2.4, nor to have been "comparable" within the meaning of Article 2.4.2. Finally, the United States will show that Korea has presented a highly selective picture of the past practice of the United States on this issue, and that the position of the United States in the cases before the Panel is consistent with its position in similar cases.

5. The United States will also show that its determination that "local sales," which were invoiced in Korean won, paid in Korean won, recorded in POSCO's internal records in Korean won, and reported in POSCO's questionnaire response in Korean won, were won transactions is based on an objective assessment of the information provided by POSCO, including limited information concerning dollar values reflected on the invoices.

6. This second written submission concludes by refuting Korea's peculiar assertion that, if the Panel finds any error in the determinations by the United States, regardless of how small the effect of such error on the ultimate margin of dumping may be, Article 1 of the AD Agreement requires the

[1] Oral Statement of the Republic of Korea, made at the First meeting of the Panel on 13-14 June 2000 (hereinafter *ROK First Oral Statement*).

panel to suggest that the entire antidumping measure be revoked, rather than merely that the measure be brought into conformity with the AD Agreement.

7. Together with this second written submission, the United States is submitting its responses to the questions presented to the United States by the Panel and by Korea on 13 June 2000. To the maximum extent possible, the United States has sought to provide complete answers that do not repeat statements in this submission or depend on this submission for support. Nonetheless, the Panel may find certain aspects of the present submission to be germane to the matters covered in the responses, and vice-a-versa.

II. PRELIMINARY ISSUES

A. ARTICLE X:3 OF GATT 1994 IS NOT RELEVANT TO THE DISPUTE BEFORE THE PANEL

8. Korea continues to assert its expansive reading of Article X:3 which threatens to swallow the entire DSU, as well as Article 17 of the AD Agreement. According to Korea's reading, Article X:3 authorizes a panel to look into domestic precedent regardless of whether an action is otherwise consistent with the covered agreements, and strike down that action if it has not followed the panel's determination of what that precedent is.[2] This expansive reading is without foundation.

9. As pointed out in the first submission of the United States, Article X:3 addresses overall *administration* of the law, rather than specific administrative rulings. The Appellate Body in *Bananas* recognized that Article X:3(a) does not apply to "laws, regulations, *decisions* and *rulings*," but only to the administration of such matters.[3] Thus, if Korea were asserting that the United States had issued an administrative ruling in which it found dumping for several countries, but was only collecting duties for some of them, then it might be able to raise a claim under Article X:3 that the administration of the ruling was inconsistent. However, as the Appellate Body recognized in *Bananas*, to the extent a party is complaining about the ruling itself, a panel can address that claim under the covered agreement.

10. This understanding of Article X:3 is further reinforced by the finding of the Appellate Body in *Shrimp*.[4] In that case, the Appellate body applied Article X:3 not because one particular decision was inconsistent with a prior decision, but rather because it had been alleged that the entire procedure under review was "non-transparent and ex-parte," that there was no formal notice of or reasons provided for actions, and that there was no opportunity for review of or appeal from an action. In the present case, although Korea has complained about two particular rulings, it has not argued that some aspect of the system of enforcement of anti-dumping decisions in the United States is arbitrary. In light of this, Korea's reliance on Article X:3 is misplaced.

11. The use to which Korea is putting Article X:3 is as transparent as it is improper. Lacking persuasive arguments that the actions of the United States are inconsistent with the AD Agreement, Korea has attempted to bolster its claim by alleging that the United States' actions were inconsistent with its domestic precedent.[5] As has been shown, this is simply not the case. More significantly, however, the Panel should make clear that this attempt to expand the WTO dispute resolution process into the role of a reviewing court for domestic law is inappropriate.

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[2] ROK First Oral Statement, at para. 80.

[3] See the discussion of the *Bananas* decision in the First Submission of the United States of America, dated 26 May 2000, (hereinafter US First Submission), at para. 43.

[4] See the discussion of the *Shrimp* decision in the US First Submission, at para. 45.

[5] Indeed, Korea goes so far as to assert that the opinions issued by a US Federal Court which refer solely to US law, and contain no mention of the AD Agreement, provide "interpretive guidance" to the Panel regarding provisions of the AD Agreement. ROK First Oral Statement at para. 36.

B. THE FINDINGS BY THE UNITED STATES WERE NOT "RESULTS ORIENTED"

12. In its statements to the Panel, Korea has gone beyond its earlier allegations that the United States took actions inconsistent with a proper reading of the AD Agreement. Korea has now alleged that this misapplication of the AD Agreement was a deliberate and intentional effort to reach a certain result — in Korea's words, the determinations at issue were "results oriented."

13. Korea has failed to support this allegation with a single piece of evidence. Moreover, a simple review of the facts of the cases before the Panel demonstrates that the United States sided with the Korean producers on numerous controversial issues.

14. For example, in the preliminary determinations, the United States included sales of non-prime merchandise in its analysis. Subsequent to the preliminary determinations POSCO argued that this action distorted the test for whether sales have been made below the cost of production.[6] In accordance with POSCO's arguments, and over the objections of the domestic industry, the United States altered its methodology for purposes of the final determinations.[7] Thus, changes made in the final determination did not solely serve to raise POSCO's margin of dumping.

15. More significant than the issues on which the United States changed its policy between the preliminary and final determinations are the number of issues on which the United States sided with POSCO from the beginning. For example, as discussed in the first submission of the United States, the United States agreed with POSCO in the preliminary and final determinations, over the opposition of domestic producers, that the United States should alter its normal currency conversion methodology so that daily exchange rates were used throughout the period of severe devaluation.[8] Indeed, a review of the final determinations reveals that there are many more issues on which the United States agreed with POSCO than on which it disagreed. POSCO has taken three issues out of context, and attempted to portray the entire procedure as "results oriented." The facts reveal otherwise.

16. Finally, in the *SSSS* determination, the United States found that another Korean producer, Inchon, was not dumping at all.[9] Consequently, the United States excluded Inchon from coverage under the anti-dumping duty order entirely. Thus, the facts demonstrate that the United States' determinations were not "results oriented," but, in fact, were the product of a transparent proceeding in which the United States accorded producers a meaningful opportunity to participate and made an objective assessment of the facts and argument presented by the parties in that proceeding. The fact that POSCO's records and responses indicated that it had been dumping in the United States does not mean that the proceeding was "unfair" or "results oriented."

III. THE DETERMINATION OF THE UNITED STATES WITH RESPECT TO POSCO'S BAD DEBT WAS PROPER

17. Throughout this proceeding, Korea has attempted to blur the distinction between deductions made to construct an export price consistent with Article 2.3 of the AD Agreement, and adjustments to account for differences between export price (constructed or otherwise) and normal value that

[6] ROK Ex. 7, at 7-8; ROK Ex. 20, at 6-7.

[7] See *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils ("SSPC") from the Republic of Korea*, 64 Fed. Reg. 15444, 15455 (31 March 1999) (hereinafter SSPC Final Determination) (ROK Ex. 11); and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea*, 64 Fed. Reg. 30664, 30679 (8 June 1999) (hereinafter *SSSS Final Determination*) (ROK Ex. 24).

[8] US First Submission, at para. 114 - 117.

[9] *SSSS Final Determination*, at 30688.

affect price comparability, as required by Article 2.4 of the AD Agreement. It is, of course, in Korea's interest to do so because it has not brought a claim under Article 2.3.

18. Understanding the distinction between Articles 2.3 and 2.4 is essential to understanding the United States' treatment of the bad debt expense incurred in connection with the sales to ABC company. We will demonstrate below that, for sales through POSAM, this bad debt expense was part of the *construction of* export price, which is governed by Article 2.3. Further, although Korea has not made a claim under Article 2.3, the United States will show that the deduction of the bad debt expense in constructing export price was consistent with Article 2.3. In contrast, for the remainder of POSCO's sales, this bad debt expense was part of an adjustment to neutralize differences in conditions and terms of sale, which is governed by Article 2.4. The United States will also demonstrate below that this adjustment was consistent with Article 2.4.

19. In sum, the United States will show that Korea has failed to establish a *prima facie* case that the treatment of this bad debt expense was in violation of the AD Agreement.

A. KOREA HAS FAILED TO STATE A CLAIM WITH RESPECT TO THE UNITED STATES TREATMENT OF BAD DEBT EXPENSE IN THE CONSTRUCTION OF EXPORT PRICE

20. As noted above, Articles 2.3 and 2.4 deal with separate and distinct aspects of a dumping analysis. There is nothing "novel" about this argument, as Korea asserts.[10] To the contrary, it is well-grounded in the AD Agreement, which reflects the fact that, methodologically, export price must be established *before* it can be compared to normal value or the amount of any due allowance for differences that affect price comparability can be determined. Article 2.3 addresses how export price may be established in certain situations. In particular, Article 2.3 provides that when the export price is unreliable because of an association between the exporter and the importer, rather than use the unreliable export price, the export price may be constructed based on the price to the independent buyer.

21. During the period of these investigations, POSCO made sales to the United States through its US affiliate, POSAM. For those sales, consistent with Article 2.3, the United States constructed the export price between POSCO and POSAM. The United States constructed the export price by deducting from POSAM's price to independent buyers all expenses incurred in connection with POSAM's sales to independent buyers, including an allocated portion of the bad debt expense incurred in connection with the sales to ABC company.

22. Because Korea has made no claim under Article 2.3, the United States' decision to construct export price and the methodology it employed to do so are not issues before this Panel. Nevertheless, it is the United States' view that its construction of the export price for sales through POSAM was entirely consistent with Article 2.3.

23. Article 2.3 provides generally that export price may be constructed on the basis of the price at which the merchandise is first sold to an independent buyer, but provides no other methodological detail. Additional guidance on the construction of export price is found in Article 2.4,[11] which states that "in the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made."[12] The United States

[10] ROK First Oral Statement, at para. 29.

[11] As noted in the United States oral statement, the language in Article 2.4 on construction of export price is neither mandatory nor exclusive. Oral Statement of the United States, made at the First meeting of the Panel on June 13-14, 2000 (hereinafter *US First Oral Statement*), at para. 24.

[12] This reference in Article 2.4 to allowances made pursuant to Article 2.3 also provides context for the sentence that follows, which addresses the comparison of constructed export price and normal value. That

interprets the reference to costs "incurred between importation and resale" as distinguishing between costs incurred in connection with the import transaction and those incurred in connection with the resale. [13] Only the latter are deducted in constructing export price.

24. The United States deduction from POSAM's price to the independent buyer of all expenses related to that resale was consistent with the guidance in Article 2.4, and with the object and purpose of Article 2.3, which is to construct a price between the exporter and affiliated importer. Therefore, even if Korea had made a proper claim under Article 2.3, that claim would fail.

B. THE UNITED STATES' TREATMENT OF BAD DEBT EXPENSE IN COMPARING EXPORT PRICE AND NORMAL VALUE WAS CONSISTENT WITH ARTICLE 2.4

25. The claims by Korea relate solely to the consistency of the United States' treatment of ABC Company's bad debt with Article 2.4. Article 2.4 governs the comparison of export price and normal value. Therefore, the issue before the Panel is limited to whether, in *comparing* export price – not *constructing* it – and normal value, the United States accounted for POSCO's bad debt expense in a manner consistent with the AD Agreement.

26. Article 2.4 requires a "fair comparison" – it also defines it. The predecessor to Article 2.4, Article 2.6 of the Anti-dumping Code, also defined the allowances necessary "[i]n order to *effect* a fair comparison" (emphasis added). Therefore, *how* to make a fair comparison was clear. What was ambiguous was whether Members were *required* to make the fair comparison described in Article 2.6. That ambiguity was eliminated in the current AD Agreement. The first sentence of Article 2.4 makes explicit the requirement to make a fair comparison. The remainder of Article 2.4, like its predecessor, defines how "this comparison" is made.[14]

27. In light of the object and purpose of the AD Agreement, there is no basis for an interpretation of Article 2.4 that divorces the obligation to make a fair comparison from the allowances required to establish price comparability. In accordance with Article 2.1, a dumping analysis is based on a comparison of prices for sales in the export market to prices for sales in the home market. By requiring due allowance for all factors affecting price comparability, Article 2.4 assures that the prices used to establish dumping in accordance with Article 2.1 are "comparable," *i.e.* a comparison of such prices is fair. There is simply no logic in asserting that even where transactions in the two markets are rendered comparable in all respects affecting price, comparing the prices in a dumping analysis could be unfair. The concept of fairness and the concept of comparability are inseparable.

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sentence states that, if the Article 2.3 allowances affect price comparability, normal value shall be established at a level of trade equivalent to the constructed export price or due allowance shall be made as warranted.

[13] Price is equal to cost plus profit. After deducting from the resale price all costs and profit associated with the resale transaction, the remaining costs and profit represent a construction of the price between the exporter and the associated importer. The suggestion that "incurred between importation and resale" should be interpreted as a temporal limitation is inconsistent with the object and purpose of Article 2.3 and elevates form over substance. Under such an interpretation, whether a cost is accounted for would depend on when the cost is "incurred," which is ambiguous. Moreover, whether a cost was accounted for would be based solely on timing; for one transaction the cost would be deducted because the merchandise happened to arrive the day before the cost was deemed to have been "incurred", and for another transaction the identical cost would not be deducted because the merchandise happened to arrive the day after the cost was incurred. In contrast, the US interpretation, which focuses on the transactions – the sale between the exporter and associated importer and the resale – is consistent with the object and purpose of Article 2.3, which is to construct a price for the former transaction based on the price for the latter.

[14] For a further discussion of the history and interpretation of Article 2.4, see Response to Panel Question 1 (General).

28. As explained in our first submission,[15] POSCO's sales to ABC company were comparable to the normal value transactions, as adjusted in accordance with Article 2.4. There was nothing unusual about the merchandise, terms of the contract, distribution channel or any other aspect of the transactions. Nevertheless, Korea asserts that it was unfair to include these sales in the dumping analysis because they resulted in a bad debt, even though bad debt is a normal selling expense. Although differences in selling expenses such as bad debt may affect the comparability of export price and normal value, allowance for such differences can be made, and such allowance is all that Article 2.4 requires.

29. The United States' comparison of export price and normal value in the cases at issue was consistent with the requirements of Article 2.4 and, therefore, was fair. To establish a fair comparison, Article 2.4 requires that due allowance shall be made for differences affecting price comparability including, *inter alia*, differences in the "conditions and terms of sale." A permissible interpretation of differences in "conditions and terms of sale" encompasses differences in costs associated with the terms of the sales contract and other expenses that are directly related to the sale, *i.e*, but for the sale the expense would not be incurred. The United States refers to such expenses as "direct selling expenses" and bad debt is such an expense.

30. As discussed in the United States' first submission and its oral statement before this Panel, bad debt is an expense that is directly related to the payment terms in the sales contract.[16] Whenever a seller sells on credit, rather than demanding immediate payment, the seller accepts a credit expense, including any bad debt that may result from the sale. There is no meaningful distinction between bad debt and other selling expenses, such as warranty, which Korea concedes constitute conditions and terms of sale within the meaning of Article 2.4. Selling under warranty directly generates warranty expense and selling on credit directly generates credit expenses, including bad debt. In both cases, the expense is part of the bargain and but for the sale the expense would not be incurred. Therefore, like warranty, it is reasonable to treat bad debt as a condition or term of sale within the meaning of Article 2.4.[17]

31. As explained previously, the United States made allowance for differences in direct selling expenses, including bad debt, through its normal methodology, which is known as the "circumstance of sale" adjustment.[18] This adjustment was made by deducting direct selling expenses on Korean sales from normal value and adding to normal value the US direct selling expenses.[19] As a result, the effect on the dumping analysis of any differences in direct selling expenses in the United States and Korea was neutralized.[20]

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[15] US First Submission, para. 65-71.

[16] US First Submission, at para. 83-86; US First Oral Statement, at para. 14-16.

[17] Because bad debt falls within the meaning of "conditions and terms of sale", we have not relied on the reference in Article 2.4 to "any other differences" demonstrated to affect price comparability. That does not constitute a concession that bad debt could not fall within "other differences." See also, Response to Panel Question 5 (Treatment of Unpaid Sales).

[18] US First Submission, at para. 87; US First Oral Statement, at para. 12.

[19] As the United States noted in its oral statement, for comparison to constructed export price sales there was no *increase* to normal value because there were no direct selling expenses related to the sale between POSCO and POSAM and all selling expenses related to the resale by POSAM were deducted in constructing the export price. US First Oral Statement at para. 12.

[20] See also, US First Oral Statement, at para. 20.

32. The allowances required under Article 2.4 must be determined on a case-by-case basis. Thus, the only remaining issue is whether the United States' determination of the allowance for differences in bad debt expenses in this case was based on an objective assessment of the facts.[21]

33. Korea concedes that whether the unpaid sales are bad debts is not really an issue. That concession is not surprising in light of the evidence, discussed below. Nevertheless, Korea contends that an adjustment for bad debt is unfair because it is unpredictable and occurs after the price is set. This argument is difficult to reconcile with the fact that bad debt is, in fact, a normal business expense that is routinely accounted for in accordance with generally accepted accounting principles (GAAP). Moreover, as discussed below, POSCO has recognized other bad debts, and accounts for this expense in its normal accounting records.[22]

34. In the present cases, the United States based the circumstance of sale adjustment for bad debt on POSCO's questionnaire response and its accounting records, as verified, for the period of investigation.[23] In a dumping analysis, it is not possible or practicable to match all expenses with particular sales because of the nature of the expense and the available information. The only practicable method for making allowance for such expenses is based on the exporter's actual expenses during the period of investigation. In the case of certain contingent expenses, such as warranty,[24] the United States will also confirm that the expenses recognized during the period of investigation are consistent with the company's recent experience. This is not necessary in the case of bad debt because, in accordance with GAAP, companies normally account for bad debt using a reserve accounting method that is based on the company's experience. In such cases, the bad debt expense recognized in a given period reflects that experience.

35. As noted above, in the present cases, the United States based the circumstance of sale adjustment for bad debt on POSCO's questionnaire response and its accounting records. POSCO reported the sales to ABC Company and originally stated that they had been "written-off" during the period of investigation.[25] Although POSCO later stated that the sales were simply "unpaid", POSAM's accounting records examined at verification were consistent with POSCO's original statement that the receivables had been written off. POSAM did not maintain a bad debt reserve account,[26] but its records showed a credit to accounts receivable and a debit to sales, which reversed the entries that recorded the sales.[27] POSAM would only make such entries if it deemed the receivables to be uncollectable. Furthermore, there was evidence that POSCO claimed the bad debt

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[21] Article 2.4 states that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale. . . ." The phrase "on its merits" does not suggest that differences in conditions and terms of sale may have no effect on price comparability in a given case. The phrase "differences which affect price comparability" is defined to "include" those in the illustrative list that follows. Thus, the differences expressly listed – such as differences in conditions and terms of sale – *are* differences which affect price comparability. What must be determined on the merits of each case are what allowances are necessary and how they should be quantified, not whether the differences affect price comparability. See also, Response to Panel Question 6 (Treatment of Unpaid Sales).

[22] See also, Response to Panel Question 3 (Treatment of Unpaid Sales).

[23] Although not controlling in this case, the United States notes that Article 2.2.1.1 states that costs shall "normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with generally accepted accounting principles...."

[24] This type of "snap shot" analysis is also used for expenses that cannot be specifically determined for the sales during the period of investigation because of the nature and timing of the expense, *e.g.*, research and development.

[25] SSPC POSCO Response to Section A of Initial Questionnaire dated 2 July 1998, at A-3, (US Ex. 7); SSSS POSCO Response to Section A of Initial Questionnaire dated September 3, 1998, at A-3, (US Ex. 8)

[26] In contrast, POSCO and its Korean affiliate, POSTEEL, do maintain bad debt accounts. See Response to Panel Question 3 (Treatment of Unpaid Sales).

[27] SSPC POSAM Verification Report, at 8-9 and Exhibit 5 (US Ex. 9); SSSS POSAM Verification Report, at 8, (US Ex. 10).

expense as a direct write-off for tax purposes. To do so, POSCO must have deemed the debt worthless.[28] The United States merely relied on POSCO's determination, as reflected in the evidence, that these receivables were uncollectible.[29] Furthermore, although POSAM did not use a reserve accounting method for bad debt, the United States based the adjustment for bad debt on the accounting method used by POSAM. While POSAM's accounting methodology was not based on experience, it provided the only reasonable means of calculating the bad debt expense.[30]

36. Finally, the United States included bad debt expense in the circumstance of sale adjustment only where there was sufficient evidence to demonstrate that the expense was directly related to sales of the subject merchandise. The evidence concerning the bad debt incurred on sales to ABC company demonstrated that the expense was directly related to US sales of the subject merchandise. Therefore, consistent with Article 2.4, the expense was allocated to all US sales and the allocated amount was included in the circumstance of sale adjustment.

37. In contrast, other bad debt expense recognized by POSCO during the period of investigation was not included in the circumstance of sale adjustment because the available evidence was insufficient to treat the bad debt as a selling expense directly related to US sales of the subject merchandise. POSCO and its Korean affiliate, POSTEEL, which is responsible for all export sales, maintain bad debt accounts. However, POSCO did not have the ability to tie specific bad debt expense recognized during the period of investigation to particular products or export markets. As a result, it was not possible to determine precisely what portion of the expense was associated with US sales of subject merchandise. Therefore, although POSCO allocated a portion of the bad debt expense to its sales to the United States, it reported the bad debt expense as an indirect selling expense and the United States treated it as such, *i.e.*, the United States did *not* include this additional bad debt expense in the circumstance of sale adjustment.[31]

38. The foregoing demonstrates that the United States' treatment of POSCO's bad debt expense in the comparison of export price and normal value was based on a permissible interpretation of Article 2.4 and an objective assessment of the facts. Therefore, when rhetoric is put aside in favor of a legal analysis, it is evident that there is no basis on which to find a violation of the AD Agreement.

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[28] SSSS Response to Supplemental Questionnaire (4 December 1998) at 3 (US Ex. 30). POSCO stated that POSAM was required under US tax law to cancel the unpaid sales. POSAM would only be required by US tax law to recognize the bad debt expense if it was taking the expense as a tax deduction. To take the deduction, US tax law requires that the debt be worthless. Bankruptcy of the debtor is generally considered good evidence that an unsecured debt is worthless. Publication 535, US Department of Treasury, Internal Revenue Service at 52-53 (US Ex. 31). Therefore, POSAM must have deemed the debt to be worthless.

[29] We note that, although POSAM used negative invoices as the accounting mechanism, this does not constitute "cancellation" of the sales. Generally, cancellation of a sale occurs *before* the transaction has been completed. Once delivery has been made, as in the present cases, the obligation to pay arises, creating a debt. Thus, by reversing the accounting entries after the debt was established, POSAM was writing off a bad debt, not cancelling the sales.

[30] Neither POSCO nor Korea has ever contested the calculation of the bad debt expense, only how that expense was accounted for in the dumping analysis.

[31] Where the evidence is insufficient to tie a direct selling expense such as bad debt to the sales under investigation it is standard practice to treat the expense as indirect and, therefore, exclude the expense from the circumstance of sale adjustment. For this reason, POSCO also reported its home market bad debt expense as indirect, and the United States treated it as such. Nevertheless, the evidence reported by POSCO confirms that POSCO, in fact, has had experience with bad debt, other than the sales to ABC Company, and that POSCO accounts for such expense in its normal records. Furthermore, POSCO deemed a portion of that expense to be associated with sales to the United States. See Response to Panel Question 3 (Treatment of Unpaid Sales). Finally, POSCO never claimed that it had no other bad debt related to US sales. See e.g., Supplemental Questionnaire Response (US Ex. 30), at 2 (stating only that POSCO had never had a customer go bankrupt).

IV. THE UNITED STATES PROPERLY CREATED MULTIPLE AVERAGES IN LIGHT OF THE 50 PER CENT DEVALUATION OF THE KOREAN WON

39. In its first submission, the United States explained that, due to the unprecedented fifty percent devaluation of the Korean won during the periods of investigation of the cases before the Panel, the United States properly determined, under Article 2.4.2 of the AD Agreement, that separate pre-and post-devaluation averages should be created in order to avoid comparing prices established prior to the devaluation with prices established after.[32] Korea continues to argue that Article 2.4.2 permits only a single average of all normal values and export prices. Korea also argues that the fundamental collapse of the currency in which normal values were denominated was not an event of sufficient significance to warrant finding sales before and after the devaluation not "comparable" within the meaning of Article 2.4.2. As will be shown below, these arguments are without foundation.

40. Korea's primary argument is that the text of Article 2.4.2 is "unambiguous."[33] Korea relies on what it refers to as the "distinctly singular phrase 'a weighted average'" contained in Article 2.4.2.[34] According to Korea, this language requires in all cases that, in calculating dumping margins, Members only create "one average — not two averages".[35]

41. The United States agrees that, with respect to the number of averages which may be created, the text of Article 2.4.2 is unambiguous, although its clear meaning is not that asserted by Korea. Rather, Article 2.4.2 clearly states that averages must be limited to "comparable" transactions. In other words, in conducting an anti-dumping investigation, where an investigating authority identifies two transactions which are not comparable, and are not made so, for example, through an adjustment pursuant to Article 2.4, then under Article 2.4.2 they must not be included in a single average. Thus, the assumption underlying Article 2.4.2 is that most investigations will involve multiple average-to-average comparisons. Indeed, it will only be in the rare case in which every transaction is comparable to every other transaction, that the investigating authority will be permitted to construct a single average normal value and a single average export price.

42. Korea's focus on the use of the singular in the first sentence of Article 2.4.2 (e.g. "*a* weighted-average of prices of *all* comparable export transaction") misapprehends the meaning of that provision. The sentence presumes that comparability has already been determined prior to construction of the average. Thus, to the extent that the investigating authority has identified a group of comparable transactions, the use of the singular in Article 2.4.2 requires the investigating authority to calculate only one average of those comparable transactions. However, it does not require the investigating authority to average together transactions which it has found not to be comparable to begin with.

43. As discussed above, Article 2.4.2 clearly permits creation of multiple averages where transactions are not comparable. Thus, the only issue before the Panel is whether the United States' determination that a collapse of the currency of 50 per cent in two months rendered transactions before and after the devaluation not "comparable" was a permissible interpretation of that term as used in Article 2.4.2. In light of this unprecedented situation, the United States acted in accordance with the Article 2.4.2 in determining that sales prior to the devaluation should not be compared with sales after the devaluation.

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[32] US First Submission, at para. 107 - 168.
[33] ROK First Oral Statement, at para. 46.
[34] *Id.* at para. 45
[35] Id.

44. The term "comparable" is not itself defined in the AD Agreement. Indeed, the WTO panel in *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*[36] explicitly found that the word comparable is inherently ambiguous. As stated in the panel report, "it appeared to the Panel that the term 'comparable', including the ordinary meaning thereof, was susceptible of a range of meanings."[37] Although the panel in *US - Tobacco* was looking at the word in a different context, the fundamental finding is no less relevant in the present case: the ordinary meaning of the word "comparable" is subject to a range of permissible interpretations.

45. In light of this range of permissible interpretations of the term "comparable," Article 17.6 squarely governs the Panel's examination of this issue: "Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Given these circumstances, Korea's burden before the Panel is a heavy one, for it must establish that the interpretation adopted by the United States is effectively precluded by the AD Agreement. This Korea has failed to do.

46. Although Article 2.4.2 does not define the term comparable, leaving the term subject to a range of permissible interpretations, Article 2.4 does address the issue of comparability.[38] Article 2.4 supports the conclusion that sales before and after a 50 percent devaluation of the currency should not be considered "comparable," is a permissible interpretation.

47. Article 2.4 expressly states that comparisons should be "in respect of sales made at as nearly as possible the same time." Thus, Article 2.4 recognizes that time is a fundamental aspect of comparability. In light of this requirement, far from the year-long average proposed by Korea, the AD Agreement presumes that multiple averages of shorter periods typically result in a preferable comparison. Indeed, one could view the cited language of Article 2.4 as expressing a preference for daily averages (i.e. average normal values or export prices made up solely of sales made on the same day), because sales made on the same day are "made at as nearly as possible the same time." Further support for such a methodology is found in the fact that comparisons of daily averages would be very similar to the transaction-to-transaction methodology, which is expressly approved by Article 2.4.2.

48. In most cases, absent any allegation or evidence to the contrary, the United States considers sales made within a one-year period to be sufficiently close in time to satisfy the "same time" requirement of Article 2.4. However, where facts indicate that changes within the year have the potential to affect comparability of the transactions, for example high inflation in the exporting country in question,[39] the United States will divide the period of investigation into shorter periods.[40] Indeed, the "same time" requirement of Article 2.4 should lead Members to create multiple averaging

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[36] Panel Report on *United States -- Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 October 1994, BISD 41S/131 (*"US -- Tobacco"*).

[37] *Id.*, 41S/176, para. 123.

[38] Article 2.4.2 is expressly made subject to "the provisions governing fair comparisons in paragraph 4 of this Article ."

[39] See, US First Submission, at para. 154, and cases cited therein.

[40] The United States has long contemplated the possibility that facts may arise which would call for averaging periods of less than the full period of investigation when it adopted section 351.414(d)(3) of its regulations, 19 C.F.R. § 351.414(d)(3), which reads as follows:

> *Time period over which weighted average is calculated.* When applying the average-to-average method, the Secretary normally will calculate weighted averages for the entire period of investigation or review, as the case may be. However, when normal values, export prices, or constructed export prices differ significantly over the course of the period of investigation or review, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate.

periods whenever time may have affected the comparability of prices. In other words, Members should not presume that a year-long average is necessarily preferable, as urged by Korea.

49. The above indicates that a Member could interpret the "same time" requirement of Article 2.4 and the "comparable" requirement of Article 2.4.2 as authorizing an interpretation that two groups of transactions are not comparable (*i.e.* not made at as nearly as possible the same time) merely because they were made on different days (when same-day comparisons can be made). In light of this permissible interpretation, it is clearly permissible for the United States to conclude that periods distinguished from each other by a much greater difference, i.e. a 50 percent devaluation, should also not be considered comparable.

50. It is also significant to note that POSCO is no worse off under the methodology adopted by the United States than it would have been had the United States used the transaction-to-transaction methodology (or a comparison of daily averages). Under Article 2.4.2, the United States is free to employ a transaction-to-transaction comparison methodology, although it does not do so in most cases for practical reasons.[41] Had the United States adopted a transaction-to-transaction comparison methodology there would have been few, if any, comparisons of transactions prior to the devaluation with transactions after the devaluation. Consequently, the permissible outcome of a transaction-to-transaction analysis would have been the same as the multiple averaging periods used in the cases before the Panel. An outcome which is permissible under the transaction-to-transaction methodology should not be deemed unreasonable when reached through an average-to-average methodology.

51. Korea has argued that sudden dramatic shifts in exchange rates cannot affect the comparability of transactions in the home market and the United States.[42] According to Korea, differences in levels of trade and differences in physical characteristics of the products sold may result in transactions which are not comparable, but dramatic differences in the value of the home market currency in which transactions are denominated do not.[43] Korea offers no argument to support this assertion.[44] As discussed previously, the term "comparable" in Article 2.4.2 is subject to a range of permissible interpretations. Further, Article 2.4 contemplates that time, no less than levels of trade and physical characteristics, should be taken into account when making comparisons.

52. Moreover, Korea's argument that physical characteristics and levels of trade may make transactions not comparable within the meaning of Article 2.4.2 appears to conflict with the argument that Article 2.4.2 is clear on its face in only allowing "one average — not two averages."[45] While

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[41] Indeed, such a transaction-to-transaction approach is also authorized under US law. See, 19 USC. § 1677f–1(d)(1).

[42] ROK First Oral Statement, at para. 48.

[43] *Id.*

[44] Korea even appears to assert that the devaluation was not a particularly remarkable event: merely an "overvaluation" in one part of the year offset by an "undervaluation" in another part until it settled on a "mid-point" of approximately 1400 won to the dollar. ROK First Oral Statement, at para. 49. First, the United States assumes that it is not the position of the Government of Korea that the won would be "overvalued" at 900 won to the dollar. Second, describing an exchange rate of 1400 won to the dollar as a "mid-point" is somewhat like describing the Alps as hills of average size because they are not as high as the Himalayas. The daily won/dollar exchange rate never reached 900 won to the dollar, let alone 1400 won to the dollar, for at least several decades prior to the period of investigation. See, the Federal Reserve Bank's listing of historical exchange rates reaching back to January 1, 1990. (US Ex. 32). See also, listing of historical daily exchange rates for 1981 through 1990 maintained on the Internet by the Pacific Exchange Rate Service of the University of British Columbia at http://pacific.commerce.ubc.ca/xr. (US Ex. 33). See also, the graph of exchange rates during the period of investigation which POSCO supplied during the *SSPC* investigation. (US Ex. 21).

[45] ROK First Oral Statement, at para 45, states unequivocally that Article 2.4.2 only permits "one average." However ROK Oral Statement, at para. 54, states that multiple averages for products with different physical characteristics are permitted.

Korea has described it as "obfuscation,"[46] the confusion of the United States on this point is genuine: If the "unambiguous" language of Article 2.4.2 only permits "one average," how can it also permit multiple averages by level of trade and product? The United States agrees with Korea that transactions may be considered "not comparable" based on differences in their levels of trade or physical characteristics. Similarly, transactions can be considered not comparable based on differences in the time at which the sales are made.

53. Moreover, contrary to Korea's assertion, the value of the currency in which a transaction is conducted is a fundamental characteristic of a transaction. For example, a person who is asked how many units of an unidentified currency ("currency X") they would be willing to pay for a automobile would be unable to answer the question until they had some information about the value of currency X in the economy and, in the final analysis, relative to other currencies. Thus, a 50 percent depreciation of the currency in which a transaction is denominated represents a fundamental change in the comparability of that transaction with transaction prior to the devaluation.

54. Korea has also asserted that the United States action was inconsistent with its prior practice with respect to rapidly declining exchange rates.[47] According to Korea, the United States, in *Certain Preserved Mushrooms from Indonesia*[48] found that it would be improper to create two averages in response to a currency devaluation.[49] However, as pointed out in the First Submission of the United States, the Mushrooms decision was based on a finding that the ultimate dumping margin in that case would not change regardless of whether the United States used a single period-long average, or created two averages.[50] In light of this fact, the United States declined to address the issue.

55. Moreover, Korea overlooks the fact that in the very next investigation to address the devaluation of the Indonesian rupiah, the United States did create two averaging periods. Three months after the *Preserved Mushrooms* determination cited by Korea, in the same month in which the *SSPC* final determination was issued, the United States was again faced an investigation in which the devaluation of the Indonesian rupiah was an issue. In *Extruded Rubber Thread from Indonesia*[51] the United States concluded, as it did in the cases before the Panel, that a severe devaluation could create a situation in which multiple averaging periods would be warranted. The final determination in *Extruded Rubber Thread* states:

> We agree with petitioners that separate averaging periods should be used. Under section 777A(d)(1)(A) of the Act , the Department has wide latitude in calculating the average prices used to determine whether sales at less than fair value exist. More specifically, under 19 C.F.R. 351.414(d)(3), the Department may use shorter averaging periods where normal value varies significantly over the POI. In this case, such a change is evidenced by the steady, significant decline in the rupiah's value that began about August 1997 and continued through the end of the POI. From August through December, the end of the POI, the rupiah's value decreased by more than 50 per cent in relation to the dollar. Consequently, it is appropriate to use two averaging periods to avoid the possibility of a distortion in the dumping calculation. We disagree with Globe's claim that the use of averaging periods is not warranted because the POI is the same as the POI in Preserved Mushrooms. Whereas we

[46] ROK First Oral Statement, at para. 54.
[47] ROK First Submission, at para. 3.43 - 3.45.
[48] *Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Indonesia*, 63 Fed. Reg. 72268, 72272 (December 31, 1998) (Preserved Mushrooms) (ROK Ex. 40).
[49] ROK First Submission, at para 4.56.
[50] US First Submission, at para. 163.
[51] *Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Indonesia*, 64 Fed. Reg. 14690 (26 March 1999) (*Extruded Rubber Thread*) (US Ex. 34).

> declined to use two averaging periods in that case because doing so would have had no effect, thus rendering the issue moot, in this case the use of two averaging periods would affect our determination. As noted above, in our view, using a single averaging period would result in a distortion of the dumping calculation.[52]

56. Thus, on the one hand Korea has represented as a substantive decision a prior determination (*Preserved Mushrooms*) in which the United States explicitly declined to address multiple averages. On the other hand, Korea has ignored a prior decision (*Extruded Rubber Thread*) in which the United States reached a decision on the multiple averages issue which is fully consistent with the cases before this Panel. This selective use of prior determinations demonstrates a fundamental problem with Korea's approach: absent a showing that the entire anti-dumping regime in the United States is pervasively arbitrary, the Panel's attention should be focused on consistency with the AD Agreement, rather than on consistency with this or that prior administrative determination. POSCO is free to refer the issue of consistency with domestic law to a domestic court which is well-suited to determining what the prior practice is, and whether a given action is consistent with that practice, or the reasons for departure sufficient.[53]

57. In sum, the language of Article 2.4.2 clearly limits averaging to transactions which are "comparable," an undefined term with a broad range of permissible interpretations. Article 2.4.2 is specifically made subject to the fair comparison provisions of Article 2.4. Article 2.4 states that comparisons should be made at as nearly as possible the same time. Consequently, in light of the 50 per cent devaluation in the home market currency, the United States reasonably concluded that sales before and after such a depreciation should not be considered to have been made at the "same time" within the meaning of Article 2.4, and therefore not "comparable" within the meaning of Article 2.4.2. Finally, the position of the United States in the cases before the Panel is consistent with similar cases, notwithstanding Korea's claims to the contrary.[54]

58. In light of the foregoing, the Panel should find that the United States' use of multiple averaging periods is in conformity with the AD Agreement.

V. THE UNITED STATES PROPERLY DETERMINED THAT THE "LOCAL SALES" WERE TRANSACTED IN WON

59. With respect to the issue of "local sales," Korea has failed to prove its claim that the United States' establishment of the facts was improper, and its evaluation of the facts was biased and not objective.

60. The United States and Korea agree that when the sales used to establish normal value and export price are in different currencies, a conversion of currencies is required, consistent with Article 2.4.1. With respect to POSCO's "local sales", Korea claims that no conversion was necessary because the sales were made in dollars. On the other hand, the United States determined, based on an

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[52] *Id.*, 64 Fed. Reg. at 14693.

[53] Korea has also repeatedly discussed the issue of refusing to offset dumping by the amount by which certain sales may exceed normal value, which Korea refers to as "zeroing," as if that practice were an independent reason for finding the actions of the United States inconsistent with the AD Agreement. See, e.g. ROK First Oral Statement, at para. 42. Yet Korea has not provided any argument to support such a position, nor even clearly asserted whether it believes that "zeroing" is not in accordance with the AD Agreement. In any event, as Korea made no mention of the issue of "zeroing" in its request for panel review (nor during consultations), the Panel should conclude that the issue is not within its terms of reference, and consequently should decline to address the issue. This issue is discussed further in response to Korea's question 1 regarding "Multiple Averaging."

[54] The incomplete picture presented by those claims only serves to demonstrate why the focus of WTO panels should be on consistency with WTO agreements, rather than on the consistency with domestic law.

assessment of all the information provided by POSCO, that the sales were made in won and, therefore, converted the won prices reported by POSCO to dollars, consistent with Article 2.4.1. In short, the central issue in dispute is a question of fact, *i.e.*, whether these local sales were in won or dollars.

61. Over the course of these anti-dumping investigations the facts asserted by POSCO concerning the local sales issue changed.[55] The information was, at times, contradictory or vague, and some was provided late in the proceeding. Further, some was provided in one proceeding, but not the other. Nevertheless, the United States evaluated the facts in the SSPC and SSSS investigations objectively and without bias. The facts established on the record of these investigations support the United States' conclusion that the currency of "local" sales was Korean won. Nothing Korea has presented to this Panel in its attempt to retry the facts substantiates its claim that the establishment of the facts was improper, or that the United States' evaluation of the facts was biased and not objective. Therefore, the Panel must uphold the United States' determination, even though the Panel may have reached a different conclusion.

62. In these investigations, the United States confirmed that the won amounts originally reported by POSCO in its response were on the invoices and matched the won amounts recorded in the company's accounts receivable, although the dollar amounts later reported by POSCO also were listed on the invoices. Further, it is beyond dispute in both SSPC and SSSS that POSCO received payment in Korean won for all local sales.

63. In its oral statement to the Panel, Korea boldly asserted that "the United States converted the dollar value into won at one exchange rate, calculated normal value in won, and then converted the won normal value into dollars at a different exchange rate."[56] That statement is a literal half-truth. It is well-established on the record of both investigations that in its final determination the United States made a single conversion of won to dollars for all sales that were transacted in won currency.[57] The United States converted the actual won amount on POSCO's invoices to its customers, the same won amount that POSCO reported in its home market sales listing in both investigations, and the same won amount recorded in the company's accounts receivable.

64. Korea's claim of a double conversion is not based on the actual methodology used by the United States, but rather on the premise that the currency of the transaction was actually dollars, not won. However, as discussed above, the properly established facts surrounding these sales do not support that premise. The facts showed that no dollars change hands, the customer is charged (invoiced) in won, pays in won, and POSCO enters the won amount into its accounts receivable. Given those facts, the United States' determination that these are won-sales cannot be found to be anything but unbiased and objective.

65. Korea also reiterates its argument that use of the dollar amount is necessary to avoid distortions caused by currency conversions. Once again, the premise of the argument is that the parties locked in a dollar price, and therefore, any differences due to currency conversion constitute a "distortion." As discussed in the United States' first submission, this argument is simply another way of saying that the transactions were in dollars, and the appropriate conversion formula is the one established by the POSCO, rather than the method established under Article 2.4.1. The conversion formula used by POSCO does not satisfy the rules set forth in Article 2.4.1.

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[55] For a detailed discussion of these changing assertions by POSCO, see Response to Panel Question 3 ("Currency Conversion").

[56] *Korea's 13-14 June Oral Statement*, at para. 26.

[57] Note that in the preliminary determination in SSSS the United States did inadvertently convert the dollar figure into won, then back into dollars. However, it corrected this error in the final determination. This preliminary error is further discussed in response to Panel Question 14 (Currency Conversion).

66. Finally, Korea claims that the United States admits error in "its stated rationale for making the double conversion."[58] Korea claims that hidden in footnote 161 of the US submission is an admission in which the United States "concedes" that the anti-dumping measures are based upon a faulty rationale. Although the error occurred only with respect to the SSPC investigation, Korea has misinterpreted the United States' statement contained in the footnote.

67. In the First Submission of the United States, at footnote 161, the United States stated that it inadvertently used "adjusted exchange rates" in the SSPC case *solely* for purposes of determining, pursuant to *Roses from Colombia*, whether POSCO's exchange rate for converting won prices to dollars mirrored the rate the United States would use. These were *not* the rates used to convert POSCO's won sales to dollars. The "adjusted exchange rates" referred-to are the rates produced by the United States' normal currency conversion methodology, which did not take into account the devaluation during November and December, 1997, *i.e.* which used benchmark rates rather than daily rates during this period. The table in that footnote demonstrates that use of the daily rates for this comparison still reveals that POSCO's rates differed *substantially* from the rates being used by the United States. Thus, the error did not erode in any way the United States' rationale for declining to apply the *Roses* exception.

68. Moreover, Korea's continued reliance upon *Roses from Colombia* as a reflection of the United States' practice is flawed. As the United States has stated, *Roses* is a single-case exception to the United States' practice, not the rule. The facts of the cases before the Panel differ significantly from *Roses*, and no subsequent case has followed the position taken in *Roses*. Moreover, it is important to recognize that *Roses* pre-dates the Uruguay Round Agreements Act of the United States and thus none of the requirements of Article 2.4.1 were considered in that case. By contrast, in SSPC and SSSS, the exchange rates applied by the United States satisfied the requirements of Article 2.4.1.

69. The foregoing demonstrates that the United States establishment of the facts concerning POSCO's local sales was proper, and its evaluation unbiased and objective. These were local won transactions that were converted to dollars in accordance with Article 2.4.1. Accordingly, there is no basis upon which to find a violation of the AD Agreement.

VI. THE REMEDY REQUESTED BY KOREA IS INAPPROPRIATE

70. Korea continues to argue that, should the Panel agree with it on the merits, the Panel may suggest revocation of the anti-dumping measures.[59] Korea relies upon Article 1 of the AD Agreement, which it claims, plainly dictates that anti-dumping measures may be applied only pursuant to investigations initiated and conducted in accordance with the provisions of the AD Agreement. Korea claims that if the investigations were not conducted in accordance with the AD Agreement, then the Member does not have authority to maintain the anti-dumping measures.

71. Korea's broad interpretation of Article 1 of the AD Agreement cannot withstand scrutiny. Under that reading, the only permissible remedy available, regardless of the nature or magnitude of the violation, would be to eliminate the measure in its entirety. Such an interpretation would render meaningless the provision under Article 19.1 of the DSU that a panel recommend that the Member "bring the *measure* into conformity with that agreement."[60] If the drafters had intended that a measure be eliminated based upon any violation, the drafters could have so stated. They did not. Further, there would be no need to provide panels with the discretion to make suggestions if the intent were simply to eliminate the measure upon a finding of a violation. Therefore, even if the Panel were to agree with Korea on the merits, Article 19.1 mandates the recommendation that the Panel is to make.

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[58] *Korea's 13 June Oral Statement*, at para. 36.
[59] ROK First Oral Statement, at para. 84.
[60] Article 19.1 of the DSU (emphasis added).

VII. CONCLUSION

72. In light of the foregoing, the Panel should conclude that the measures undertaken by the United States are consistent with the AD Agreement in all respect.

LIST OF EXHIBITS

Exhibit	Description
US Ex. 30	SSSS – POSCO Response to Supplemental Questionnaire dated Dec. 4, 1998 (excerpts)
US Ex. 31	US Internal Revenue Service Publication 535 (excerpts)
US Ex. 32	Federal Reserve Daily Won/US$ Exchange Rates 1990 - 2000
US Ex. 33	Pacific Exchange Rate Service Daily Won/US$ Exchange Rates 1981 - 1990
US Ex. 34	Notice of Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Indonesia, 64 Fed. Reg. 14690 (March 26, 1999)
US Ex. 35	SSPC – Final Analysis Memorandum for POSCO
US Ex. 36	SSSS – Final Analysis Memorandum for POSCO
US Ex. 37	SSPC – POSCO Response to Section A of Initial Questionnaire, dated July 1, 1998 (excerpt from POSCO Chart of Accounts and Narrative)
US Ex. 38	SSPC – POSCO Response to Supplemental Section B & C Questionnaire, dated August 26, 1998 (excerpts)
US Ex. 39	SSPC – Verification Exhibit 41: Breakdown of POSCO's Reported Indirect Selling Expense Figures for POSCO and POSTEEL
US Ex. 40	SSPC – Exhibit B-16 and Narrative from POSCO's Response to Section B of Initial Questionnaire, dated July 20, 1998 (excerpt)
US Ex. 41	SSSS – POSCO Response to Sections B & C of Initial Questionnaire, dated September 23, 1998 (excerpts)
US Ex. 42	SSSS – POSCO Response to Supplemental Section B & C Questionnaire, dated November 23, 1998 (excerpts)
US Ex. 43	SSPC - POSCO Response to Supplemental Section D Questionnaire, dated October 16, 1998 (excerpts)
US Ex. 44	SSPC - Ministerial Error Allegation Memorandum, dated November 23, 1998
US Ex. 45	SSPC - Verification Outline, dated November 2, 1998 (excerpts)
US Ex. 46	SSSS - POSCO Response to Section A Questionnaire, dated September 2, 1998 (excerpts)
US Ex. 47	SSSS - Department Supplemental Questionnaire, dated October 23, 1998 (excerpt)
US Ex. 48	SSSS - Preliminary Analysis Memorandum, dated December 17, 1998 (excerpt)
US Ex. 49	SSPC - Exhibit 39 from Sales Verification Report for POSCO, dated January 5, 1999
US Ex. 50	SSPC - Exhibit 23 from Sales Verification Report for POSCO, dated January 5, 1999

ANNEX 2-6

ORAL STATEMENT OF THE UNITED STATES

SECOND MEETING OF THE PANEL

(12 July 2000)

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I. INTRODUCTION

1. Thank you Mr. Chairman and members of the Panel. The United States is pleased once again to have the opportunity to appear before you to present its views on the issues raised in this proceeding and to address any issues on which the Panel would like further clarification. The United States has presented its views in its prior submissions and during the first panel meeting and, at this stage in the proceedings, the issues are in sharper focus.

2. There are, however, some new aspects to Korea's arguments that we would like to address. In fact, you can well imagine my surprise when I opened Korea's rebuttal brief and read that the United States had sounded a full retreat and conceded the entire case. To be precise, the word "conceded" appears 27 times in Korea's submission, not including the table of contents. Thus, you can also imagine my relief when, upon further examination, it was evident that we had only "conceded" arguments never made and retreated from positions never taken.

3. Of course, the United States has not conceded this case. We continue to be of the view that, despite the fact that Korea is unhappy with the results, the investigations at issue were conducted in complete conformity with the requirements of the Anti-dumping Agreement. As discussed in our prior submissions, all of Korea's attempts to find a basis for its complaints in the provisions of the Agreement fail.

4. Of course, one way Korea might prevail is if the United States were precluded from presenting a defense. To that end, Korea argues that, in this proceeding, any arguments made or facts cited by the United States that were not addressed in its notices and decision memoranda in the underlying investigations constitute *post hoc* rationalizations. Korea relies on the panel's decision in *High Fructose Corn Syrup*, but a review of that case reveals that it addressed an entirely different issue and does not support Korea's argument. In *Corn Syrup*, the panel found that there was no evidence that Mexico had made the findings and conclusions necessary to impose duties retroactively, and the panel concluded that it was not its task to attempt to discern them from the record.

5. In contrast, the United States' findings and conclusions on the issues before this Panel are set forth in its notices and decision memoranda, and we have stood by those decisions during this proceeding. Of course, as Korea has acknowledged, arguments concerning consistency with WTO obligations were not an issue in the domestic proceeding. Therefore, the absence of any arguments concerning WTO consistency in the notices is not surprising. A rationale that was never required in the first place is not *post hoc*. I would like to use as an example, the Article 2.3/2.4 issue. This is not an issue under domestic law. The notices and decision memoranda show that we calculated two separate adjustments, one for constructing export price for sales through POSAM and one for the circumstance of sale adjustment. Those adjustments are covered under two separate provisions of US law. In its first submission, Korea described the bad debt deduction as a single adjustment to all export prices. In response, the United States pointed out that there were two adjustments covered under different provisions of the Agreement, Articles 2.3 and 2.4, which brought us to the current discussion of those two provisions. This example demonstrates that this not a case of *post hoc* rationale, but merely point/counter point.

6. Moreover, as required by the Agreement, the United States discussed in the notices and decision memoranda the facts relied upon in reaching its conclusion. Nothing in the Agreement suggests that the United States is now precluded from addressing Korea's arguments, in which they re-weigh the facts and argue that the United States should have reached a different conclusion. In arguing to the contrary, Korea is essentially asking the Panel to require the United States to defend its position with one hand tied behind its back.

II. FAIR COMPARISON

7. Korea also hopes to find a cure for the flaws in its legal arguments in the first sentence of Article 2.4. Putting aside for the moment the textual problems with Korea's argument that the "fair comparison" requirement in the first sentence of Article 2.4 is a separate obligation, independent of the remainder of Article 2.4, take a moment and simply consider the issue logically. Under Korea's interpretation, the United States (or any other Member) could perform a dumping analysis that compares identical products at the same levels of trade, makes all allowances necessary to ensure price comparability, converts currencies in accordance with Article 2.4.1 and constructs weighted average export prices and normal values in accordance with Article 2.4.2 and yet would still be subject to a claim that the analysis was unfair. However, Korea has failed to explain what could possibly be unfair about a dumping analysis that meets the methodological requirements set out in Article 2.4.

8. In effect, Korea's interpretation of the first sentence of Article 2.4 renders the remainder of Article 2.4 meaningless. It also presumes that the Members, after the painstaking process of reaching consensus on the basic rules for conducting a dumping analysis, then accepted a virtually limitless number of undefined rules that override that consensus. However, an analysis of the text of Article 2.4 and its history demonstrates to the contrary.

9. Contrary to Korea's assertion, the US is not reading "fair comparison" out of the Agreement. While the first sentence of Article 2.4 establishes an obligation to make a fair comparison, the remainder of Article 2.4 defines that comparison. As we explained in response to the Panel's question, the predecessor to Article 2.4, Article 2.6 of the Anti-Dumping Code, also defined what was required "*[i]n order to effect* a fair comparison" (emphasis added). However, there was no language in Article 2.6 that clearly made that comparison mandatory. "In order to effect" was ambiguous. It is not the United States' view that the provisions were discretionary, only that the language was ambiguous and the change removed that ambiguity.

10. The ambiguity was eliminated in the current Agreement by adding the first sentence of Article 2.4, in which the *requirement to make* a fair comparison is explicit. However, the remainder of Article 2.4, like its predecessor, defines the comparison. In fact, the version of Article 2.4 contained in what is known as the "Dunkel Draft" was specifically amended to begin the second sentence of Article 2.4 with the words "this comparison", thereby explicitly establishing that the rules that follow defined the fair comparison. Further, the first sentence of Article 2.4.2 explicitly refers to the provisions of paragraph 4 as "governing fair comparison", which is consistent with the view that Article 2.4 defines a fair comparison.

11. Thus, whether the price comparison performed by the United States in the underlying investigations was "fair" can only be judged in light of the explicit methodological requirements of Article 2.4. Because the comparison performed by the United States in the cases at issue was consistent with those requirements, Korea's claims of a violation of Article 2.4 must fail. I would like to review briefly the key points that inevitably lead to that conclusion.

III. BAD DEBT

12. With respect to the treatment of bad debt expense, the issue before the Panel boils down to two questions: (1) can you adjust for bad debt expense under Article 2.4; and (2) if an adjustment is permitted, how do you calculate it?

13. With respect to the first question, Korea has a problem because – as the United States has consistently explained – with respect to POSCO's sales through POSAM, the allocated portion of the bad debt expense was part of the deductions the United States made to construct export price pursuant

to Article 2.3. This was not an Article 2.4 adjustment. However, Korea's claim concerning the United States' treatment of bad debt expense is based solely on Article 2.4. Therefore, any adjustments for bad debt made pursuant to Article 2.3 of the Agreement are not before the Panel. Korea's attempts to overcome this problem are transparent and the fallacies in their arguments obvious.

14. First, Korea argues that Article 2.3 is within the Panel's terms of reference. As a general matter, that argument is, without question, inconsistent with the DSU and prior panel decisions. More specifically, it is inconsistent with the terms of reference established by this Panel. The terms of reference for this proceeding state that the Panel is to examine this matter "in the light of the relevant provisions of the covered agreements *cited by Korea*" (emphasis added). Therefore, the Panel may only consider the United States' treatment of bad debt expense in light of Article 2.4 because that is the only provision cited by Korea as the basis for its claim.

15. Korea does not dispute the fact that the United States constructed export price for POSCO's sales through POSAM and that in doing so the United States deducted an allocated portion of the bad debt expense. Moreover, Korea does not claim that Article 2.4 governs the construction of export price. Rather, Korea argues that by virtue of the fact that we have noted that the construction of export price is addressed in Article 2.3, the United States has, in effect, amended the terms of reference to include Article 2.3.

16. That argument turns the DSU on its head. Under Korea's theory, the terms of reference are no longer defined by the claims asserted, but rather by the defences raised. That position is inconsistent with Articles 6.2 and 7.1 of the DSU. In accordance with the DSU, the issue before the Panel is whether Korea can establish that the deduction of an allocated portion of bad debt expense made to construct the export price was inconsistent with Article 2.4, which is the only provision cited by Korea. To decide that issue, it is unnecessary and inappropriate to consider Article 2.3. A simple reading of Article 2.4 demonstrates that nothing in that provision precludes the United States from deducting the allocated bad debt expense in constructing export price.

17. That brings me to Korea's fallback argument. Korea argues that Article 2.3 is irrelevant, even in the case of the constructed export price sales through POSAM. The logic of this argument is essentially as follows: the United States adjusts for differences in direct selling expenses under Article 2.4; therefore, because the United States considers bad debt a direct selling expense, *any* adjustment for bad debt must be justified under Article 2.4. This is analogous to arguing that all houses are buildings; therefore, because we are now in a building we must be in a house.

18. As explained in our prior submissions, the United States, in fact, made two different types of adjustments. The difference in the adjustments was based on the difference in the types of transactions being examined, *i.e.*, POSCO's sales through its affiliate POSAM and POSCO's sales directly to independent US buyers. In the case of the sales through POSAM, an allocated portion of the bad debt expense was part of the adjustments made to construct export price, as provided for in Article 2.3.; no further adjustment for bad debt was made for these transactions. Only in the case of POSCO's direct sales to independent buyers was an allocated portion of the bad debt expense made part of the adjustment to account for differences in conditions and terms of sale, as required by Article 2.4.

19. The fact that there were two different adjustments made pursuant to two different provisions of the Agreement is a problem for Korea because, as discussed previously, the Panel can only review the consistency of the measures at issue with respect to *one* of those provisions, Article 2.4. To overcome this problem, Korea attempts to convert the Article 2.3 adjustment to construct export price into an Article 2.4 adjustment.

20. In that regard, Korea searches for some help in the statement in the fourth sentence of Article 2.4 that certain adjustments should "also" be made in constructing export price. Korea states that the term "also" makes it evident that adjustments to construct export price are not a replacement for adjustments to account for differences affecting price comparability.

21. The United States agrees that adjustments made to construct export price in accordance with Article 2.3 serve a different purpose than Article 2.4 adjustments. In fact, the fifth sentence of Article 2.4 recognizes that the Article 2.3 adjustments can render prices incomparable, whereas Article 2.4 adjustments establish comparability. Because the two types of adjustments are separate and distinct, it is obvious that Article 2.3 adjustments do not replace Article 2.4 adjustments. By the same token, Article 2.4 adjustments do not replace Article 2.3 adjustments. In fact, it is necessary to make the Article 2.3 adjustments – that is, to construct export price – *before* determining what Article 2.4 adjustments are necessary.

22. The real key to Korea's attempts to resolve its Article 2.3 problem is its theory that there can be only one adjustment – what they consistently refer to as "the" adjustment – for what Korea appears to view as a total, indivisible bad debt expense. Based on that premise, Korea argues that, because the United States included bad debt expense in the Article 2.4 adjustment made for the comparison of POSCO's direct sales, *all* adjustments for bad debt expense must be justified under Article 2.4. The adjustment made to construct export price is thereby, in Korea's view, converted into an Article 2.4 adjustment, rendering Article 2.3 irrelevant, which would solve their problem.

23. The fundamental flaw in this argument is that the premise is false – the total bad debt expense is not indivisible. In a dumping analysis, first the amount of selling expenses for each transaction is determined, then appropriate adjustments are made based on those expenses, as necessary. Because the necessary adjustments may vary, depending on whether the transaction at issue is a direct export sale or a resale through an associated importer, the treatment of the selling expenses may also vary, depending on the type of transaction. In other words, it is not only the type of expense that determines how that expense is taken into account; it also depends on the type of transaction.

24. As the United States discussed in its prior submissions, the bad debt at issue was allocated to all US sales of the subject merchandise. Once the allocated expense for each transaction was determined, the United States made the adjustments appropriate for each particular type of transaction. Accordingly, the portion of the bad debt expense allocated to POSCO's sales through POSAM fell within the Article 2.3 adjustments to construct export price – as discussed in paragraph 17 of our response to the Panel's questions – and only the portion allocated to POSCO's direct sales fell within the Article 2.4 adjustment for differences in conditions and terms of sale.

25. Since there were, in fact, two distinct adjustments that involved an allocated portion of the bad debt expense, and only one of those adjustments was made pursuant to Article 2.4, the issue before the Panel is whether that adjustment – and only that adjustment – was consistent with Article 2.4. The issue of the adjustment for bad debt made to construct export price is outside the Panel's terms of reference.

26. With respect to the Article 2.4 adjustment made to normal value for comparison to direct export sales, Korea's claim must also fail. In prior submissions, the United States has explained at length why it believes that differences in direct selling expenses, such as bad debt and warranty, constitute differences in the "conditions and terms of sale", within the meaning of Article 2.4. At this point, I would like to assure Korea that we have not abandoned our analogy to warranty expenses. In asserting that bad debt is not a condition and term of sale, Korea argued that a delayed payment term does not authorize non-payment. By the same token, selling under warranty does not authorize the seller to provide defective merchandise. A warranty term creates the possibility of a warranty expense and a delayed payment term creates the possibility of bad debt expense. Even Korea agrees,

in response to question 7 from the Panel concerning unpaid sales, that the conditions and terms of sale include payment terms and that some adjustment for differences in expenses related to payment terms, including bad debt, may be consistent with Article 2.4. It is now apparent that the crux of Korea's claim is not that an adjustment for bad debt is *per se* inconsistent with Article 2.4, but rather how the United States measured that adjustment in these cases.

27. The Agreement does not provide any guidance on the measurement of differences that affect price comparability. In the case of bad debt, in Korea's view, the United States should have measured any difference in bad debt risk on the basis of any difference in insurance premiums, although there is no evidence in these investigations that POSCO had insurance against bad debt. Korea also seems to accept that using the exporter's bad debt experience could provide a reasonable measurement as well.

28. As discussed in response to the Panel's questions, it is the view of the United States that a reasonable method – and in fact the only practical method – for calculating an adjustment for differences in conditions and terms of sale is to use the expenses reflected in the exporter's normal accounting records. However, in the case of contingent expenses such as warranty and bad debt, it is reasonable to factor into that measurement the seller’s experience. Therefore, in the case of warranty expense, the United States does request information concerning past experience to determine whether the actual warranty expenses incurred during the period of investigation were normal for the particular exporter being examined. In the case of bad debt, companies normally recognize bad debt expense on a reserve account basis, which is based on prior bad debt experience. Therefore, because reported bad debt expense normally reflects the exporter's experience, the United States does not normally request historical information.

29. POSAM did not maintain a bad debt reserve – a fact that POSCO did not point out until the verification in the plate case. Now, by saying that, Korea claims that the United States is trying to pass the buck. We are not passing the buck, we are simply stating a fact. The antidumping questionnaire requests everything we would normally expect to need in a dumping analysis. We had no way of knowing that POSAM used unusual accounting methods. POSAM recognized ABC company's entire bad debt as an expense during the period of the investigations. Moreover, POSCO did not argue that the bad debt expense recognized during the period of investigation should be adjusted to reflect its experience, and did not propose any methodology for making such an adjustment. Again, I am sure Korea will say that the US is passing the buck. However, it is standard in a dumping investigation, when an exporter has a problem meeting the normal reporting requirements, to propose a reporting methodology. In fact, there is a provision of US law that requires parties to promptly notify the Department if there is a problem and propose an alternative. Since we had no forewarning and no proposed methodology, in accordance with its established practice, the United States relied on the expense reflected in the company's accounting records.

30. It is only now – in this proceeding – that Korea has argued that it was incumbent upon the United States to decipher some means of calculating the bad debt adjustment on the basis of information never submitted by POSCO, despite the fact that all of the relevant information was in POSCO's control. We disagree.

31. POSCO knew from the outset of these investigations that ABC Company’s bad debt would be a factor in the dumping analysis. Rather than provide a basis for adjusting this bad debt expense to reflect experience – based on POSCO's knowledge of its own accounting practices (not ours) – POSCO opted to argue that the sales should be treated as "atypical" and excluded from the analysis. As the United States explained in its final determinations and prior submissions in this proceeding, there was nothing atypical about these transactions. Thus, the only issue was how to measure the bad debt expense in light of the information provided by POSCO.

32. With respect to the measurement of the bad debt expense, the only argument made by POSCO in the underlying investigations was that the bad debt expense should be allocated over a broader category of sales. In this proceeding, Korea originally argued that the United States should have allocated the expense only to the unpaid sales. Korea now asserts that it should be allocated over either the unpaid sales or *all* of POSCO's credit sales in all markets. Thus, Korea has acknowledged that it would be appropriate to allocate the bad debt expense beyond the unpaid sales.

33. The positions expressed by POSCO and Korea demonstrate that reasonable minds may differ concerning what constitutes an appropriate allocation of bad debt expense. As we discussed in prior submissions, the market-specific allocation of bad debt expense made by the United States in its dumping analysis was reasonable. There is no basis in the Agreement for Korea's "all or nothing" allocation argument. Moreover, as the United States explained in its first submission, to the extent that argument suggests that POSCO may exploit its domestic market to sell at lower prices in the United States – that is dumping.

34. In sum, including an allocated portion of POSCO's bad debt expense in the adjustment to account for differences in the conditions and terms of sale was entirely consistent with Article 2.4. Moreover, the United States made a reasonable calculation of that adjustment in the cases at issue, based on the evidence provided by POSCO.

IV. MULTIPLE AVERAGING PERIODS

35. I will now turn to the issue of the use of multiple averaging periods in response to the sudden devaluation of the Korean won.

36. After sorting through Korea's various arguments on the issue, and with the assistance of the insightful questions from the Panel, it is now evident that there is one and only one relevant question with respect to this issue: whether the United States permissibly determined not to compare sales made prior to and after a 50 percent devaluation of the won, based on its conclusion that such sales were not "comparable" within the meaning of Article 2.4.2.

37. The term "comparable" is not defined in the context of Article 2.4.2. Further, the period of sales to be covered by the averages described in Article 2.4.2 is also not defined. However, the term "comparable" cannot be understood outside of its context in the Agreement. In a broad sense, it is possible to compare any two sales regardless of how far apart in time they have been made, and regardless of any other differences between them; in other words such sales are "comparable" in a general sense. However, the results of such a comparison would not be particularly meaningful for the purpose of determining whether dumping exists. Thus, the United States fully agrees with the statement by Korea that "the meaning of the term 'comparable transactions' must be understood in light of the rules concerning 'comparisons' established by the anti-dumping agreement".

38. The only relevant guidance the Agreement gives to investigating authorities on this particular issue is the statement in Article 2.4 that the comparison shall be made "in respect of sales made at as nearly as possible the same time". In the cases before the Panel, two sub-periods within the period of investigation were separated by a severe devaluation of the home market currency relative to the currency of export price sales. Due to this situation, although the nominal home market prices in won remained relatively stable, sales at the end of the period of investigation were worth only half as much when compared to the export sales, as the sales at the beginning of the period. In light of this fact, and in accordance with the guidance provided in Article 2.4, the United States chose to compare sales made closer in time, rather than sales made more distant in time.

39. Korea continues to argue that the plain language of Article 2.4.2 requires a single weighted-average. However, Korea's position that multiple averages are permitted for different levels of trade

and physical characteristics reveals that the dispute in this case is not the issue of multiple averages *per se*, but rather over the interpretation of the term "comparable," a term the panel in *Tobacco* found to be "susceptible of a range of meanings."

40. Korea begins its discussion of the meaning of the term "comparable" with the statement that "the meaning of the term 'comparable transactions' must be understood in light of the rules concerning 'comparisons' established by the anti-dumping agreement", but then Korea quickly loses sight of its own principle. The Agreement explicitly states that comparisons shall be made in respect of sales made at as nearly as possible the same time. Korea advances the novel interpretation of this language that, so long as the average of the dates covered by the relevant periods are the same, all sales within the period should be considered to have been made at the same time, and thus are "comparable" for purposes of averaging under Article 2.4.2.

41. That interpretation would lead to the conclusion that it was appropriate to investigate sales made over a five-year or ten-year period, so long as the periods for the export price and normal value sales were the same, and thus the average date the same. Yet it seems clear to the United States that sales made five or ten years apart should not be considered to have been made at the same time. Moreover, the averages which the United States constructed in these cases meet Korea's test: the average date of each home market sub-period is the same as the average date of the US sub-period. Thus, Korea's test for whether sales have been made at the "same time" does not establish that a single average must be created for a year-long period of investigation. Korea's test could be met with much longer averages, and is also met by the multiple averages created in these cases. I would also note with respect to Korea's argument that transactions in two different periods are closer in time than some transactions within the same period, that is a fact inherent in determining an average period based on time. Obviously, if you create, for example, monthly averages in a hyperinflationary period, some sales in different averaging groups are separated by only a day, while some sales within the same group are separated by as much as 30 days. However, this is normal whenever averaging groups are used. The issue is whether you have defined a reasonable averaging group that reflects different conditions in the market at different times.

42. The United States notes the statement in Korea's second submission that "the sales prior to the depreciation of the Korean won would not be 'comparable transactions' to sales after the won's depreciation only if there were some provision of the Agreement that would prohibit the comparison of such transactions." However, as discussed above, Article 2.4 does contain a provision which presumes changes over time may affect comparability, and thus that comparisons between sales closer in time are preferable to comparisons between sales further apart in time.

43. Korea also argues that any issue related to currency must be addressed under Article 2.4.1 or not at all. However, Article 2.4.1 does not have such a broad purpose as that suggested by Korea. On its face, Article 2.4.1 only provides guidance with respect to which exchange rate an investigating authority should apply. It does not address the comparability of sales included in the averages being compared; rather, this issue is addressed in Article 2.4.2.

44. In an even less tenable position, Korea argues that because prices in won remained roughly even, they should be considered comparable, even though their values in dollars, which is the currency in which the comparison was made, are sharply different. The problem with this argument is that the home market prices are stated in dollars before they are compared with the export prices. By separating the sales made prior to the devaluation from those made after the devaluation, the United States has ensured that comparability of the prices in dollar terms is maintained.

45. Finally, Korea's reliance on statements by the panel in *Cotton Yarn* is misplaced. In that case, Brazil argued that the EC should have excluded from normal value sales made during a period in which the Government of Brazil held exchange rates stable, or should have adjusted the prices of

those sales. Thus, the panel in *Cotton Yarn* was addressing the question of whether a "due allowance" or "compensatory adjustment" under the second sentence of Article 2.6 of the Antidumping Code must be made to certain exchange rates. Brazil did not argue that sales during the period of fixed exchange rates were not made "at the same time" as other sales. Therefore, the effect of time on comparability was not before the panel. Nor was the panel presented with the question of whether separate averages could be created in light of a severe devaluation of the home market currency for the simple reason that the concept of average-to-average comparisons did not exist under the Code.

46. In light of the fact that the United States permissibly concluded that a 50 percent devaluation in the home market currency rendered sales before and after the devaluation not comparable within the meaning of Article 2.4.2, the Panel should find the measures taken by the United States to be in conformity with the Agreement with respect to this issue.

V. LOCAL SALES

47. Finally, I will address the issue of local sales.

48. A review of the submissions confirms that there is no real disagreement over the meaning of the relevant provisions of Article 2.4.1. Korea and the United States agree that if the sales used to establish normal value are in a different currency than the export price sales, conversion at the rate in effect on the date of sale was appropriate, and if the sales are in the same currency, no conversion is necessary or appropriate.

49. In these investigations, the United States found, based on the evidence provided by POSCO, that the local sales were made in won. Therefore, Korea's claim rests on whether that finding was based on an unbiased and objective assessment of the facts. In this regard, there is a dispute about the finding of fact. The United States concluded that the sales were in won. Korea's premise is that these sales are dollar sales, based on *its* review of the facts. Thus, there is a dispute about the *finding of fact*, which Korea confuses with the underlying data. Korea's legal argument starts from *its* finding of fact that these were dollar sales, then applies the US reasoning that starts from a different factual premise, that these were won sales. Korea then concludes that the US' argument fails. That conclusion is not surprising since they start from a different factual premise. Thus, notwithstanding Korea's assertion that there are no facts in dispute, this issue is primarily a question of fact.

50. In analyzing that issue, the Panel should examine how the facts were presented by POSCO in the investigations – not how they were presented by Korea in this proceeding. It is also important to keep in mind that Korea's claim is asserted with respect to two separate investigations conducted over different time periods and on the basis of different evidentiary records. Thus, the United States' assessment of the facts in each case must be reviewed independently.

51. The facts and arguments presented in each of these investigations are set out in detail in paragraphs 36-59 of the United States response to the Panel's questions. Again, I emphasize, if you review that analysis of the facts in the record, it is readily apparent that how the facts were presented by POSCO differs significantly from how the facts have been presented by Korea here. To summarize, in the plate case, POSCO originally reported these sales prices in won and stated that the sales were paid in won, and the invoices reflected the won amounts reported by POSCO. POSCO subsequently claimed that these sales were made in dollars and reported dollar amounts that were also reflected on the invoices. At verification, the United States confirmed that the reported invoiced won amounts were consistent with the amounts recorded in POSCO's accounts receivable. There was no evidence in that case that the won amounts reported were different from the won amounts actually paid and POSCO did not make such a claim.

52. The sales at issue were sales made in Korea, between two Korean companies, for consumption in Korea. In light of the fact that the sales were invoiced, paid and recorded in won, it was not only reasonable for the United States to determine that the sales were made in won, it is difficult to image how it could have reached a contrary conclusion.

53. In the sheet case, POSCO also reported these sales in won and stated that the sales were paid in won, and that the amounts reported were "the actual invoice price per metric ton in Korean won." Once again, POSCO claimed later in the proceeding that these sales were made in dollars and reported dollar amounts that were also reflected on the invoices. In that case, POSCO also provided evidence at verification that the won amounts actually paid differed from the amounts on the invoices. The verification report indicates that a local sale was examined and POSCO provided accounting entries showing that the won amount paid for that sale differed from the won price on the invoice.

54. Korea's suggestion that the statements in the verification report constitute findings of fact is incorrect. Verifiers do not make findings of fact or conclusions of law. The verification report records what the verifier saw and what she was told by POSCO. After verification, the United States weighed all of the evidence and again concluded that the local sales were made in won, as explained in the notice of final determination. I would like to point out that the United States is not passing the buck. Korea has failed to point to one piece of information that we did not ask POSCO to provide. We addressed the record as POSCO presented it.

55. Was there conflicting evidence on that record? Yes. Nevertheless, based on the record, an unbiased and objective person could reach the conclusion that these Korean sales were made in won. Therefore, the United States' determination was consistent with its obligations under the Agreement. The fact that Korea may now sift through the record, re-weigh the facts, and argue that it would have reached a different conclusion is irrelevant.

56. Given that the United States determined, based on an unbiased and objective assessment of the information provided by POSCO, that these local sales were made in won, the conversion of the won prices into dollars was consistent with the Agreement and Korea's claim to the contrary must fail.

VI. CONCLUSION

57. In sum, the United States has amply demonstrated that Korea's claims are unfounded. The dumping analyses in the cases at issue were consistent with Agreement. In closing, I believe it is appropriate to return briefly to the topic with which I began. It is important to recognize that the fair comparison requirement of Article 2.4 is not one-sided. One purpose of the Agreement is, of course, to establish rules to govern the conduct of anti-dumping proceedings, and the particular purpose of Article 2.4 is to establish rules for how to measure – fairly – the existence of dumping. However, the fundamental purpose of the Agreement is to implement Article VI of the GATT in which "the contracting parties recognize that [injurious] dumping. . . is to be condemned", and establish that a Member whose domestic industry is injured by dumping has a right to take a remedial measure. Thus, the requirement to make a fair comparison exists not only for the benefit of the exporters alleged to be dumping, but also for the benefit of the domestic industries alleged to be injured by dumped imports.

ANNEX 2-7

RESPONSES OF THE UNITED STATES TO QUESTIONS POSED BY THE PANEL

SECOND MEETING OF THE PANEL

(28 July 2000)

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I. CURRENCY CONVERSION

Q.1. For the United States. In the Plate case, did you verify any "dollar-denominated" local sales? If so, did you verify the amount actually paid in respect of those sales?

1. In the *Plate* case, the United States examined documentation pertaining to local sales during its verification in Korea.[1] In its examination, the United States verified that the won amount listed on the invoice was the same amount recorded in the company's sales ledger, as reported by POSCO in its questionnaire response.[2] As discussed below, POSCO did not inform the United States, during the verification or at any time during the *Plate* investigation, that the invoiced amount that was recorded in the company's accounts and reported to the United States differed from the amount actually paid for the sales at issue.[3] In particular, during the verification POSCO did not direct the United States to any records that would indicate a difference between the invoice amount and the payment amount. Indeed, all of the information examined at verification was consistent with the United States' understanding that the invoice and payment amounts were the same. Finally, we note that POSCO's home market sales were paid on a revolving account basis.[4] The United States, therefore, was unable to tie payments directly to a particular sale. Accordingly, it was not possible to verify the actual payment for a particular invoice.[5]

Q.2. For Korea. It is the understanding of the Panel that the initial questionnaire responses in both the Plate and Sheet cases reported the "local dollar-denominated sales" at issue at the invoiced price in won, rather than the amount of won actually paid. In the Plate case, the Panel is unaware that POSCO at any point informed the USDOC that the amount paid in won differed from the amount invoiced in won, nor that any evidence in the record so indicates. If Korea considers that the Panel's understanding is incorrect, please provide relevant evidence from the record in support of Korea's view.

2. The evidence indicates that the Panel's understanding is correct. In both cases, POSCO reported only the invoice price for the local sales at issue. In neither case did POSCO report the actual won amount paid by POSCO's customer.[6] In the *Plate* case, POSCO did not inform the United States at any time during the proceeding that the amount paid differed from the amount invoiced and reported by POSCO in its response. Moreover, no other information on the record indicates the existence of a difference between the invoiced amount and payment amount.[7]

3. In the *Sheet* case, the only suggestion that these amounts differed came late in the proceeding amid conflicting information. In that case, once again POSCO only reported the invoice price and never reported that the won amount actually paid by the customer differed. Further, POSCO neither

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[1] SSPC Sales Verification Report (5 Jan. 1999) at 4 and 10 (ROK Ex. 6).

[2] *See, e.g., id.* at Exh. 6 (ROK Ex. 6) and Exh. 23 (US Ex. 50) (where the amount listed on the tax invoice and shipping invoice is the same amount entered into the company's sales ledger).

[3] *See* Responses of the United States to Questions from the Panel (29 June 2000), paras. 36-49.

[4] Section B-D Response (20 July 1998), at B-17, and B-19 (US Ex. 40) (stating that "POSCO's home market customers pay on an open (*i.e.*, revolving) account basis that is the normal method of payment in the Korean domestic market.").

[5] *See* Responses of the United States to Questions from the Panel (29 June 2000), para. 105.

[6] *See* Responses of the United States to Questions from the Panel (29 June 2000), paras. 36-42 and 50-54.

[7] *See generally*, SSPC Sales Verification Report (5 Jan. 1999), at Exh. 6 (ROK Ex.6) and 23 (US Ex. 50). The United States examined the order sheet, the mill certificate, the shipping invoice, the monthly shipping list by customer, the tax invoice, the freight expense ledger, the sales ledger, the summary of accounts payable, the tax invoice for freight and the application for duty drawback. None of these documents indicate that the won amount paid by POSCO's customers differed from the invoiced amount recorded in the company's sales ledger.

informed the United States nor claimed in any of its responses in the *Sheet* case that the amount paid and amount invoiced were different. US verifiers only uncovered this information during the verification. Similarly, in its arguments to the United States in the *Sheet* case, POSCO never indicated nor argued that the won amount paid differed from the amount invoiced.

Q.3. For Korea. Please identify where, in the course of your argumentation in the Plate and Sheet investigations regarding whether "dollar denominated" local sales were in fact dollar or won sales, you drew the attention of the USDOC to the fact that the order sheets indicated "D" for dollar sales.

4. In its arguments made to the United States during the course of both the *Plate* and *Sheet* investigations, neither POSCO nor Korea ever raised, argued, nor drew attention to the letter "D" on the order sheets.[8] Indeed, in all of its arguments concerning local sales, neither POSCO nor Korea ever referred to, or relied upon, the order sheets as relevant to establish that the sales were dollar-denominated sales.[9]

5. Korea appears to assume that all POSCO had to do was claim that these sales were denominated in dollars and the United States would have to accept that claim unless it could sift through the voluminous record and disprove it. To the contrary, the party asserting a claim must support it. All of the relevant information was known to and in the control of POSCO. It is evident from the records of these investigations that POSCO did not view the order sheets as relevant to its claim that these sales were made in dollars or won. This underscores the fact that, in this proceeding, Korea has presented a different view of the facts than was presented to the United States by POSCO in the underlying investigations.

II. UNPAID SALES

Q.1. For Korea. Korea characterizes the United States' "constructed export price defense" as a post hoc argument. The United States has however indicated places in the record that it considers to indicate that, in respect of sales through POSAM, the United States deducted an allocated portion of the US bad debt expenses as part of the construction of the export price (US answer to question 4 from the Panel regarding unpaid sales). The portions of the record cited by the United States seem to suggest that the adjustments in respect of POSAM sales were conducted under a legal provision applicable only to adjustments relating to a constructed export price and using a different methodology than is used for circumstance of sale adjustments. If you disagree, please explain, citing to the relevant portions of the record.

6. Korea's suggestion that, under US law, any adjustment for direct selling expenses must be a circumstance of sale adjustment is simply inaccurate. The United States' arguments to the contrary are not *post hoc* as Korea claims. As stated in the final determinations in both cases, for POSCO's sales through POSAM, the United States constructed export price based on POSAM's prices to unaffiliated customers in the United States. With respect to the construction of export price (CEP), the notices specifically state that "[i]n accordance with section 772(d)(1) of the Act, we deducted those selling expenses associated with economic activity in the United States, including *direct selling*

[8] *See generally*, POSCO SSPC Case Brief (26 Jan. 1999) at 3-6 (ROK Ex. 7); POSCO SSSS Case Brief (15 April 1999) at 3-6. (ROK Ex. 20). Indeed, this fact was raised for the first time in Korea's Second Submission to the Panel, 29 June 2000, at n. 35; and in its Oral Statement of 13 July 2000 at para. 78.

[9] *See generally*, POSCO SSPC Case Brief (26 Jan. 1999) at 3-6 (ROK Ex. 7); POSCO SSSS Case Brief (15 April 1999) at 3-6. (ROK Ex. 20). *See also* POSCO SSPC Rebuttal Brief (2 Feb. 1999) at 28 (ROK Ex. 9); and *see generally* POSCO SSSS Rebuttal Brief (21 Apr. 1999). (ROK Ex. 22).

expenses (credit costs, bank charges and US commissions) and indirect selling expenses."[10] (Emphasis added). As we have explained previously, under US law, CEP is calculated by deducting all expenses (direct and indirect selling expenses; further manufacturing costs) related to the resale by the associated importer, plus an amount for profit. Those deductions are required by section 772(d)(1) of the US antidumping law, which is applicable only to CEP transactions.[11]

7. The deductions made to calculate CEP are separate and distinct from the adjustment made to normal value to account for differences in the circumstances of sale (*i.e.*, conditions and terms of sale). Although the circumstance of sale (COS) adjustment is calculated based on direct selling expenses, it is governed by a separate provision of US law, section 773(a)(6)(C)(iii) of the Act.[12] The COS adjustment is made for the purpose of *comparing* export price and normal value, not *constructing* export price. The COS adjustment is performed by deducting home market direct selling expenses from normal value and adding US direct selling expenses (excluding direct selling expenses that were deducted in calculating the CEP). Thus, while both the CEP and COS provisions deal with the treatment of direct selling expenses, such as bad debt, the adjustments are distinct and serve different purposes.

8. As discussed in our prior submissions, the bad debt expense at issue here was allocated across all US sales of the subject merchandise during the period of investigation. How the allocated portion of the bad debt expense was then treated depended on whether the transactions were sales through POSAM (*i.e.*, CEP sales) or sales direct to independent US customers. As noted by the Panel in its question, the United States' response to the Panel's first set of questions (question 4, Unpaid Sales) explains where the CEP adjustments, including an allocated portion of bad debt, are reflected in the record.

9. The COS adjustments to normal value are also reflected in the analysis memoranda. For the *Plate* case, the analysis memorandum at page 8 shows that the allocated portion of bad debt expense was included in the US direct selling expenses (DIREXPU). At page 13, the memorandum shows that for EP sales the home market direct selling expenses were deducted from normal value and, at page 14, shows that the US direct selling expenses shown on page 8 were added to normal value. In contrast, the CEP calculation on page 15 of the memorandum shows that US direct selling expenses were deducted from CEP, but there was no addition to NV for US direct selling expenses (*i.e.*, the direct selling expenses were not part of a COS adjustment).[13]

10. In the *Sheet* case, the final analysis memorandum at page 9 shows that the allocated amount of the bad debt expense was included in the US direct selling expenses. At page 13, the memorandum shows that for EP sales the home market direct selling expenses were deducted from normal value and, at page 15, shows that the US direct selling expenses shown on page 9 were added to normal value. In contrast, the CEP calculation on page 10 of the memorandum shows that there was no

[10] SSPC Final Determination, 64 Fed. Reg. 15444, 15445 (ROK Ex. 11); SSSS Final Determination, 64 Fed. Reg. 30664, 30668 (ROK Ex. 24). The phrase "expenses associated with economic activity in the United States" is used to distinguish expenses associated with the transaction between the associated importer and the independent buyer from the expenses associated with the transaction between the exporter and the associated importer.

[11] The Tariff Act of 1930, as amended (the Act) (ROK Ex.1), 19 USC. § 1677a(d).

[12] *Id.* 19 USC. § 1677b(a)(6)(C).

[13] SSPC Final Analysis Memorandum (19 March 1999) (US Ex. 35); see also SSPC Model Match Program Log at line 4059 and SSPC Margin Program Log at lines, 5246 and 5669-74 (US Ex. 54); see also Responses of the United States to Questions from the Panel (29 June 2000), paras. 16-19.

addition to NV for US direct selling expenses (*i.e.*, the direct selling expenses were not part of a COS adjustment).[14]

Q.2. For the United States. The United States argues that, "[b]ecause Korea has made no claim under Article 2.3, the United States' decision to construct export price and the methodology it employed to do so are not issues before this Panel." US rebuttal submission, para. 22. Article 2.4 provides that ""[I]n the cases referred to in paragraph 3, allowances for costs incurred between importation and resale, and of profits occurring, should also be made." Thus, it could be argued that the guidelines governing the construction of an export price pursuant to Article 2.3 may be found in Article 2.4. Please comment.

11. Article 2.3 provides for the construction of export price when the export price appears unreliable because the exporter and importer are associated. Article 2.3 also contains the only mandatory provisions with respect to the methodology that may be employed to construct export price. Specifically, in accordance with Article 2.3, export price must be constructed on the basis of the price at which the merchandise is first sold to an independent buyer or, in certain situations, on such other reasonable basis as the authorities may determine.

12. Although Article 2.3 provides only general requirements for the construction of export price, any methodology used must be reasonable and consistent with the object and purpose of Article 2.3. Moreover, as we have stated previously, the United States agrees that the third sentence of Article 2.4 provides guidance on how to construct export price. However, that sentence refers to what adjustments "should" be made in constructing export price pursuant to Article 2.3; the language is not mandatory. Thus, while the third sentence of Article 2.4 would be relevant in considering whether a methodology employed to construct export price was reasonable and consistent with the object and purpose of Article 2.3, it does not provide a basis for a claim of a violation. A claim that the construction of export price was in violation of the Agreement must be based on Article 2.3. Therefore, because Korea's claim with respect to the treatment of bad debt expense is based on Article 2.4, that claim does not encompass the adjustment for selling expenses, including the allocated portion of bad debt, made to construct the export price for sales through POSAM.

13. The United States also notes that Korea's reliance on the Appellate Body's decision in *Argentine Footwear* [15] is misplaced. Korea argues, based on a misreading of that case, that the reference to Article 2.3 in the third sentence of Article 2.4 brings Article 2.3 within the Panel's terms of reference.

14. *Argentine Footwear* involved a claim that Argentina failed to comply with its obligations of Article 4.2(c) of the Agreement on Safeguards. Article 4.2(c) of the Agreement on Safeguards provides that:

> The competent authorities shall publish promptly, *in accordance with the provisions of Article 3*, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined. (Emphasis in original)

Article 3 of the Agreement on Safeguards provides that:

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[14] SSSS Final Analysis Memorandum (19 May 1999) (ROK Ex. 25); see also SSSS Model Match Program Log at line 1122 and SSSS Margin Log Program at lines 2565 and 3002-4 (US Ex. 55); see also Responses of the United States to Questions from the Panel (29 June 2000), paras. 16-19.

[15] *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, Report of the Appellate Body adopted 12 January 2000.

> The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law.

The panel's decision that it had not exceeded its terms of reference in considering provisions of Article 3 was based on the fact that Article 4.2(c) of the Agreement on Safeguards expressly incorporated the requirements of Article 3 in a manner that mandated compliance with Article 3 as a requirement of Article 4.2(c). The Articles at issue here are not so related.

15. Article 2.4 of the Antidumping Agreement merely contains a reference back to "cases referred to in paragraph 3" followed by a description of allowances that "should" be made in such cases. The language of Article 2.4 does not require allowances "in accordance with" Article 2.3. In fact, as noted above, the allowances themselves are not mandated by Article 2.4. Therefore, there is no basis for sweeping the constructed export price methodology employed by the United States into Korea's claim under Article 2.4.

16. Moreover, as discussed below in response to question 5, even if the Panel were to conclude that it was appropriate to consider whether the CEP methodology employed by the United States is consistent with the guidance provided in Article 2.4, it must answer that inquiry in the affirmative.

Q.3. For the United States. Is there anything in the record of the investigations indicating whether POSAM extended the credit in respect of the unpaid sales and thus bore the risk of non-payment, or whether, to the contrary, the risk of loss was borne by the exporter? Where in the record does the USDOC make such a determination in respect of its treatment of unpaid sales as a cost incurred by POSAM between importation and resale?

17. The questionnaire responses and verification reports in both cases indicate that POSAM sold to ABC Company on credit. Although POSAM did not receive payment for the transactions at issue, POSAM had paid its Korean affiliate, POSTEEL, for the merchandise. Thus, the bad debt was recognized in POSAM's accounting records.

18. Specifically, in the *Plate* case, Exhibit 5 to the POSAM verification report includes a copy of POSAM's invoice to ABC company, which shows the future date on which payment is due.[16] In addition, the POSAM verification report states that when POSAM purchases from POSTEEL, it pays POSTEEL immediately and records the transaction as a pre-paid purchase. As a result, when POSAM wrote-off the sales to ABC Company, the amount paid to POSTEEL for that merchandise remained in POSAM's "cost of goods sold" account.[17]

19. Similarly, in the *Sheet* case, the record contains a copy of POSAM's invoice to ABC Company, which requires payment on a specified future date.[18] The record also indicates that, prior to ABC Company's bankruptcy, POSAM had paid POSTEEL, which in turn paid POSCO, for the merchandise. Therefore, the loss was recognized in POSAM's accounting records.[19]

20. With respect to the second part of the Panel's question, the phrase "incurred between importation and resale" is ambiguous and susceptible of more than one reasonable interpretation. As

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[16] SSPC POSAM Verification Report (14 Jan. 1999), Exhibit 5 (excerpt) (US Ex. 52) (see "Due Date" at bottom of the invoice).

[17] SSPC POSAM Verification Report at 9 (US Ex. 52); see also, SSPC POSCO Verification Report at 20 (ROK Ex. 6) (POSCO stated that, although POSAM did not receive payment, POSAM paid POSTEEL).

[18] SSSS POSAM Verification Report (2 April 1999), Exhibit 6 (excerpts) (US Ex. 53). In addition to the invoice, this exhibit includes copies of accounting records showing how the sales were entered and then written off by POSAM. The same documents are on the SSPC record.

[19] SSSS POSAM Verification Report at 7 (US Ex. 10); POSCO Supplemental Questionnaire Response (4 Dec. 1998) at 2-3 (US Exhibit 30).

explained previously, the United States interprets that phrase to include all costs incurred in connection with the transaction between the affiliated importer and the independent buyer.

21. The suggestion that "incurred between importation and resale" should be interpreted as a temporal limitation is inconsistent with the object and purpose of Article 2.3 and elevates form over substance. Under such an interpretation, whether a cost was accounted for in constructing export price would be determined solely by timing, rather than the nature of the expense and the object and purpose of Article 2.3. For example, Korea concedes that the cost of salaries for the affiliated importer's sales force is a legitimate Article 2.3 deduction.[20] However, some salary expense may be incurred after importation (*e.g.*, sales from inventory) and some may be incurred *before* importation (*e.g.*, drop shipments). There is no rational reason to deduct the salary expense in one case but not the other. In fact, under a temporal interpretation, even though estimated expenses, such as bad debt or warranty, are recognized by the associated importer, no such expenses could not be taken into account in constructing export price because by their nature they arise after resale.[21]

22. In contrast, the US interpretation of the third sentence of Article 2.4, which focuses on the transactions – the sale between the exporter and associated importer and the resale – is consistent with the object and purpose of Article 2.3, which is to construct a price for the former transaction based on the price for the latter. Accordingly, for CEP transactions, section 772(d)(1) of the US anti-dumping law requires the deduction of all selling expenses related to the US affiliate's sales to independent US buyers. Because the United States interpretation of "between importation and resale" is incorporated into the statutory requirements for the construction of export price, the only determination required in each case is the identification of the expenses related to the transaction between the US affiliate and the independent US buyer.

23. As discussed further below, in the cases at issue, the United States allocated the bad debt expense for the sales to ABC Company across all US sales of the subject merchandise. In accordance with US law, the portion of the expense allocated to the sales through POSAM became part of the pool of expenses deducted to construct export price. The citations to the record that demonstrate the allocation of the bad debt expense, the inclusion of an allocated portion of that expense in the pool of US direct selling expenses, and the deduction of those expenses in the construction of export price, were provided in response to question 4 (Unpaid Sales) of the Panel's first set of questions.

Q.4. For the United States. If unpaid sales were a cost incurred by POSAM between importation and resale in respect of those sales handled by POSAM, why did the USDOC consider that those sales should be allocated over all sales of the subject merchandise in the United States, irrespective of whether or not those sales were handled by POSAM?

24. What constitutes a reasonable allocation may depend on the nature of the expense or the particular facts of the case. For example, it may be reasonable to allocate transportation costs on a transaction-specific or customer-specific basis because there are known variances in distance. In contrast, while bad debt is a normal, anticipated expense, specifically what transactions, or even what customer, will generate a bad debt is not known in advance. All transactions made on credit in a particular market are a potential source of bad debt, regardless of the channel of trade or customer. Therefore, it is reasonable to allocate a portion of that expense to all transactions in that market.[22]

[20] See Korea's Second Submission at para. 58.

[21] The term "incurred" is itself ambiguous. Even under a temporal analysis, it would be consistent with the object and purpose of Article 2.3 to treat contingent expenses, such as bad debt and warranty, as "incurred" at the time the terms of sale are established.

[22] US First Submission at para. 89.

25. Accordingly, because the record demonstrated that the bad debt expense at issue was tied to US sales of the subject merchandise, the United States determined that it was appropriate to allocate the expense to all of POSCO's US sales of the subject merchandise.[23] All of POSCO's US customers that buy subject merchandise on credit, regardless of whether POSCO sells to them directly or through POSAM, are a potential source of bad debt expense in the US market. Therefore, it was reasonable to allocate the bad debt expense across all US sales of the subject merchandise.

Q.5. For the United States. Without prejudice to your position that the construction of the export price is not within the Panel's terms of reference, please respond to Korea's argument in paragraphs 56-59 of Korea's rebuttal submission.

26. The United States does not share Korea's view of the object and purpose of Article 2.3. Korea asserts that the purpose of Article 2.3 is the construction of a "hypothetical" price the exporter would have charged a hypothetical independent importer.[24] Korea argues further that Article 2.3 "instructs" investigating authorities to construct export price by deducting that hypothetic mark-up from the resale price.[25] However, there is no basis in the language of Article 2.3 for Korea's assertion, and Korea does not support its argument with any analysis of the text of Article 2.3.

27. Article 2.3 provides that when the export price is unreliable because of an association between the exporter and the importer, rather than use the unreliable export price, the export price may be constructed. Thus, the purpose of Article 2.3 is to construct a reliable export price to the associated importer to use in lieu of the unreliable price. Moreover, Article 2.3 explicitly provides that export price is to be constructed based on the price to the independent buyer. If the object were to construct a hypothetical price to a hypothetical independent importer, as Korea suggests, there would be no need to start with the price to the independent buyer (*e.g.*, constructed export price could be based on prices to independent importers).

28. In contrast, a methodology that is based on the price to the independent buyer is consistent with the purpose of constructing an export price for the actual transactions at issue, rather than some hypothetical transaction. In short, the price to the independent buyer is to be converted to an export price through appropriate adjustments.

29. Price is equal to cost plus profit. Thus, by starting with the price to the independent buyer and deducting all costs and profit associated with that transaction, the remaining costs and profit represent a construction of the price for the actual export transactions at issue, *i.e.*, the transaction between the exporter and the associated importer. In essence, this represents the effective price between the exporter and the importer for those transactions, based on the actual data concerning those transactions.[26]

30. Even if the Panel were to agree with Korea's assertion that the purpose of Article 2.3 is to calculate a hypothetical mark-up by the US importer, the United States' methodology is not inconsistent with such a theory.

31. A mark-up is the difference between the reseller's price and its acquisition cost. Korea asserts that this hypothetical mark-up should include duties, freight, salaries and overhead. While Korea

[23] See SSSS Final Determination, 64 Fed. Reg. at 30674 (ROK Ex. 24) (this issue was not argued in the parties SSPC case briefs).

[24] Korea's Second Submission at para. 56-59.

[25] Korea's Second Submission at para. 57.

[26] The United States sometimes refers to the construction of export price as, essentially, constructing what is the functional equivalent of an arm's-length price between the exporter and associated importer, *i.e.*, what, based on the resale price, the export price to the associated importer would be if the importer were independent.

agrees that price adjustments for expenses such as warranty and bad debt are reasonable, if based on the seller's expectations or experience at the time of sale,[27] it apparently would not include any direct selling expenses (*e.g.*, warranty, credit/bad debt, technical assistance) in the hypothetical mark-up. Korea simply asserts, without explanation, that it is "clear" that such expenses would not be included in a reseller's mark-up.[28] We disagree.

32. In order to stay in business, any rational seller, including resellers, should set its prices to cover its costs plus profit. Therefore, a rational hypothetical mark-up should include all the reseller's costs. When selling on credit or under warranty, resellers – like exporters – account for anticipated warranty and bad debt expenses. Thus, it is reasonable to conclude that a reseller would establish a mark-up that would cover those anticipated expenses.

33. Because the US CEP deductions were comprised of the reseller's expenses, including an allocated portion of bad debt – plus profit – they represent a reasonable hypothetical mark-up. Therefore, even under Korea's hypothetical mark-up theory, the methodology employed by the United States to construct export price is consistent with Article 2.3.

Q.6. For both parties. It is a generally accepted principle that certain costs are to be expensed while others are to be allocated over time or over product. See, e.g., ADP Agreement, Article 2.2.1.1. In respect of the treatment of unpaid sales, for example, the United States allocated the "cost" of unpaid sales incurred by POSAM over all subject merchandise. Assuming for the sake of argument that the unpaid sales were "costs . . . incurred between importation and resale", it could be argued that those costs should be allocated over a period of time longer than the POI. Please comment.

34. Allocating bad debt expense over a period of time longer than the POI would be inconsistent with Generally Accepted Accounting Principles (GAAP). Under GAAP, expenses such as bad debt are not amortized over time. GAAP requires that the expenses be matched with revenues, *i.e.*, the expense must be recognized in the same period as the revenues to which they are related.[29]

35. Because the amount of bad debt expense normally is not known with certainty during the period in which the revenues are earned, an estimate is made. The estimated amount is then placed in a reserve account for uncollectible receivables. When a specific receivable is subsequently deemed uncollectible, it is written off against the reserve account.

36. Normally, the bad debt expense reported by exporters in a dumping investigation is based on the estimated expense recognized during the period, but – as explained previously – POSAM did not have a bad debt reserve. It wrote off the receivables and effectively recognized the expense during the period of investigation. Therefore, the United States based the adjustments for bad debt expense on the amount reflected in POSAM's accounting records. Although the direct write-off method used by POSAM is normally not sufficient under GAAP because it results in mismatching of expenses and revenues, in the case of the bad debt at issue here, there was no mismatching of expenses and revenues because both the revenue and the expense were realized in the same period. By recognizing the expense in this period, POSAM itself determined that the expense was appropriately matched to revenues during the period. Therefore, using either the direct write-off or a reserve method would be GAAP consistent.

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[27] Korea's Response to Questions Posed by the Panel at the First Meeting, question 7 regarding unpaid sales.

[28] Korea's Second Submission at para. 58.

[29] Wiley's Interpretation and Application of Generally Accepted Accounting Principles 1998 at 106 (US Ex. 51). The two most common estimation techniques are the "percentage of sales" method and the "aging the accounts" method, both of which reflect the seller's bad debt experience. *Id.* at 106-7.

37. As noted above, Korea appears to agree that an adjustment for bad debt expense, like warranty expense, is reasonable, if it is based on risk, *i.e.*, it must reflect the exporter's experience. However, Korea asserts that the burden was on United States to request historical data on bad debt, as it did on warranty expense.[30]

38. The United States requested that POSCO report its direct selling expenses.[31] With respect to bad debt expense, the United States' standard questionnaire does not request historical data on bad debt because, as discussed above, GAAP normally requires that bad debt expense be accounted for using a methodology that reflects bad debt experience.

39. POSCO knew that POSAM had written off these receivables and knew that POSAM did not use a reserve accounting methodology for bad debt.[32] In contrast, the United States did not know and cannot reasonably be expected to know the specific details of POSAM's accounting practices. Therefore, if POSCO believed that any adjustment for bad debt should be determined based on its experience rather than its accounting records, the burden was on POSCO to make that claim and provide the necessary information to support it. POSCO never made such a claim.

III. MULTIPLE AVERAGING

Q.1. Korea acknowledges that "zeroing" per se is outside this Panel's terms of reference. It argues however that it does claim that the "multiple averaging" methodology used by the United States violates the AD Agreement, and that, to the extent that "zeroing" is an integral part of that methodology, it is properly within the Panel' terms of reference. Korea's request for establishment (WT/DS179/2), however, states that

> **"[I]n the final determinations of sales at less than fair value . . . the DOC divided the period of investigation into two sub-periods and calculated separate weighted average normal values for each sub-period. That methodology, however, is inconsistent with Article 2.4.2 . . . ." (emphasis added).**

It could be argued that "zeroing" is not part of the "methodology" regarding which Korea complains in its request for establishment of a panel. Please comment.

40. Korea has complained about a very specific action: "[division of] the period of investigation into two sub-periods and [calculation of] separate weighted average normal values for each sub-period." According to Korea's request for establishment (WT/DS179/2), this action alone was inconsistent with Article 2.4.2. This limitation on Korea's complaint is made clear by the phrase "that methodology," cited in the question. The Panel can address the issue of whether "that methodology," *i.e*. creation of multiple averages, is consistent with Article 2.4.2 without addressing whether zeroing is consistent with the Agreement.

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[30] Oral Statement of the Republic of Korea (12-13 July 2000), paras. 31-34.

[31] See, *e.g.*, SSSS Questionnaire (3 August 1998), page C-34 (Other Direct Selling Expenses) ("Report the unit cost of other direct selling expenses you incurred on sales of the subject merchandise which are not reported in other fields."). Appendix I-5 of the Questionnaire (Direct vs. Indirect Expenses) also states that "Direct expenses generally must be (1) variable and (2) traceable in a company's financial records to sales of the subject merchandise . . . . Direct expenses are typically variable expenses that are incurred as a direct and unavoidable consequence of the sale (*i.e.*, in the absence of the sale these expenses would not be incurred. (US Ex. 56). As explained previously, US administrative and judicial precedents establish that, under US law, bad debt, like warranty, is a direct selling expense. See First Submission of the United States, para. 58, n. 58.

[32] POSCO knew from the beginning of these cases that these sales would be an issue and, in fact, noted the issue in their first questionnaire response. See First Submission of the United States, para. 54.

41. As the United States noted in its response to questions posed by Korea, zeroing occurs at a separate stage, after the averaging and comparisons under Article 2.4 and 2.4.2 are completed.[33] This was explicitly recognized by the Panel in *Cotton Yarn*.[34] Thus, zeroing is not an integral part of the averaging methodology; indeed, it is not a part of the methodology addressed by Articles 2.4 and 2.4.2 at all. Thus, the zeroing practice is simply not a part of the methodology regarding which Korea requested establishment of a panel.

Q.2. For the United States. Do you agree that multiple averaging is permitted by Article 2.4.2 only to the extent it enhances the comparability of the normal value and export prices being compared?

42. The question appears to proceed from a presumption that is the opposite of that contained in the Agreement. The Agreement presumes that most anti-dumping proceedings will require multiple averages to account for variations in physical characteristics, levels of trade, and changes over time. Thus, an investigating authority need not establish that multiple averages enhance comparability, but rather that use of a single average has not detracted from comparability.

43. The best comparison for measuring dumping is a transaction-to-transaction comparison of identical merchandise at the same level of trade and sold at exactly the same time. However, because of practical problems with such an approach, the Agreement also permits average-to-average comparisons. However, with each additional sale which is added to the average on either side, the risk that comparability will be impaired increases to the extent that the additional sale differs in respect of merchandise characteristics, level of trade or time of sale. Consequently, averages should be constructed as narrowly as possible.

44. The Agreement reflects this view. Article 2.1 and 2.6 establish that a product should only be compared to an identical or most similar product. The only way to accomplish this is to create separate averages for each combination of physical characteristics. The Agreement recognizes that comparisons between *identical* products are the most appropriate comparisons and that including similar products in broader averages, where possible, is not necessary or desirable. Comparisons between identical products "enhance comparability" only in the sense that they ensure the best possible comparisons. Thus, investigating authorities need not establish that comparability will be enhanced before creating multiple averages to account for different physical characteristics.

45. The second sentence of Article 2.4 also states that products should be compared at the same level of trade. Thus, in every case in which there are several levels of trade, investigating authorities must create multiple averages by level of trade. The Agreement presumes that averaging together sales at different levels of trade detracts from comparability.

46. The same sentence of Article 2.4 states that transactions should be compared at as nearly as possible the same time. Thus, investigating authorities should only create a single average where there is no evidence of a change over time which may have affected comparability. Although in most cases the United States is not presented with any evidence to suggest that changes within the one year period of investigation may have affected comparability, it does create multiple averages for subperiods in appropriate circumstances. Moreover, the language of the Agreement could be read to support a Member which created, for example, monthly averages in every case.

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[33] See, Responses of the United States to Questions from the Panel and Korea, dated 29 June 2000, at para. 92.

[34] See e.g., EC - Imposition of Anti-dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, (4 July 1995) paras. 500-501 (finding the practice of "zeroing" not to be inconsistent with the Anti-dumping Code).

47. Throughout this proceeding, Korea has argued that the Agreement presumes that averaging will normally encompass the full period of investigation. However, there is nothing in the Agreement to support such a view. Indeed, the Agreement places a burden on the investigating authority which creates a single period-long average in the face of facts demonstrating a change over time, to establish that comparability has not been impaired by use of the single average.

LIST OF EXHIBITS

Exhibit	Description
US Ex. 51	Generally Accepted Accounting Principles (1998)
US Ex. 52	SSPC POSAM Verification Report, Exhibit 5 (excerpts)
US Ex. 53	SSSS POSAM Verification Report, Exhibit 6 (excerpts)
US Ex. 54	SSPC Model Match Program Log (line 4059) and Margin Program Log (lines 5246, and 5669-74)
US Ex. 55	SSSS Model Match Program Log (line 1122) and Margin Program Log (lines 2565 and 3002-04)
US Ex. 56	SSSS Questionnaire (Aug. 3, 1998), p. C-34 and Appendix I-5

ANNEX 3-1

FIRST SUBMISSION OF THE EUROPEAN COMMUNITIES

(5 June 2000)

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I. INTRODUCTION

1. The European Communities (hereafter "the EC") makes this third party submission because of its systemic interest in the correct interpretation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("the Anti-dumping Agreement").

2. Many of the issues in dispute involve questions of fact on which the EC is not in a position to comment. Accordingly, this submission will address only a number of issues of legal interpretation which are of particular interest to the EC.

3. Section II discusses some of the claims raised by Korea in connection with the so-called "multiple averaging" methodology applied by the United States in calculating the dumping margins. Section III addresses Korea's claims under Article 2.4 with respect to the export sales made to a customer that later went bankrupt. Finally, Section IV deals with Korea's claims under Article X.3(a) of the GATT.

II. THE "MULTIPLE AVERAGING" METHODOLOGY

A. ARTICLE 2.4.2

4. The US authorities divided the period of investigation into two sub-periods and compared the weighted average normal value for each sub-period to the weighted average export price for the same sub-period. The resulting dumping margins were then combined into an overall dumping margin for the entire investigation period. For that purpose "negative" margins were treated as zero. Korea alleges that the use by the United States of multiple averages instead of a single average for the whole investigation period violates Article 2.4.2.[1]

5. Korea's claim rests on a misunderstanding of the scope of the requirements imposed by Article 2.4.2. The first option presented by the first sentence of Article 2.4.2 does not require a comparison of the weighted average normal value with the weighted average of <u>all</u> export sales of the product under investigation. Instead, Article 2.4.2 requires a comparison «with a weighted average of prices of all <u>comparable</u> export transactions».

6. Therefore, when all export transactions are not "comparable", Article 2.4.2 allows the investigating authorities to calculate separate averages for each set of "comparable" transactions.

7. The two textual arguments derived by Korea from the wording of Article 2.4.2[2] are clearly without merit:

- it is true that Article 2.4.2 refers to "*a* weighted average". At the same time, however, Article 2.4.2 contemplates that it may be necessary to establish the "existence of margins of dumping" (in plural) in those cases where not all transactions are comparable. Furthermore, it is significant that Article 2.4.2 alludes to "*a* weighted average", rather than to "*the* weighted average";

- the argument that Article 2.4.2 requires that *all* export transactions must be taken into account in the average is fallacious because, as recalled above, Article 2.4.2 refers to "all *comparable* export transactions". Korea's argument reads the word "comparable" out of Article 2.4.2.

[1] Korea's submission, paras. 4.45-4.48.
[2] *Ibid.*, para. 4.46.

8. It is obvious that the timing of the sales may affect price comparability. Indeed, it is precisely for that reason that Article 2.4 requires that the comparison of normal value with the export price shall be made "in respect of sales at as nearly as possible the same time". Thus, the timing of the sales is one of the factors which, in the EC's view, may warrant the use of multiple averages when comparing the normal value to the export price. (Other factors affecting comparability which may require the use of multiple averages are the existence of different product types or models, or the presence of different levels of trade).

9. The EC's experience is that while, under normal circumstances, all sales made within the period of investigation (normally one year in the EC practice) will be "comparable", there may be special circumstances (e.g. high inflation rates in the exporting country) which render necessary to compare quarterly or even monthly averages.

10. The EC is not a in position to express any views on the factual question of whether, in the case at hand, the US investigative authorities were justified in concluding that the sales made in the first sub-period were not "comparable" to those made in the second sub-period. The EC would note, nevertheless, that Korea does not appear to contend that they were "comparable". Rather, Korea's claim is that Article 2.4.2 does not allow the use multiple averages under any circumstances, a claim which for the reasons explained above is clearly unfounded.

11. Although Korea's submission mentions at several points the fact that the US authorities "zeroed" the negative dumping margins when calculating the overall margin for the entire investigation period[3], Korea does not appear to contest that practice, but only the use of multiple averages.[4]

12. In the event that Korea were challenging also the "zeroing" of negative dumping margins, the EC submits that such practice is not addressed by Article 2.4.2. Where the investigative authorities use "multiple averages", it becomes necessary to combine the resulting dumping margins into a single margin for the product under investigation. It is at that point that the issue of zeroing arises. That stage of the calculation process, however, is not subject to Article 2.4.2.

13. The view that the first sentence of Article 2.4.2 prohibits "zeroing" would upset the finely balanced compromise achieved by the negotiators of the Anti-dumping Agreement. As confirmed by the *Audio Cassettes* report[5], there is nothing inherently "wrong" or "unfair" about "zeroing". It would be a mistake to assume that simply because Article 2.4.2 now provides for the use of an average-to-average methodology at the first stage of the dumping margin calculation, the same methodology should be extrapolated to the entire process

B. ARTICLE 2.4.1

14. Korea contends that by dividing the investigation period into two sub-periods to take into account the devaluation of the won, the US authorities violated Article 2.4.1.[6]

15. In the EC's view, this claim is unfounded. Article 2.4.1 is concerned exclusively with the selection of exchange rates for converting normal value and export price into the same currency, prior to comparing them. The rules contained in Article 2.4.1 do not preclude the possibility that, after that conversion, the prices of some export transactions may still not be "comparable" within the meaning

[3] Korea's submission, paras. 3.46 and 4.43.

[4] Korea's panel request does not refer to the issue of zeroing (cf. point (d)of the request).

[5] Panel report on *EC – Anti-dumping Duties on Audio Tapes in Cassettes originating in Japan*, ADP/136, distributed on 28 April 1995, unadopted, at paras. 347-366.

[6] Korea's submission, paras. 4.49-4.53.

of Article 2.4.2, due to factors such as the depreciation of the local currency, which would warrant the use of "multiple averages".

C. ARTICLE 2.4

16. Korea alleges that the "multiple averaging" methodology is inconsistent with the fair comparison requirement contained in Article 2.4 because it resulted in a finding of dumping based solely on pre-devaluation sales, while the finding of injury was based primarily on post-devaluation sales.[7]

17. The EC considers that this claim does not concern the comparison between normal value and export price, which is the only issue governed by Article 2.4, but rather the entirely different issue of whether there is a causal link between dumping and injury. Accordingly, the EC is of the view that this claim should have been brought under Article 3.5, and not under Article 2.4.

III. EXPORTS SALES TO A CUSTOMER WHICH LATER WENT BANKRUPT

18. The Korean exporter made some export sales to a US customer that later went bankrupt (the ABC company). The US authorities treated those sales as "bad debt" and deducted their cost by way of adjustment from the export price for the remaining transactions. Korea alleges that in doing so the US authorities violated, *inter alia*, Article 2.4.[8] Korea contends that the US authorities should have excluded the sales to ABC from the export price calculation.

19. The EC agrees with the United States that it was not required by Article 2.4 to exclude the sales to ABC from the export price.[9] The EC also agrees with the United States that the "bad debt" expenses incurred by a related importer may be deducted from the resale price when calculating the constructed export price in accordance with Article 2.3.[10]

20. On the other hand, the EC disagrees with the US view that differences in "bad debt" expenses may give raise to an adjustment under Article 2.4.[11] In the EC's view, "bad debt" expenses do not "affect price comparability" within the meaning of Article 2.4 because they have no bearing on the customer's decision to make a purchase.

21. Contrary to what is argued by the United States, the risk that a customer may go bankrupt is not a "condition" of sale in the meaning of Article 2.4.[12] The word "conditions", as used in Article 2.4, is largely synonymous with the word "terms". Both words allude to the conditions agreed by the seller and the purchaser, and not to the general conditions prevailing in the market in which the sale takes place. The US extensive interpretation of the term "condition" would require to make an adjustment for virtually any difference in SGA expenses.

22. The analogy drawn by the United States to warranty expenses and credit costs[13] is inapt. While it is true that the eventual cost of the warranty to the exporter is not known at the time where a sale is made, the provision of the warranty is part of the sales contract (or is required by law) and, therefore, influences the customer's purchasing decision. As regards credit costs, the EC practice is to

[7] *Ibid.*, paras. 4.59-4.63.
[8] *Ibid.*, para.4.10 *et seq.*
[9] US Submission, paras.65-73.
[10] *Ibid.*, paras. 74-80.
[11] *Ibid.*, paras. 81-90.
[12] *Ibid.* , para. 83
[13] *Ibid.*, paras. 83-86.

make an adjustment only where the payment terms are expressly agreed in the sales contract or, at least, in the invoice.

IV. CLAIMS UNDER ARTICLE X.3(A) OF THE GATT

23. The EC considers that the requirements imposed by Article X.3(a), and in particular the requirement of "reasonableness", should be interpreted consistently with the requirements imposed upon the investigative authorities by the Anti-dumping Agreement.

24. The Anti-dumping Agreement contains very detailed substantive and procedural requirements for the imposition of Anti-dumping measures. Those rules must be assumed to reflect the Members' agreement as to what is "reasonable" in that particular field. Article X.3(a) should not be used in order to second-guess the drafters of the Anti-dumping Agreement.

25. Many, if not all the claims submitted by Korea under Article X.3(a) concern matters that are specifically addressed in the Anti-dumping Agreement, as evidenced by the fact that those claims have been submitted together with other claims based on the Anti-dumping Agreement. In addressing those claims, the Panel should consider first the relevant provisions of the Anti-dumping Agreement, in accordance with the Appellate Body's admonition in *EC – Bananas* that the more specific WTO agreement must be applied first.[14] If the Panel finds that the measures are in conformity with the relevant provisions of the Anti-dumping Agreement, it should find that they are "reasonable" also for the purposes of Article X.3(a).

[14] Report of the Appellate Body in *EC – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, at para.204.

ANNEX 3-2

FIRST SUBMISSION OF JAPAN

(5 June 2000)

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I. BURDEN OF PROOF

1. It is well-established by panel and Appellate Body decisions that the initial burden of proof is on the complaining party to establish a *prima facie* case.[1] Japan believes that Korea has met that burden in this proceeding.

2. In its submission, the US makes no specific allegations that Korea has failed to meet the initial burden of establishing a *prima facie* case. Instead, the US simply urges the panel to recognize the basic principle that the initial burden to establish a *prima facie* case lies with the complaining party.[2]

3. Although the US makes repeated references to the WTO decisions that have addressed burden of proof issues, the US fails to acknowledge that once the complaining party has established its *prima facie* case, the onus then shifts to the responding or defending party to bring forward evidence and argument.[3] Furthermore, in the discussion of the burden of proof in this dispute, the relationship between Article VI of GATT 1994 and the Anti-Dumping Agreement ("ADA") on the one hand, and the other Articles of the GATT that establish primary obligations on the other should be dully considered.

4. In examining the relationship between Article VI and the primary obligations of the GATT 1994, it is important to recall that GATT 1994 and its associated agreements represent a collection of "positive rules" and "limited exceptions." As the Appellate Body has recently acknowledged, positive rules establish the basic obligations of any Member.[4] Positive rules, such as Article I:1 and II:1, specify actions that must be taken by Members to ensure the integrity of the WTO. These obligations are not dependent on the actions of other Members, but rather are basic obligations that must be honoured by all Members. Limited exceptions, on the other hand, represent exceptions from the basic obligations established by positive rules.

5. Between these two categories, it is clear that Article VI and the ADA do not represent "basic rights" or "positive rules".[5] Article VI and ADA are not positive rules because the disciplines in these provisions do not apply generally to all imports, and do not require a Member to take positive actions with respect to those imports. Article VI is not constructed or drafted to impose any positive obligation. Instead, Article VI provides a discretionary remedy that is allowable as a reaction to actions taken by particular companies within a Member. Article VI allows a "reaction" to commercial conduct of private parties.

6. This stands in contrast to Article I, which obligates Members to bestow most-favoured nation treatment on imports from WTO Members. Similarly, Article II is distinct in that the provision obligates Members to honour the schedule of tariff concessions. The basic obligations of these

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[1] *EC - Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998 (hereinafter "*EC-Hormones*"), para. 104.

[2] US First Submission , para. 40.

[3] *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body adopted 23 May 1997 (hereinafter "*Wool Shirts*") at 16.

[4] *Id.*

[5] The US does not argue affirmatively that Article VI of GATT 1994 and the ADA are positive rules. However, the US misinterprets the Appellate Body's decision in *Wool Shirts* to argue broadly that "trade remedies authorized by the WTO agreements do not constitute 'exceptions'. . ." US First Submission, para. 38. The US fails to recall that the dispute in that proceeding focused on the relationship between Article s within the WTO Agreements on Textiles and Clothing, and not on the relationship between GATT Article s. *Wool Shirts* at 16. In fact, the Appellate Body stated in that decision that the previous GATT panel decisions and the relationship between various GATT Article s was irrelevant in that proceeding.

Articles are not in any way contingent on the actions of other Members. They are universal obligations that may be avoided only if a limited exception is invoked.

7. Thus, based on the architecture of GATT 1994, it is clear that Article VI and the ADA are distinct from the basic obligations such as those found in Article I, II, III or XI. Article VI and the ADA carve out a "limited exception" from the obligations established by the basic GATT Articles.

8. Taking these nature of Article VI and the ADA into consideration, whether the defending Member met the burden of justifying a measure under Article VI and the ADA after the complaining Member has established a *prima facie* case should be subjected to careful scrutiny.

II. ARTICLE 2.3 OF THE ADA - CONSTRUCTION OF EXPORT PRICE

9. As discussed in this section and in Section III below, Japan believes that the US has failed to demonstrate that the adjustments made to export price and normal value for the sales to the bad debt customer were in accordance with Article 2.3 and Article 2.4 of the ADA. As a result, the US did not ensure a fair comparison, as required by Article 2.4.

10. In both the stainless steel plate in coils and the stainless steel sheet and strip sheet investigations, the US made adjustments to POSCO for bad debt expenses incurred in the US With respect to sales made through POSCO's affiliate - POSAM-, the US asserts that the adjustment for bad debt expenses was authorized under Article 2.3.[6] According to the US, it deducted the bad debt expenses in the US from the "starting export price" to derive a "constructed export price."[7] The US position is that its deduction was permitted by Article 2.3, and the fourth sentence of Article 2.4, which authorizes deductions for certain costs associated with selling through an affiliated importer.[8]

A. ADJUSTMENTS ALLOWED UNDER ARTICLE 2.3 ARE NOT WITHOUT LIMITATIONS

11. The US position is untenable for several reasons. First, the US does not acknowledge that there are limitations or constraints on investigating Members in making a downward adjustment to starting export price pursuant to Article 2.3. Contrary to the US position, Article 2.3 does not authorize every conceivable adjustment to starting export price in deriving constructed export price. Instead, Article 2.3 limit the type of downward adjustments that may be made to the starting export price.

12. If there were no limitations to Article 2.3, investigating Members would be permitted to make any adjustment to the starting export price. In this scenario, there would be no requirement for the investigating Member, and this means that there would be a basis to infer that the expense was somehow "included in" or an "element of" the starting export price. Without any limitations on the operation of Article 2.3, there would be no analysis of whether the expense was incurred exclusively because the export was made through an affiliated importer, and not sold directly to an export customer.[9] In short, the US reading of Article 2.3. would leave the investigating Member with

[6] US First Submission, para. 76.

[7] For the purposes of this submission, "starting export price" refers to the "price at which the imported products are first resold to an independent buyer" as used in Article 2.3. The phrase "constructed export price" is used to refer to the export price derived or constructed from the "starting export price."

[8] US First Submission, paras. 74-80.

[9] Article 2.3 also allows the construction of export price when the exporter price is unreliable because of a "compensatory agreement" between the exporter and importer. As this situation was not relevant in the underlying proceedings, the following discussion addresses circumstances where there is an "association" between the exporter and importer.

unlimited discretion to make any downward adjustment to the starting export price, without any disciplines or restraints.

13. Contrary to the US interpretation, it is clear that there are some limitations as to what types of downward adjustments may be made to the starting export price when constructing export price. The position of Japan is that such an adjustment is authorized by Article 2.3 only if the investigating Member establishes affirmatively that there is a basis to infer that the underlying cost or expense was included in the composition of starting export price because the sale was made through an affiliated importer.

14. This interpretation recognizes that the purpose of Article 2.3 is to enable an authority to eliminate elements of export price that are attributable to the fact that the sale was made through an affiliated importer.

15. In this case, there is no evidence that the bad debt expense was included in starting export price of POSAM, and that a deduction was necessary to construct an export price. The US never established a nexus between this theoretical expense and the fact that it was sold through an affiliated importer. This deficiency is also demonstrated by the fact that the US made a similar adjustment for bad debt expenses for POSCO's sales made directly to US customers, (in this case, POSAM did not intervene in the transactions). The US seemed to conclude that the adjustment of the bad debt could be done without any particular connection to the fact that the sales were made through an affiliated importer. The US decision demonstrates that the US believed the bad debt expense had affected all US sales, not just those made through the affiliated importer. Thus the US adjustment was not authorized or appropriate by virtue of Article 2.3.

B. ARTICLE 2.4 ONLY ALLOWS ADJUSTMENTS "INCURRED BETWEEN IMPORTATION AND RESALE"

16. Second, the US argues that the adjustment to starting price in constructing export price was authorized by the fourth sentence of Article 2.4. According to the US, that sentence governs exclusively adjustments made to starting export price to derive constructed export price. However, the US ignores the plain language of that sentence. The fourth sentence of Article 2.4 allows adjustments for costs only if the costs are "incurred between importation and resale."

17. In its submission, the US relies on the clause "costs incurred between importation and resale" in order to justify this deduction. In particular, the US states that the adjustment was " a deduction made *to construct* the export price."[10] However, the US never establishes or even assumes that this was a cost that was incurred between importation and resale. In fact, it is clear that the bad debt expense was an expense incurred after resale. Given the explicit temporal limitation of the fourth sentence of Article 2.4, the US was not authorized to make an adjustment to starting export price to construct an export price for an event that occurred after the resale to the first unaffiliated customer.

18. As such, the panel should find that the US decision to make an adjustment to starting export price for the unpaid sales was not consistent with the requirements of Article 2.3 and Article 2.4 of the ADA.

III. ARTICLE 2.4 - "DIFFERENCES IN CONDITION AND TERMS OF SALE"

19. During the period of investigation, POSCO made sales in the US through its affiliated importer, as well as directly to US customers. For those sales made directly to US customers, the US also made an adjustment for the bad debt expenses. The US asserts that this adjustment was justified by the third sentence of Article 2.4. In particular, the US argues that the adjustment for lack of

[10] US First Submission, para. 76 (emphasis in original).

payment was permitted under the clause "differences in conditions and terms" of the third sentence of Article 2.4. The US states that "it interprets differences in 'conditions and terms of sale' as including differences in selling expenses such as bad debt."[11] Moreover, the US clarifies that it believes the bad debt expense is a "condition," implicitly conceding that bad debt expense is not a "term" of sale.[12]

A. REQUIREMENT THAT A CONDITION IS AN "ELEMENT OF PRICE" WAS NOT MET

20. The US acknowledged that, in order for a condition of sale to qualify for a due allowance adjustment stipulated in Article 2.4, the condition must be an "element of price"[13], because it is fair to presume that the condition affects price comparability if there is a basis to conclude that a factor is an "element of price". According to the US, if a condition affects price comparability, it is eligible for an Article 2.4, third sentence, due allowance adjustment.[14]

21. The critical aspect of the US analysis relates to when there is a basis to conclude that a condition is an "element of price." The US and Korea appear to agree that in some cases the seller will know of the conditions at the time of sale.[15] In its submission, however, the US argues that there is a second category of conditions where the conditions, and the cost of the conditions, are not known precisely to the seller.[16] In these circumstances, the US argues, that the seller nevertheless "anticipates" or should anticipate the cost. In these cases, the US appears to believe it is fair to presume that these costs are also an element of price.[17]

22. The US analysis is generally correct that in order for a cost to affect price comparability, it must be an element of price. The US analysis is also correct in concluding that some costs are not known precisely to a seller at the time of sale. Last, the US is generally correct that where the condition is not known to the seller, but there is a basis to conclude the seller "anticipated" the costs, it is reasonable to presume the cost was an element of price. The important implication of this last observation is that unless a seller knows of a condition, or is in a position to anticipate the condition, there is no basis to conclude the condition was an element of price.

23. Japan believes that even based on the analysis advanced by the US, the US has failed to demonstrate that the bad debt adjustment was warranted under Article 2.4. In particular, the US provides no evidence that POSCO anticipated or should have anticipated the bad debt expenses related to the US sales during the period of investigation. Therefore there is no basis to conclude that POSCO was mindful of this condition in its composition of price to any of its US customers.

24. The US decision that the bad debt expenses were an element of price is unusual given the US conventional treatment of home market warranty expenses.[18] In its anti-dumping investigations, the US has a practice of evaluating a company's prior knowledge when addressing warranty expenses in its home market. In its investigations, the US requires exporters to provide an overview of their warranty expenses for three years prior to the period of investigation.[19]

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[11] *Id.* at para. 82.
[12] *Id.* at para.84.
[13] *Id.* at paras. 84, 86.
[14] *Id.*
[15] *Id.* at para. 86.
[16] *Id.*
[17] *Id.*
[18] In its submission, the US argues that bad debt expense are like warranty expenses in that they are not known with precision at the time of sale, but instead are anticipated by the seller. US First Submission at para. 86.
[19] *See* Standard US DOC Anti-dumping Questionnaire, Section B, Field 34, Warranty Expenses (requiring an exporter to submit a schedule of home market warranty expenses for three calendar years to support a request for a warranty adjustment to normal value).

25. There is no evidence in the proceedings underlying this dispute that the US requested or considered a history of default expenses in the US relevant in establishing a likelihood of default (and therefore an impact on price comparability for sales made during the period). Since there was no basis to conclude that POSCO anticipated, or should have anticipated, these default expenses in the US, there is no basis to conclude that these expenses were an "element of price." Therefore, the expenses were not a "condition" for the sales made during the period of investigation.[20]

B. REQUIREMENT THAT THERE IS A "DIFFERENCE" WAS NOT MET

26. Furthermore, the US analysis fails to consider the important requirement of Article 2.4 that any adjustment or allowance be based on a finding of a "difference." Thus, in order for the US to justify the upward adjustment to normal value for the US bad debt expenses, the US would need to establish there was some "difference" between the composition of price for US sales related to potential bad debt, and the composition of price for home market sales related to potential bad debt.

27. The US presumption of a difference at the time the prices were composed in the respective markets is unsupported by the evidence in the underlying proceedings.

28. The fact remains that the US never established a "difference" in the conditions of sale as an element of price as between the US market and the Korean market at the time the sales were made in the respective markets. Absent some reason to conclude that, at the time POSCO established its prices with the customers in the two markets, POSCO included a different and exceptional mark-up for bad debt expenses in the US market, the adjustment proposed by the US is not authorized by Article 2.4. The US failed to demonstrate that: (1) the post-facto bankruptcy of the US customer (ABC company) was a condition of sale at the time the prices for all US sales were established (i.e., there was no basis to conclude this condition was an element of price) and (2) there was in fact a "difference" in the composition of pricing in either market for this element for this condition.

C. THE US HAS APPLIED INCONSISTENT POLICIES TO DISADVANTAGE FOREIGN RESPONDENTS

29. In its submission, Korea establishes that the US decision to make a downward adjustment to US price for the unpaid sales violates Article X:3(a) of GATT 1994. In particular, Korea demonstrates that the US decision was not a uniform, impartial and reasonable manner in accordance with the obligation of Article X:3(a).

30. The bias in the US methodology is especially pronounced when one considers how the US reacts in situations where an exporter had delinquent customer in the home market, and a downward direct selling expense adjustment to normal value would have benefited the exporter in the margin calculations. In a recent proceeding involving a Brazilian exporter, a Brazilian company had sales in the home market where it was doubtful that the company would ever be paid by the home market customers.[21] In the proceeding, the US did not make a downward "due allowance" adjustment to normal value for the expense of these sales, consistent with the principles of its decision in the Korean cases underlying this dispute. Instead, in the underlying proceeding, the US reversed its philosophy completely to avoid a favorable downward adjustment to normal value.

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[20] Japan notes that this does not preclude the possibility that these expenses would be an element of price for future sales to the US Given the customer's default, it is plain that POSCO may decide to include in its composition of price for future US sales a mark-up in anticipation of future bankruptcies. This would have to be established in a subsequent review. However, the US efforts to designate this default as a condition for sales in the original investigation are, at best, premature.

[21] *Certain Cold-rolled Flat-rolled Carbon-Quality Steel Products from Brazil*, 65 Fed. Reg. 5554, 5574 (4 February 2000).

31. In that proceeding, the US elected to "presume" that the company would ultimately collect payment from the home market customers, and also that the company would collect penalty interest for the period between the original due date and the ultimate date payment was received. This presumption was made despite the company's affirmations that it was unlikely to collect the underlying value for the sale from the customer.[22]

32. In justifying its decision, the US noted that it is reasonable to presume that a company, when faced with non-paying customers, would take prospective action. The US Department of Commerce ("DOC") observed: "if a company over time does not receive a significant portion of payments, the company would certainly try to minimize this loss by discontinuing selling to, or altering the level of business conducted with these customers."[23]

33. Importantly, the US DOC's decision emphasizes an impact of the non-payment on future sales. That is, it is only proper to presume that a seller will take into account this "condition" prospectively. Thus, the DOC has recognized the important requirement of knowledge at the time of sale in order to find an impact on pricing and price comparability.

34. The US DOC's analysis in the Brazilian proceeding reveals that its evaluation of the facts with respect to POSCO, and whether the facts demonstrated a difference that affected price comparability, was biased. Apparently, when faced with non-payment in the home market, the US will make the adverse assumption that payment and penalty interest will be received. Said differently, the US will assume that the anticipation of customer's default in the home market was not an element of price, because it can be presumed that the seller will eventually be paid for the sales, and recover its revenue.

35. On the other hand, when faced with non-payment related to export sales, the US will make the opposite assumption (i.e., that payment and penalty interest will not be received, and that the exporter anticipated, or should have anticipated this at the time it made the export sales). Such inconsistent policies fails the requirements of the authorities in Article 17.6 (i) that the establishment of facts be "proper" and the evaluation of those facts be "unbiased and objective." To the contrary, the US approach reflects an outcome determinative approach to its investigations. This outcome determinative approach also violates the requirement of Article X:3(a) that the US administration of its anti-dumping laws be impartial.

IV. ARTICLE 2.4.2 - AVERAGE-TO-AVERAGE COMPARISONS

36. In its submission, Korea addresses the US decision to split the period of investigation for purposes of its average-to-average comparisons.[24] In response, the US argues that its decision to split the period was allowable under Article 2.4.2 because Article 2.4.2. requires average-to-average comparisons of only "comparable" transactions. The US position is that since home market sales before the devaluation are not comparable to export sales made after the devaluation, it adopted an average-to-average comparison methodology that separately compared US sales before the devaluation with Korean sales before the devaluation.[25]

[22] *Id.*
[23] *Id.*
[24] ROK First Submission, para. 4.45.
[25] US First Submission, para. 145.

A. VARIATIONS IN PRICING AMONG TIME PERIODS ARE ONLY RELEVANT FOR THE PURPOSES OF DETERMINING WHETHER TO USE A PREFERRED OR SECONDARY COMPARISON METHODOLOGY UNDER ARTICLE 2.4.2

37. The US position fails to take into account the hierarchy of comparisons within Article 2.4.2. In addition, the US methodology fails to recognize the limited circumstances in which Article 2.4.2 authorizes investigating Members to depart from the preferred methodologies identified in the first sentence of Article 2.4.2.

38. Article 2.4.2 creates a plain hierarchy between "preferred" comparison methodologies in the first sentence (i.e., average-to-average, or transaction-to-transaction), and a "secondary" methodology in the second sentence (i.e., export sale to average normal value). Article 2.4.2 is explicit in that it authorizes the use of the secondary methodology only in certain circumstances. One of the primary conditions for the use of the secondary methodology in Article 2.4.2 is if there are variations in export pricing such that an average-to-average comparison would not take the variations into account. The US has not claimed that the circumstances in the underlying investigations warranted the use of this secondary methodology of Article 2.4.2. Importantly, Article 2.4.2 does not authorize the use of the secondary comparison methodology if there are variations in normal value pricing, either before or after conversion into a particular currency.

39. Recognizing that Article 2.4.2. authorizes the use of a secondary methodology only in the particular circumstances in which the preferred comparison methodologies will not account for export pricing variations over a period, it would be an impermissible interpretation of Article 2.4.2. to conclude that a modification to the average-to-average comparison methodology under the first sentence is permissible when there are variations in normal value pricing. That is, the investigating authority must decide whether an average-to-average approach over the entire period does or does not capture variations in pricing over the period of investigation. If the Member decides circumstances do not justify the use of the secondary methodology, then the Member must use one of the preferred methodologies, without outcome - determinative modifications.

40. Thus, Article 2.4.2 allows avoidance of the preferred comparison methodologies in one circumstance: when export pricing varies among purchasers, regions, or periods of time, and if an explanation is provided as to why such differences cannot be taken into account by the preferred methodologies. Given the clear designation of a specific exception to the preferred methodologies in Article 2.4.2, common rules of interpretation dictate that Article 2.4.2 does not contemplate other exceptions to the preferred methodologies.[26] That is, Article 2.4.2 does not authorize a Member to create exceptions within the categories of preferred methodologies for variations in prices among different time periods.

41. Despite this clear and transparent structure, the US has taken the position that Article 2.4.2 permits an investigating member to modify the mandate to use average-to-average comparisons in certain circumstances. The US average-to-average comparison within split periods is contrary to Article 2.4.2.

B. VARIATIONS IN PRICING AFTER EXCHANGE RATE CONVERSIONS ARE NOT RELEVANT TO WHETHER A SALE IS "COMPARABLE"

42. The US concludes that a variation in pricing after an exchange rate conversion is a relevant criterion in determining whether sales are comparable under Article 2.4.2. However, this position wrongly confuses the role of the currency conversion in the dumping calculation.

[26] *Inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another).

43. The structure of the paragraphs of Article 2 of the ADA demonstrates that there are several steps to a price-to-price dumping comparison. The steps generally follow the sequential of the paragraphs within Article 2. These steps may be generally categorized as follows:[27]

Step #1 Identification of comparable sales that will be used in the dumping comparisons. Article 2.2 and Article 2.4 govern the selection of which sales are comparable. For example, Article 2.2.1 permits authorities to exclude normal value sales that are outside the ordinary course of trade. In addition, Article 2.4. demands that the sales compared be at the same level of trade.

Step #2 Due allowance adjustments to export price and normal value for differences to ensure fair comparisons pursuant to Article 2.4. and 2.3

Step #3 Conversion, if necessary, of either export price or normal value into a uniform currency to enable pricing comparisons.[28] Article 2.4.1 governs this conversion.

Step #4 Comparison between normal values and export prices using one of the methodologies identified in Article 2.4.2.

44. Based on this overview of the dumping calculation, it is plain that the conversion of pricing from one currency to another currency in Step #3 is separate and independent from the identification of which normal value sales are "comparable" to export price in Step #1. The conversion of normal value into the same currency as export price, for example, simply allows a useful numeric comparison between the export and normal value sales selected in Step #1. The conversion is subsequent to a selection of sales for comparison.

45. Article 2.4.1 provides the exclusive rules that govern currency conversions. However, there is no support in Article 2.4.1 or any other Article within the ADA for the conclusion that an investigating authority may determine in step #1 whether a particular group of sales is "comparable" after the sales are converted into the common currency. The currency conversion is simply designed to reflect the current value of a particular sale in another currency as of the date of the sale. It is a step and procedure that is entirely disconnected from the process of identifying which sales are comparable, or even whether there is a variation in pricing.

46. Thus, the US proposal that it may decide which normal value sales are comparable to export price after the conversion into a common currency is inconsistent with the dumping comparison methodology contemplated by Articles 2.2, 2.3 and 2.4. The US proposal to elevate currency conversion to a step prior to the determination of comparability is inconsistent with the structure of Article 2 of the ADA. As such, the US position that it was authorized to assess comparability after currency conversion violates the disciplines of the ADA. The panel should conclude that the US justification for making average-to-average comparisons only within split sub-periods of the period of investigation violates the rules of the ADA.

[27] With the apparent exception of the underlying disputes, the US dumping calculations are made pursuant to the steps in the sequence below.

[28] In the underlying investigations, the US converted all normal value (i.e., Korean home market), sales into US dollars. US First Submission, para. 122. However, the same dumping comparisons could be generated by converting all US sales dollars into Korean currency. Mathematically, the result of the dumping comparison would be the same. The ADA is silent as to the direction of the conversion.

ANNEX 3-3

**ORAL STATEMENT OF THE EUROPEAN COMMUNITIES
FIRST MEETING OF THE PANEL**

(14 June 2000)

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III. ARTICLE 2.4.2 ADA: MULTIPLE AVERAGES 371

The EC would like to thank the Panel for the opportunity to submit orally its views in this dispute.

1. In our oral statement today, we will not repeat the points already made in our written submission. In stead, we will address briefly some of the arguments submitted by Japan, the only other Third Party in this case.

I. BURDEN OF PROOF

1. Japan attempts to distinguish GATT Article VI and the ADA from other GATT provisions such as Articles I and II. According to Japan, those provisions contain "positive rules", whereas GATT Article VI and the ADA would "carve out a limited exception"[29].

2. Yet, Japan shrinks from stating what would be the logical consequence of that premise, namely that the burden of proof in this case lies with United States. Instead, Japan enunciates the principle that "whether the defending member met the burden of justifying a measure under GATT Article VI and the ADA after the complaining member has established a *prima facie* case should be subjected to careful scrutiny"[30]. Japan seems to be suggesting that such scrutiny should be more "careful" than in cases involving the violation of a "positive rule".

3. The EC disagrees with that proposition. GATT Article VI and the ADA are not a mere "exception". They recognise the right of Members to impose anti-dumping measures, subject to certain requirements. Those requirements constitute "positive" rules which, unlike true exceptions such as GATT Article XX, establish obligations in themselves. Indeed, if Article VI and the ADA were but an "exception", the Panel would have to dismiss Korea's complaint *ad limine*, since Korea has not invoked the violation of any of the "positive" rules to which GATT Article VI and the ADA are supposedly an exception.

4. Since GATT Article VI and the ADA are not exceptions, the burden of proof in this case lies with Korea, the complaining party, and not with the United States, as indeed has been acknowledged by Japan itself. For the same reason, the Panel should reject Japan's suggestion to the effect that in disputes involving GATT Article VI and the ADA the complainant's burden of proof should be somehow "mitigated" or, conversely, that the defendant should bear a heavier burden of proof than in "ordinary" disputes in order to refute the complainant's *prima facie* case.

II. ARTICLE 2.3 ADA: CONSTRUCTED EXPORT PRICES

5. Japan has expressed the view[31] that when constructing the export price in accordance with Article 2.3, the investigative authorities may deduct only those costs that are "incurred exclusively because the export was made through an affiliated importer, and not sold directly to an export customer"[32]. Thus, according to Japan, since "bad debt" expenses are incurred also in sales to independent export customers, it would follow that they cannot be deducted from the resale price charged by the related importer in constructing the export price to that importer.

6. The distinction drawn by Japan between different types of costs incurred by the related importer has no basis whatsoever in the wording of the fourth sentence of Article 2.4, which provides that "in the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made". In the EC's view, that wording allows the deduction of all the costs incurred by the related importer.

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[29] Japan's Third Party Submission, para. 4.
[30] Ibid., para. 8
[31] Ibid., paras. 11-15.
[32] Ibid., para. 12

7. Japan's view is based on a misconception of the purpose of Article 2.3. Contrary to Japan's assertions, the purpose of Article 2.3 is not "to enable an authority to eliminate elements of export price that are attributable to the fact that the sale was made through an affiliated importer"[33]. The relevant "export sale" is not the re-sale by the related importer, as wrongly assumed by Japan, but instead the sale by the exporter to the related importer. Article 2.3 allows to work back the price for that export sale from the first re-sale price to an independent customer. The purpose of that exercise is to arrive at the price that would have been paid by the related importer, had the transaction been made on a commercial basis, and not at the price that would have been charged by the exporter to an independent importer. This is confirmed by the fact that Article 2.3 does not require to disregard the prices between the exporter and the related importer. Rather, it allows for the possibility to construct that price where the invoiced price is not considered to be at arm's length.

8. The EC disagrees also with Japan's contention that "bad debts" expenses cannot be deducted from the re-sale price because they are incurred after the re-sale[34] . The formula "between importation and resale" does not refer to a certain period of time. If so, it would be very easy for related importers to circumvent the rules on the construction of the export price by either advancing or delaying the payment of expenses. Rather, that formula purports to define the scope of the expenses that are attributable to the functions performed by a typical related importer. "Bad debt" expenses would not be incurred if the imported goods were not re-sold and therefore belong to that function.

III. ARTICLE 2.4.2 ADA: MULTIPLE AVERAGES

9. Japan contends that Article 2.4.2 allows Members to depart from the preferred comparison methodologies in the first sentence only in the circumstances provided for in the second sentence and, therefore, does not authorise Members to create other "exceptions"[35]. The EC agrees. From that obvious proposition, however, it does not follow that the method applied by the United States in this case is in violation of Article 2.4.2. By characterising the US method as an "exception", Japan assumes what it purports to prove. The US method is not an exception. The use of multiple averages has been expressly contemplated in the first sentence of Article 2.4.2 by inserting the term "comparable" before "all export transactions".

10. Japan also asserts that comparability must be determined before the conversion of currencies[36]. The ADA, however, contains no rule to that effect. Exchange rate movements may affect comparability in ways that are not taken into account by the rules on currency conversion contained in Article 2.4.1. By definition, those effects on comparability may be assessed only after the currency conversion has taken place and not before.

[33] Ibid., para. 14.
[34] Ibid, paras. 16-18.
[35] Ibid., paras. 37-41.
[36] Ibid., paras. 42-46.

ANNEX 3-4

**ORAL STATEMENT OF JAPAN
FIRST MEETING OF THE PANEL**

(14 June 2000)

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1. In our presentation today, we wish to focus on four issues set out in our written submission. In addition, we would like to address two issues raised by the European Community in its third party submission.

I. BURDEN OF PROOF

2. Our first issue relates to the "Burden of Proof"

3. Even before the panel considers the merits of this proceeding, Japan believes it will be important for the panel to clarify the respective burdens of proof in this proceeding. The fact that this proceeding involves an allegation that the US violated its obligations under GATT Article VI, and the Anti-dumping Agreement is highly relevant in clarifying the duties and burdens on the US in this proceeding.

4. The parties seem to agree that the initial burden to present a *prima facie* case is on the complaining party in a WTO dispute. In this proceeding, the Korean submission provides the information and argument necessary to establish its *prima facie* case against the US In particular, Korea has met this burden by carefully and comprehensively addressing US actions in this proceedings, and explained how these actions were inconsistent with individual provisions of the Anti-dumping Agreement and Article VI of the GATT.

5. It is also well-established that once the complaining party has established its *prima facie* case, as Korea has done in this proceeding, the burden then shifts to the responding party. Thus, the panel must consider the nature of the burden on the US in its examination of the US justifications for their actions in the underlying investigations.

6. The nature of this burden is directly related to the type of defense advanced by the US. In particular, the US has argued that it is entitled to the application of discriminatory duties on exports from Korea based on GATT Article VI and the Antidumping Agreement. It is therefore critical to acknowledge that the US is invoking a limited exception to its basic obligations under the WTO. This distinction between basic obligations and limited exceptions in the Articles of the GATT was embraced by the Appellate Body' in its *Wool Shirts from India* decision.

7. Japan notes that the US, in its submission, overlooks this important distinction. Of greater concern is the US mischaracterization of the holding in *Wool Shirts*. In that decision, the Appellate Body stated plainly that it was addressing the relationship between provisions <u>within</u> the Agreement on Textiles and Clothing. The Appellate Body expressly noted that, in that dispute, it was <u>not</u> focused on the relationship <u>between</u> Articles in the GATT. Notwithstanding this explicit qualification by the Appellate Body, the US attempts to take the Appellate Body's observations about provisions <u>within</u> the Agreement on Textiles and Clothing and transform them into conclusions about the relationship between GATT Articles . The panel should note that the US position on the burden of proof is based entirely on this misinterpretation.

8. Japan believes that the US must prove and demonstrate that its actions were in accordance with the strict procedures and requirements associated with the Anti-dumping Agreement after Korea has established a *prima facie* case. To the extent the US is unable to persuade the panel that its establishment of facts was proper and that its evaluation of facts was unbiased and objective, the panel must find that the US actions do not meet the requirements necessary to justify discriminatory duties.

9. In assessing whether the US has met this burden, the panel should recall that the Anti-dumping Agreement reflects a consensus among the WTO members to enhance and clarify the disciplines that govern the application of antidumping duties. The panel should ensure that the US measures are consistent with the Anti-dumping Agreement which imposes strict disciplines on

Members that seek to impose antidumping duties. The objective of these disciplines is to prevent antidumping duties based on result-oriented methodological decisions that generate or overstate actual anti-dumping margins.

10. Taking into consideration the nature of Article VI and the Anti-dumping Agreement described above, careful scrutiny should be undertaken for determining whether the defending Member met the burden of justifying a measure under Article VI and the Anti-dumping Agreement after the complaining Member has established a *prima facie* case.

II. ARTICLE 2.3 - CONSTRUCTION OF EXPORT PRICE

11. Our second issue relates to the downward adjustment made by the US for bad debt expenses to export price in the underlying proceedings for sales made through the affiliated US subsidiary of the Korean exporter. Japan believes this decision violated US obligations under the Anti-dumping Agreement.

12. The US appears to believe that Article 2.3 does not define any limitations for adjustments, and this downward adjustment was thus allowable. However, the US never acknowledges any limitations as to when such downward adjustments are appropriate and permissible. Thus, the overbroad interpretation of Article 2.3by the US would effectively allow investigating Members to make any adjustment deemed necessary.

13. The US position is contrary to the plain language of Article 2. As acknowledged by the US, the fourth sentence in Article 2.4 governs the circumstances in which an Article 2.3 adjustment is permitted. The US completely ignores the plain language of that provision. The fourth sentence of Article 2.4 allows a downward adjustment or "allowance" for costs (such as bad debt costs) only if the costs are "incurred between importation and resale."

14. Based on the US and Korean submissions, it is apparent that the US never established, or attempted to establish, that the bad debt costs associated with the sales in the US were "incurred between importation and resale." As a result, the US explanation for its Article 2.3 downward adjustment for bad debt expenses does not withstand scrutiny.

III. ARTICLE 2.4 - "DIFFERENCES IN CONDITION AND TERMS OF SALE"

15. Our third issue relates to the bad debt adjustment made by the US for all of POSCO's sales made directly to US customers. Japan believes the adjustment made by the US was not authorized by that clause in Article 2.4.

16. The "terms and conditions" clause in Article 2.4 refers to factors and commercial circumstances known or anticipated by the seller. Unless a seller knew or anticipated a factor at the time of sale, it is inconceivable that the factor or costs could be an element of price. As the US correctly points out in its submission, in order for something to affect price comparability, it must be an element of price. That is, it must have been involved in the composition of price at the time the price was negotiated for any given sale. Yet the US fails to demonstrate or establish that the bad debt expense was known or anticipated by the POSCO at the time it made any of its sales into the US market.

17. Secondly, another requirement of Article 2.4, second sentence, is that there must be a "difference" to permit a due allowance adjustment. However, the US never demonstrated that there was in fact a difference in the composition of prices between the Korean market and the US market anticipating a higher level of bad debt expenses in the US than it anticipated in the home market.

18. Instead, the US decision seems to be based on the unsupported presumption that since bad debt expenses were actually incurred for one customer in the US (but not with respect to any customers in the Korean market), there were necessarily differences in the composition of price between the two markets at the time of sale. However, there is no provision in the Agreement that allows an investigating authority to make such a presumption. A "due allowance" adjustment pursuant to Article 2.4, second sentence, must be based on a finding of an actual difference in terms and circumstances at the time of sale. In this case, the US failed to establish this difference.

IV. ARTICLE 2.4.2 - AVERAGE-TO-AVERAGE COMPARISONS

19. With respect to the last issue raised in its written submission, Japan believes that the decision by the US to split the underlying period of investigation into two sub-periods was not in accordance with Article 2.4.2. Article 2.4.2 identifies two categories of comparison methodologies. The first category addresses the preferred methodologies of average-to-average or transaction-to-transaction comparisons. The second category is the alternative methodology that may be invoked only in certain circumstances, and if certain conditions are met.

20. Importantly, Article 2.4.2 identifies variations in pricing over the period as relevant only to the determination of which methodology is appropriate. Variations in pricing over the period is relevant only to the extent it justifies the use of the alternative methodology in Article 2.4.2. Article 2.4.2 does not authorize an investigating Member to consider variations in home market pricing (after the prices are converted into another currency) as a justification to modify one of the preferred methodologies. Yet this is precisely what the US did in the underlying proceedings. In this case, the US modified the average-to-average methodology to compare averages over sub-periods, instead of averages over the entire period of investigation.

21. Given the explicit reference in Article 2.4.2 to export pricing variations as relevant factor in determining whether to use either the preferred or alternative methodologies, the panel should conclude that variations in normal value were purposefully excluded as a criterion for selecting which type of comparisons methodology is appropriate. This explicit reference to variations in export pricing in Article 2.4.2 demonstrates that Article 2.4.2 did not contemplate variations in normal value (after conversion into a foreign currency) to be justification for modifying the average-to-average comparison methodology identified in Article 2.4.2, first sentence. Thus, the US actions were inconsistent with the language and structure of Article 2.4.2.

22. Secondly, the US contends that variations in pricing after conversion into a common currency are relevant to a determination of whether sales are "comparable" as that phrase is used in Article 2.4.2. However, currency conversion has nothing to do with the question of comparability. As we have mentioned in our written submission, the normal US investigation follows a series of steps where the step for determining comparability is clearly separate from the step for currency conversion.

23. In addition, the US reasoning to justify its decision to create two averages for pre-devaluation period and post-devaluation period is flawed. It maintains in its submission that

> … the United States reasonably determined that this characteristic had as much of an effect on comparability of transactions as did physical characteristics, levels of trade or high inflation. This is because comparison of a given amount of dollars received for an export transaction with a given amount of won on a normal value transaction produces a dramatically different margin of dumping depending on whether the sales occurred before or during the devaluation period. (para. 155)

24. This statement is inexact, if not wrong, because price comparability is not affected by a change in exchange rate. Whether there is actually a different margin of dumping before and after devaluation depends on the pricing policy of exporters.[1]

25. Against this background, the question the panel might want to ask is why the US used the two average method when this method is not justified by the change in exchange rate.

26. Because a different method leads to a different dumping margin, Japan believes that there should be a clear guideline for the selection of method, in order to avoid result-oriented selection. The Anti-dumping Agreement does provide this guideline: the basic rule of single average for the investigation period.

27. The AD Agreement also provides an exception in the second sentence of Article 2.4.2. But the application of this exceptional method is allowed only when the authorities find a pattern of export prices which differ significantly among different time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of the preferred methods.

28. The US did not satisfy either of these conditions. The panel should find that the US decision to split the period of investigation is not authorized by the relevant provision of the Anti-dumping Agreement.

V. ZEROING

29. In response to the EC third party submission, first, Japan notes that Korea has not directly raised the issue of zeroing in this dispute. This issue was not identified in Korea's request for a panel. As a result, it would be inappropriate and unnecessary for the panel to address zeroing in this dispute. As a result, the panel need not consider the arguments in the EC third party submission that the act of "combining" and weight averaging margins is not subject to Article 2.4.2. The EC contention that the requirement of an average-to-average comparison only applies to the first stage of the dumping margin calculation is not relevant to the issues before the panel.

VI. GATT ARTICLE X:3(A)

30. Secondly, Japan would like also to address a comment raised by the EC in its third party submission with respect to Korea's GATT Article X:3(a) claim. Japan, the US and Korea all appear to agree that the actions of an investigating Member are subject to the requirements of GATT Article X:3. In its third party submission, however, the EC argues that if a panel finds the US actions were consistent with the relevant provisions of the Anti-dumping Agreement, then the panel should automatically determine the actions were also "reasonable" under GATT Article X:3(a).

31. Japan believes the EC position is based on a misreading of the *EC - Bananas* decision. In *EC - Bananas*, the Appellate Body indicated that if there is a specific WTO agreement that addresses the conduct in dispute, the provisions of that agreement and Article X:3(a) both apply. The Appellate Body's finding in *EC- Bananas* was simply that procedurally, a panel should <u>first</u> consider whether a Member's conduct was inconsistent with the specific agreement. The implication of this finding, therefore, is that whether a panel finds a Member's actions were <u>consistent</u> with the specific agreement or not, it still must examine whether the actions were <u>inconsistent</u> with GATT Article X:3(a).

[1] If exporters maintain the export price at a level where they can keep income in Korean won terms, the dumping margin will be the same. If exporters maintain the export price in US dollar, the dumping margin will decrease, or the negative dumping margin will increase, after the devaluation.

32. Based on *EC- Bananas*, this panel should first consider Korea's claims relevant to the Anti-dumping Agreement. Even if the panel finds a particular action by the US is consistent with the Agreement, then it still must consider whether the action was consistent with GATT Article X:3(a).

33. This concludes our statement.